

knowmore
free legal help for survivors

Inquiry into the
potential for a
Human Rights Act
for South Australia
Submission to the
Social Development
Committee

15 February 2024

Table of Contents

About knowmore _____ **3**

Our service _____ 3

Our clients _____ 3

knowmore’s submission _____ **5**

knowmore’s overall approach to the inquiry _____ 5

List of recommendations _____ 6

Why South Australia needs a Human Rights Act and what elements it should include ____ 6

Inadequate protection of the human rights of children, victims and survivors _____ 8

Benefits of a Human Rights Act for children, victims and survivors _____ 12

Need for specific protection of victims’ and survivors’ rights _____ 16

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.

From 2013 to 2018, our service assisted 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 delivered 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 delivers financial counselling services to people participating in the NRS, and works with other services in the NRS support network to support and build their capability. Since 2022, knowmore has also been assisting survivors who experienced child sexual abuse in non-institutional settings, and providing 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 October 2023, knowmore has received 100,736 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 16,784 clients. Almost 2 in 5 clients (38%) identify as Aboriginal and/or Torres Strait Islander peoples. About 1 in 6 clients (14%) 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 South Australia

knowmore has a significant client base in South Australia — 7 per cent of our clients reside in the state. We therefore have a strong interest in improving human rights protection for children, victims and survivors in South Australia.

knowmore's submission

knowmore supports a Human Rights Act for South Australia, with specific protection of the human rights of victims and survivors of crime.

knowmore's overall approach to the inquiry

As a nation-wide service assisting survivors of child sexual abuse, knowmore works with people who have experienced severe violations of their human rights and sees the impact of inadequate human rights protections. We strongly support Human Rights Acts or Charters being implemented in all Australian jurisdictions, including South Australia. We consider that a Human Rights Act for South Australia has significant potential to improve human rights outcomes for children and for victims and survivors of child sexual abuse.

knowmore acknowledges that the inquiry has a broad scope, relating to the human rights of all people in South Australia. At the same time, we consider that South Australia's human rights mechanisms must work in a way that is fair to children, victims and survivors and effectively protects their rights.

We consider that many elements of a Human Rights Act that will benefit people in South Australia broadly will also benefit children, victims and survivors. At the same time, we recognise that children, victims and survivors have distinct experiences and needs, requiring protection of specific rights in a Human Rights Act for South Australia.

In this submission, we first make some general comments about why we consider that South Australia needs a Human Rights Act and what elements it should include. We then make some specific comments about:

- the current inadequate protection of the human rights of children and of victims and survivors of child sexual abuse
- the benefits of a Human Rights Act for children, victims and survivors
- the need for specific protection of victims' and survivors' rights under a Human Rights Act.

List of recommendations

Recommendation 1

The South Australian Government should implement a Human Rights Act, taking guidance from:

- existing Human Rights Acts or Charters in Victoria, Queensland and the Australian Capital Territory
- the Australian Human Rights Commission's position paper, *Free and Equal: A Human Rights Act for Australia*
- the Human Rights Law Centre's submission to the federal parliamentary inquiry into Australia's Human Rights Framework
- the Rights Resource Network SA's report, *Designing a Human Rights Framework for South Australia*.

Recommendation 2

A Human Rights Act for South Australia should include specific, enforceable protection of the rights of victims and survivors of crime, including victims and survivors of child sexual abuse.

Why South Australia needs a Human Rights Act and what elements it should include

There is currently inadequate protection of the human rights of people in all parts of Australia, including South Australia, contributing to abuses of people's human rights and inadequate responses when this occurs. The Australian Human Rights Commission (AHRC) has described Australia's human rights protections as 'patchy', 'forming an incomplete and piecemeal framework, with many gaps'.¹ The AHRC noted the absence of a Human Rights Act for South Australia as one of these gaps² and summarised the significance of these gaps as follows:

The gaps in our legal coverage of human rights mean that there is not a consistent, principled and complementary framework for protecting human rights. Decision makers are not required to consider and act in accordance with

1 Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia*, December 2022, p 46, <[humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf](https://www.humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf)>.

2 Australian Human Rights Commission, p 57.

*human rights. There are limited avenues to seek review of government decisions or actions that violate a person's human rights.*³

Of particular relevance to our clients, the AHRC noted:

*The consequences of Australia's lack of legal human rights protections acutely affect people who experience disadvantage, marginalisation and discrimination. It is the most vulnerable people who can fall through the cracks in the existing frameworks.*⁴

Victoria, Queensland and the Australian Capital Territory have taken significant steps to address this problem by implementing Human Rights Acts or Charters.⁵ While knowmore advocates to improve these laws to better protect the human rights of children, victims and survivors,⁶ these laws nonetheless provide valuable guidance about how a Human Rights Act for South Australia could work.

We also note the valuable guidance provided by:

- the AHRC in its position paper, *Free and Equal: A Human Rights Act for Australia*
- the Human Rights Law Centre in its submission to the federal parliamentary inquiry into Australia's Human Rights Framework⁷
- the Rights Resource Network SA in its report, *Designing a Human Rights Framework for South Australia*.⁸

These resources highlight the importance of Human Rights Acts or Charters in Australia, and provide a strong starting point for considering what elements a Human Rights Act for South Australia should include. While we do not propose to comment on every potential element of a Human Rights Act for South Australia, we particularly support:

3 Australian Human Rights Commission, p 47.

4 Australian Human Rights Commission, p 47.

5 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld); *Human Rights Act 2004* (ACT).

6 See, for example, knowmore, *Submission to the inquiry into youth justice reform in Queensland*, 9 January 2024, pp 30–31, <documents.parliament.qld.gov.au/com/YJRSC-6004/YJRSC-54D8/submissions/00000119.pdf>; knowmore, *Inquiry into Australia's Human Rights Framework — answer to Question on Notice*, 17 October 2023, <www.aph.gov.au/DocumentStore.ashx?id=e5c11b69-d922-446b-9a77-aa4dcacc7235>.

7 Human Rights Law Centre, *Submission to the Parliamentary Joint Committee on Human Rights*, 14 July 2023, <www.aph.gov.au/DocumentStore.ashx?id=43283cc8-5b98-4c83-bf95-0889af698f8a&subId=746372>. For annexures to the submission, see Parliament of Australia (Parliamentary Joint Committee on Human Rights), *Inquiry into Australia's Human Rights Framework: submissions*, accessed 17 January 2024, <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Submissions>.

8 S Moulds and M Wise, *Designing a Human Rights Framework for South Australia: final report*, February 2022, Rights Resource Network SA, <www.rightsnetworksa.com/files/ugd/8cf77c_33045f4455014d5aa55dc22c40a39d92.pdf>.

- the protection of all people in South Australia without discrimination⁹
- the protection of civil, political, economic, social and cultural rights¹⁰
- specific protection of children’s rights (see further discussion on pages 12 to 15)¹¹
- specific protection of victims’ and survivors’ rights (see further discussion on pages 16 to 18)
- a focus on preventing human rights abuses, including through the dialogue model and training for public servants¹²
- a direct path to a remedy for each right protected by a Human Rights Act¹³
- a statutory provision for periodic reviews of a Human Rights Act.¹⁴

We would welcome the opportunity in due course to provide feedback on a draft Human Rights Act for South Australia.

Recommendation 1

The South Australian Government should implement a Human Rights Act, taking guidance from:

- existing Human Rights Acts or Charters in Victoria, Queensland and the Australian Capital Territory
- the Australian Human Rights Commission’s position paper, *Free and Equal: A Human Rights Act for Australia*
- the Human Rights Law Centre’s submission to the federal parliamentary inquiry into Australia’s Human Rights Framework
- the Rights Resource Network SA’s report, *Designing a Human Rights Framework for South Australia*.

Inadequate protection of the human rights of children, victims and survivors

knowmore considers that current laws and mechanisms in South Australia fail to adequately protect the human rights of children and of victims and survivors of child sexual abuse.

9 See Australian Human Rights Commission, p 23.

10 Australian Human Rights Commission, p 17; Moulds and Wise, p 25.

11 Australian Human Rights Commission, pp 110–112; Moulds and Wise, p 25.

12 Australian Human Rights Commission, p 16; Moulds and Wise, p 38.

13 Australian Human Rights Commission, p 26; Moulds and Wise, p 38.

14 Australian Human Rights Commission, p 30; Moulds and Wise, p 38.

As noted above on pages 6 to 7, inadequate protections contribute to abuses of people’s human rights and inadequate responses when this occurs. We particularly see this in relation to 2 issues, which we discuss further below:

- the widespread, ongoing problem of child sexual abuse
- the significant barriers many victims and survivors face in seeking safety, justice and redress.

Before discussing these issues in more detail, we wish to emphasise the importance of an intersectional approach to understanding the experiences of children, victims and survivors. An intersectional approach recognises that social groups are not homogenous or fixed, and that identities can overlap to create compounding experiences of discrimination.¹⁵ Many of knowmore’s clients experience intersectional marginalisation. For example, in a recent submission to the Joint Standing Committee on Implementation of the National Redress Scheme, we provided information about the experiences of survivors who are both Aboriginal and/or Torres Strait Islander people and people with disability.¹⁶ These survivors may have experiences that are distinct from Aboriginal and/or Torres Strait Islander survivors who do not have a disability, and from survivors with disability who are not Aboriginal and/or Torres Strait Islander peoples.

Children, victims and survivors who experience intersectional marginalisation disproportionately experience human rights abuses. This reinforces the importance of comprehensive human rights protection in a Human Rights Act for South Australia.

The widespread, ongoing problem of child sexual abuse

Child sexual abuse is obviously a severe violation of a child’s human rights, with impacts extending across the survivor’s life.¹⁷ These include impacts on:

- physical health
- mental health
- relationships
- connection to culture
- education
- employment

15 United Nations Network on Racial Discrimination and Protection of Minorities, *Guidance Note on Intersectionality, Racial Discrimination and Protection of Minorities*, 22 September 2022, p 3, <www.ohchr.org/sites/default/files/documents/issues/minorities/30th-anniversary/2022-09-22/GuidanceNoteonIntersectionality.pdf>.

16 knowmore, *Submission to the Joint Standing Committee on Implementation of the National Redress Scheme*, 27 February 2023, pp 25–26, <knowmore.org.au/wp-content/uploads/2023/03/submission-joint-standing-committee-on-implementation-of-the-national-redress-scheme-cth.pdf>.

17 Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission), *Final report: volume 3, impacts*, December 2017, p 9, <www.childabuseroyalcommission.gov.au/impacts>.

- housing
- economic security.¹⁸

All of these issues have human rights implications.

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) highlighted that child sexual abuse has been widespread in Australian institutions, affecting ‘countless thousands’ of children and occurring ‘in almost every type of institution where children reside or attend for educational, recreational, sporting, religious or cultural activities’.¹⁹ Almost 8,000 survivors shared their experiences with the Royal Commission in private sessions, identifying almost 3,500 institutions where child sexual abuse occurred.²⁰ In private sessions between May 2013 and May 2017, this included 221 institutions in South Australia, or about 7% of institutions identified in private sessions during that time period.²¹ In that same time period, the Royal Commission held private sessions with 146 survivors who had experienced child sexual abuse in institutions managed by the South Australian Government.²²

The Child Protection Systems Royal Commission also highlighted the issue of child abuse, including child sexual abuse, in South Australia’s child protection systems.²³ This is consistent with Volume 12 of the Royal Commission into Institutional Responses to Child Sexual Abuse, which detailed the heightened risk of child sexual abuse for children in out-of-home care.²⁴

The Royal Commission only presents a partial image of the scale of child sexual abuse in Australia (including South Australia), as many survivors of child sexual abuse did not speak with the Royal Commission.²⁵ Further, the Royal Commission did not address non-institutional child sexual abuse — for example, child sexual abuse within families.²⁶ A fuller

18 Royal Commission, *Final report: volume 3, impacts*, pp 73–156.

19 Royal Commission, *Final report: preface and executive summary*, December 2017, pp 1 and 5 <www.childabuseroyalcommission.gov.au/preface-and-executive-summary>.

20 Royal Commission, *Final information update*, December 2017, p 1, <www.childabuseroyalcommission.gov.au/sites/default/files/final_information_update.pdf>.

21 Royal Commission, *Final report: volume 2, nature and cause*, December 2017, p 279, table A.1, <www.childabuseroyalcommission.gov.au/nature-and-cause>.

22 Royal Commission, *Final report: volume 2, nature and cause*, p 112, table 2.10.

23 Child Protection Systems Royal Commission, *The life they deserve: volume 1, summary and report*, August 2016, pp xxii–xxiii <www.childprotection.sa.gov.au/child-protection-initiatives/system-reform/child-protection-systems-royal-commission>.

24 Royal Commission, *Final report: volume 12, contemporary out-of-home care*, December 2017, <www.childabuseroyalcommission.gov.au/contemporary-out-home-care>.

25 A survivor’s decision about whether, when and how to disclose that they have experienced child sexual abuse is influenced by a variety of factors. Survivors often face barriers to disclosure and some survivors never disclose. See Royal Commission, *Final report: volume 4, identifying and disclosing child sexual abuse*, December 2017, pp 9–11, <www.childabuseroyalcommission.gov.au/identifying-and-disclosing-child-sexual-abuse>.

26 Royal Commission, *Final report: volume 1, our inquiry*, December 2017, p 18, <www.childabuseroyalcommission.gov.au/our-inquiry>.

image has emerged from the Australian Child Maltreatment Study, which recently reported that 28.5% of the Australian population had experienced child sexual abuse.²⁷ This suggests that about 527,734 people in South Australia have experienced child sexual abuse.²⁸

The Royal Commission made 409 recommendations to ‘better protect children against child sexual abuse and alleviate the impact of abuse on children when it occurs’.²⁹ The majority of recommendations were directed to governments, including the South Australian Government. Although the South Australian Government has made considerable reforms to better protect children from child sexual abuse, it has not fully implemented the Royal Commission’s recommendations — on the South Australian Government’s self-assessment, 53 recommendations remain unimplemented.³⁰

Child sexual abuse — and how society responds — remains a widespread, ongoing problem,³¹ with severe human rights implications.

Barriers for victims and survivors seeking safety, justice and redress

Survivors of child sexual abuse often experience breaches of their human rights, extending well beyond the immediate impacts of the abuse, into and across the survivor’s adult life.³² In addition to the impacts noted on pages 9 to 10 above, many survivors face significant barriers in seeking safety, justice and redress.

For example, criminal legal processes for child sex offences often fail to adequately recognise that a fair trial includes fairness to survivors and the broader community.³³ While

27 D Haslam, B Mathews, R Pacella et al, *The prevalence and impact of child maltreatment in Australia: findings from the Australian Child Maltreatment Study: brief report*, Australian Child Maltreatment Study, Queensland University of Technology, 2023, p 17, <www.acms.au/resources/the-prevalence-and-impact-of-child-maltreatment-in-australia-findings-from-the-australian-child-maltreatment-study-2023-brief-report/>.

28 28.5% of the population of South Australia, which was 1,851,700 at 30 June 2023. See Australian Bureau of Statistics, *National, state and territory population*, 14 December 2023, accessed 22 January 2023, <www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release>.

29 Royal Commission, *Final report recommendations*, December 2017, <www.childabuseroyalcommission.gov.au/recommendations>.

30 This includes 3 recommendations that the South Australian Government has not accepted. See Government of South Australia, *Safe and well: supporting families, protecting children*, 2023, p 5, <www.childprotection.sa.gov.au/child-protection-initiatives/system-reform/safe-and-well>.

31 Australian Child Maltreatment Study, p 18.

32 Royal Commission, *Final report: volume 3, impacts*, p 9.

33 See, for example, Royal Commission, *Criminal justice report: parts III–VI*, August 2017, p 521, <www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_parts_iii_to_vi.pdf>; ACT Human Rights Commission, *Submission to the inquiry into Australia’s Human Rights Framework*, 1 July 2023, p 8, <www.aph.gov.au/DocumentStore.ashx?id=fc1eeb51-25b9-4b7d-9710-813238c23d5a&subId=745757>.

South Australia has a declaration of principles for the treatment of victims of crime,³⁴ this declaration does not adequately protect the human rights of victims and survivors in South Australia. In particular, the declaration is unenforceable in criminal and civil proceedings.³⁵

In addition, redress, compensation and support processes often fail to adequately recognise:

- the impacts of child sexual abuse on victims and survivors, including distrust of institutions and other impacts that can make it difficult for victims and survivors to access services³⁶
- victims' and survivors' human rights, including the right to accessible and effective remedies for human rights violations (see further discussion on pages 16 to 18).³⁷

South Australia's victims of crime compensation scheme provides a salient example. In its submission to the Royal Commission, the Law Council of Australia noted issues with the high standard of proof for a victim to receive compensation under the scheme — generally, the offence must be proved beyond reasonable doubt.³⁸ This is a higher standard of proof than in other states and territories,³⁹ and makes it difficult for a victim in South Australia to receive compensation if the offender has not been convicted. In our experience, the high standard of proof is one of the most significant barriers to victims and survivors exercising their right to compensation under South Australia's victims of crime compensation scheme.

Benefits of a Human Rights Act for children, victims and survivors

In knowmore's view, a Human Rights Act has significant potential to improve human rights outcomes for children and for victims and survivors of child sexual abuse. This is demonstrated by experience internationally and in Australian jurisdictions with Human Rights Acts or Charters. For example, the Human Rights Law Centre provides an extensive database of cases where courts and tribunals have considered the human rights of children,

34 *Victims of Crime Act 2001 (SA)*, part 2. For a summary of the principles, see *Victims of Crime South Australia, Your rights as a victim of crime*, accessed 15 January 2024, <www.voc.sa.gov.au/your-rights-as-a-victim-of-crime>.

35 *Victims of Crime Act 2001 (SA)*, section 5(3).

36 Royal Commission, *Final report: volume 3, impacts*, pp 187–188.

37 United Nations Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, pp 6–8, <internet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2F2001%2FRev.1%2FAdd.13&Lang=en>. See also *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985, <www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse>.

38 Law Council of Australia, *Submission to the Royal Commission's issues paper 7: victims of crime compensation schemes*, 4 July 2014, pp 22–23, <lawcouncil.au/resources/submissions/victims-of-crime-compensation-schemes--issues-paper-7>.

39 Law Council of Australia, p 22, paragraph 80.

often under Human Rights Acts or Charters, and often with positive outcomes for the human rights of children.⁴⁰ These include cases from various countries, including the United Kingdom,⁴¹ Canada⁴² and Ireland.⁴³

As noted above on page 7, Victoria, Queensland and the Australian Capital Territory have all implemented Human Rights Act or Charters. While many aspects of these laws provide protection of the human rights of children, we particularly note that these laws all recognise a child's right to protection⁴⁴ and children's rights in the criminal process.⁴⁵ The AHRC provides detailed case studies demonstrating the positive impacts of these laws for the human rights of children,⁴⁶ which we have extracted below. Significantly, these case studies relate to the treatment of children in the child protection system and in detention environments — areas of persistent concern for knowmore given the heightened risk of child sexual abuse.

Case study from the Australian Human Rights Commission: systemic changes to protect young people in the ACT

The ACT Human Rights Act influenced the legislative process in the development of the *Children and Young People Act 2008* (ACT). This was a comprehensive updating and codifying statute that is the primary law in the ACT providing for the protection, care and wellbeing of children and young people.

The government released an exposure draft of the legislation and the Human Rights Commissioner and the Children and Young People's Commissioner made submissions. Human rights issues were raised by practices such as therapeutic protection orders,

continued on next page >

40 Human Rights Law Centre, *Human rights case summaries: child rights*, accessed 19 January 2024, <www.hrlc.org.au/human-rights-case-summaries/tag/Child+Rights>.

41 See, for example, Human Rights Law Centre, *UK High Court of Justice holds 17 year olds should be treated as children in the criminal justice system*, accessed 19 January 2024, <www.hrlc.org.au/human-rights-case-summaries/uk-high-court-of-justice-holds-17-year-olds-should-be-treated-as-children-in-the-criminal-justice-system>.

42 See, for example, Human Rights Law Centre, *Children's right to the presumption of innocence and to be tried as minors*, accessed 19 January 2024, <www.hrlc.org.au/human-rights-case-summaries/r-v-db-2008-scc-25-16-may-2008>.

43 See, for example, Human Rights Law Centre, *Failure to protect from sexual abuse constitutes violation of freedom from inhuman and degrading treatment*, accessed 19 January 2024, <www.hrlc.org.au/human-rights-case-summaries/failure-to-protect-from-sexual-abuse-constitutes-violation-of-freedom-from-inhuman-and-degrading-treatment>.

44 *Human Rights Act 2004* (ACT), section 11(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 17(2); *Human Rights Act 2019* (Qld), section 26(2).

45 *Human Rights Act 2004* (ACT), section 20; *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 23; *Human Rights Act 2019* (Qld), section 33(2).

46 Australian Human Rights Commission, pp 82 and 90.

prenatal reporting of children at risk, strip-searching of detained children, and behaviour management schemes proposed for a youth detention centre. These human rights issues were considered extensively by policy officers involved in the preparation of the legislation, with assistance from the Human Rights Unit. This is reflected in the lengthy Explanatory Statement presented with the Bill, which refers not only to provisions of the ACT Human Rights Act, but also to an array of relevant international standards, including the Convention on the Rights of the Child and United Nations principles relating to juvenile justice. It also draws on the audit reports of the ACT Human Rights Commissioner.

Extracted from the ANU five year review of the ACT Human Rights Act.

Case study from the Australian Human Rights Commission: children in juvenile detention

After riot damage to a youth justice centre, the Victorian Government set up a new youth justice centre in a unit in the maximum security adult Barwon Prison and started transferring children as young as 15 there. The conditions in the unit were extremely harsh and children were subject to extended solitary confinement, regular handcuffing and denied proper education.

A number of First Nations children took legal action using the [Victorian] Charter and other laws to challenge their transfer to the prison. In response, the Victorian Government agreed to remove all First Nations children from the adult prison. A number of non-Indigenous children then brought a similar legal action challenging the decision to set up the unit in the adult prison and transfer children there.

When the Minister then made a fresh decision that kept the children in the adult prison, certain children brought a final challenge using the Charter and other laws. The Supreme Court again ruled that the government's actions breached the children's rights to humane treatment in detention and protection as is in their best interests. The Court ordered that the Minister stop detaining the children at the prison and all children were transferred back into existing youth justice centres. The Court also ruled that a decision approving the use of capsicum spray in the unit in the adult prison was unlawful.

Extracted from Human Rights Law Centre, 101 Charter Cases, 2022.

The Human Rights Law Centre also provides case studies, internationally and within Australia, of Human Rights Acts or Charters contributing to the protection of human rights for victims and survivors of crime.⁴⁷ This includes victims and survivors of child sexual abuse. For example:

- a case study from Ireland shows the European Convention on Human Rights being taken into account in a court ordering an additional payment to a survivor of child sexual abuse⁴⁸
- a case study from Victoria shows the Victorian Charter of Human Rights and Responsibilities being taken into account in a court agreeing to an extension of time to allow a child victim/survivor of sexual abuse to give evidence via audio-visual recording.⁴⁹

The ACT Human Rights Commission has shared a case study in which the ACT Supreme Court considered the ACT's Human Rights Act in ordering that a child complainant in a child sexual abuse case have an intermediary to assist them to communicate their best evidence. The Court recognised that:

*... the right to a fair trial involves 'a triangulation of interests' which takes into account the human rights of the accused, the human rights of the victim and their family, as well as the public interest.*⁵⁰

The Queensland Human Rights Commission (QHRC) also states that it 'has applied several rights ... to the circumstances of victims of crime, including the right to fair hearing, right to privacy, and freedom of expression (including the right to receive information)'.⁵¹

These examples illustrate how a Human Rights Act for South Australia could focus attention on the human rights of victims and survivors in decision-making, contributing to the improved protection of those rights.

47 Human Rights Law Centre, *Advancing the rights of victim/survivors of crime using Victoria's Human Rights Charter: your advocacy guide*, accessed 19 January 2024, <www.hrlc.org.au/s/Your-advocacy-guide_Victims-and-survivors-of-crime.pdf>. See also Human Rights Law Centre, *Human rights case summaries: child rights*.

48 Human Rights Law Centre, *Failure to protect from sexual abuse constitutes violation of freedom from inhuman and degrading treatment*.

49 Human Rights Law Centre, *Advancing the rights of victim/survivors of crime using Victoria's Human Rights Charter*, p 4.

50 ACT Human Rights Commission, p 8; *R v QX (No 2)* [2021] ACTSC 244 (1 October 2021) <www.courts.act.gov.au/supreme/judgments/r-v-qx-no-2>.

51 Queensland Human Rights Commission, *Submission to the inquiry into Australia's human rights framework*, 3 July 2023, p 50, paragraph 263, <www.aph.gov.au/DocumentStore.ashx?id=b3699ab7-9b83-4b0f-b47b-a45ba35794da&subId=745481>.

Need for specific protection of victims’ and survivors’ rights

While many elements of a Human Rights Act for South Australia are likely to benefit victims and survivors (see the discussion above), existing Human Rights Acts or Charters in Australia do not presently include specific protection of victims’ and survivors’ rights. This creates a significant gap in the protection of the human rights of victims and survivors, even in those jurisdictions that have taken in the important step of implementing a Human Rights Act or Charter.

The QHRC has powerfully articulated the importance of specific protection of victims’ rights in a Human Rights Act or Charter:

It has been noted that promoting rights for victims is an attempt to address the persistent difficulties experienced by institutions and professionals to adequately meet the expectations of victims of crime. Having violence inflicted on them and experienced victimisation separates victims from their usual place in society. It disrupts the sense of trust and belonging people generally (though variably) have in others.⁵²

Specific protection of victims’ and survivors’ rights aligns with recommendations from several inquiries — for example:

- the Queensland Women’s Safety and Justice Taskforce and the Queensland Parliament’s Legal Affairs and Safety Committee both recommended that the Queensland Government consider incorporating victims’ rights into Queensland’s Human Rights Act; these recommendations have been supported by the Queensland Government⁵³
- the Victorian Law Reform Commission recommended that Victoria’s Charter of Human Rights and Responsibilities be amended to include specific minimum guarantees for victims, namely:
 - to be acknowledged as a participant with an interest in the criminal proceedings
 - to be treated with respect at all times

52 Queensland Human Rights Commission, p 51, paragraph 265.

53 Queensland Government, *Response to the report of the Queensland Women’s Safety and Justice Taskforce, Hear Her Voice — Report two: Women and girls’ experienced across the criminal justice system*, 21 November 2022, p 13, <www.publications.qld.gov.au/dataset/wsjskforcercerresponse/resource/a0705c73-62bd-4263-ab2c-694e5735d058>; Queensland Government, *Inquiry into support provided to victims of crime: Queensland Government response*, 19 May 2023, accessed 4 January 2024, p 4, <documents.parliament.qld.gov.au/com/LASC-C96E/202324BE-8296/Government%20Response%20to%20LASC%20Report%20No.%2048,%20Inquiry%20into%20support%20provided%20into%20victims%20of%20crime.pdf>.

- to be protected from unnecessary trauma, intimidation and distress when giving evidence.⁵⁴

Specific protection of victims’ and survivors’ rights is also supported by international human rights standards — for example, as noted on page 12 above, there is a right to accessible and effective remedies for human rights violations, arising from article 2 of the *International Covenant on Civil and Political Rights*.⁵⁵ The United Nations General Assembly has also adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which states the following key principle:

*Victims should be treated with compassion and respect for their dignity. They are entitled to access the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.*⁵⁶

Other international instruments also recognise rights for victims and survivors of crime, including victims and survivors of child sexual abuse.⁵⁷

As noted above on pages 11 to 12, South Australia’s declaration of principles for the treatment of victims of crime does not adequately protect the human rights of victims and survivors in South Australia. In knowmore’s view, the principles should be clearly named as rights and included in a Human Rights Act for South Australia. This would better recognise that victims and survivors have rights linked to their dignity as human beings, of equal status to other human rights. As noted on page 8, we particularly support a direct path to a remedy for each right protected by a Human Rights Act.⁵⁸ This would address a significant deficiency in South Australia’s declaration of principles for the treatment of victims of crime — namely, that the declaration is unenforceable in criminal and civil proceedings.⁵⁹

54 Victorian Law Reform Commission, *Victims in the criminal trial process: report*, 22 November 2016, chapter 3, <www.lawreform.vic.gov.au/publication/the-role-of-victims-of-crime-in-the-criminal-trial-process-report-2/>.

55 United Nations Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, pp 6–8.

56 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, article 4.

57 See, for example, *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 25 May 2000, article 8, <www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child>; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, article 6, <www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons>.

58 For further comments about a potential model of specific protection for victims’ and survivors’ rights, see knowmore, *Inquiry into Australia’s Human Rights Framework — answer to Question on Notice*.

59 *Victims of Crime Act 2001 (SA)*, section 5(3).

Recommendation 2

A Human Rights Act for South Australia should include specific, enforceable protection of the rights of victims and survivors of crime, including victims and survivors of child sexual abuse.

Adelaide

Level 1, 99 Gawler Pl, Adelaide SA 5000
GPO Box 1365, Adelaide SA 5001
t 08 7092 2740

Brisbane

Level 20, 144 Edward St, Brisbane QLD 4000
PO Box 2151, Brisbane QLD 4001
t 07 3218 4500

Darwin

Level 2, 13 Cavenagh St, Darwin City NT 0800
GPO Box 413, Darwin NT 0801
t 08 7918 8455

Melbourne

Level 15, 607 Bourke St, Melbourne VIC 3000
PO Box 504, Collins St West VIC 8007
t 03 8663 7400

Sydney

Level 15, 175 Liverpool Street, Sydney NSW 2000
PO Box 267, Darlinghurst NSW 1300
t 02 8267 7400

Perth

Level 5, 5 Mill St, Perth WA 6000
PO Box 7072, Cloisters Sq WA 6850
t 08 6117 7244

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 | ACN 639 490 912.