



Submission to the Senate's Legal and Constitutional Affairs Legislation Committee

Inquiry into the Combating Child Sexual Exploitation Legislation Amendment Bill 2019

4 March 2019

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1. Introduction

(i) About knowmore legal service

knowmore legal service is a nation-wide, independent community legal centre providing free 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 initially 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'). knowmore was established by and operates as a program of the National Association of Community Legal Centres (NACLC), with funding from the Australian Government, represented by the Attorney-General's Department. knowmore also receives some funding from the Financial Counselling Foundation.

From 1 July 2018 NACLC has been funded to operate knowmore to deliver legal support services to assist survivors of institutional child sexual abuse to access their redress options, including under the National Redress Scheme.

knowmore uses a multidisciplinary model of service delivery to provide trauma-informed, client-centred and culturally safe legal assistance to clients. knowmore has offices in Sydney, Melbourne and Brisbane, with an office re-opening in Perth in 2019, and brings together lawyers, social workers and counsellors, Aboriginal and Torres Strait Islander engagement advisors and financial counsellors to provide coordinated support to clients.

In both our Royal Commission and our redress options work, knowmore has regularly provided survivors with information and assistance for related legal issues, including initiating police investigations and prosecution action. Many of the survivors we have assisted have had direct experience as complainants in our criminal justice system.

In our Royal Commission related work, from July 2013 to 31 March 2018 knowmore assisted 8,954 individual clients. The majority of those clients were survivors of institutional child sexual abuse. 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 2019 knowmore has received 11,993 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 3,465 clients. 19% of those clients have been identified as priority cases, due to advanced age and/or immediate and serious health concerns including terminal cancer or other life-limiting illness.

(ii) knowmore's submission

knowmore welcomes the introduction of the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 ('the Bill'), and commends the Australian Government for taking this important step towards implementing the recommendations of the Royal Commission and enhancing the protection of children from sexual exploitation.

The Bill is a welcome acknowledgement of concerns voiced by survivors of institutional child sexual abuse. knowmore's clients have shared with us a large number of their experiences with the criminal justice system. Many clients also provided the detail of these experiences to the Royal Commission; in giving evidence at public hearings; in private sessions; or through the provision of statements. The Royal Commission's final report detailed many instances of people entrusted with protecting children turning a blind eye to abuse or even concealing it, rather than reporting it to police or taking action.

The Bill incorporates some of the key recommendations of the Criminal Justice Report published by the Royal Commission in 2017, including criminalising the failure to protect and/or report child sexual abuse by Commonwealth officers charged with caring for or supervising children.¹

This submission comments on some of the specific provisions of the Bill. While our submission wholly supports the passing of the Bill, we provide some brief comments on some of the suggested terminology and definitions for purposes of clarity and enforceability.

In making this submission, we are informed by the collective experience of our clients and the Criminal Justice Report and the Final Reports of the Royal Commission published in 2017. We have also drawn upon our previous submissions to the Royal Commission, in particular our submission to the Royal Commission's Consultation Paper – Criminal Justice, submitted 31 October 2016.²

knowmore recognises that there has been, and continues to be, substantial reform in the area of police and prosecution responses, which is resulting in positive benefits for survivors. We commend the Australian Government for taking action to promote the protection of children through amendments to existing criminal legislation, and are pleased to provide a submission on this important legislative reform.

2. Comments on the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019

This part of knowmore's submission considers individual provisions of the Bill.

¹ knowmore made a submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper – Criminal Justice (31 October 2016) which also supported introducing fail to protect / report offences for people in positions of authority

² Excerpts of our above submission will be included in this submission for convenience. The complete submission can be viewed at <https://www.childabuseroyalcommission.gov.au/consultation-papers>

(i) Failure to Protect from Risk of a Child Sexual Abuse Offence

knowmore supports the introduction of a failure to protect offence in addition to the failure to report offence for institutional child sexual abuse. We agree with the Royal Commission's view that a *"duty to protect is primarily designed to prevent child sexual abuse"* from occurring prior to it being known whether an offence has been committed, whereas a duty to report offence focuses on bringing allegations to the attention of the police.³

We submit that a failure to protect law will help to encourage organisations to implement effective systems to prevent and respond to allegations of institutional child sexual abuse. Further, it places additional responsibility on staff with leadership roles to foster an effective organisational culture in this area.

knowmore supports the proposed s.273B.4 of the Commonwealth Criminal Code, to implement Recommendation 36 of the Royal Commission, and creating a new offence where an officer of the Commonwealth who has a child under their care, supervision or responsibility negligently fails to reduce or remove the risk of the child being sexually abused, where that officer has actual or effective responsibilities to reduce or remove that risk.

We note that the proposed s 273B.4 is similar in its scope to the offence provision in s.490 of the *Crimes Act 1958 (Vict)*, previously identified by the Royal Commission and knowmore as an appropriate form of offence provision.

In our previous submission to the Royal Commission, we suggested that the relevant failure to protect offence provision should not be so onerous that it hindered or prevented institutions from continuing programs or services for children and, accordingly, the provision should be specifically targeted to apply to persons in positions of authority.⁴ In our view, the proposed wording of s.273B.4 is sufficiently targeted to cover a range of Commonwealth officers who may have actual or effective responsibilities but who negligently fail to respond to substantial risks of institutional child sexual abuse

We also agree that the offence should include children of 16 or 17 years of age. The Royal Commission noted that these offence provisions were important for protecting *"older children who, despite being old enough to consent to sex, remain vulnerable to sexual abuse by those who hold positions of authority in relation to them."*⁵

knowmore notes that the Royal Commission recommended that only adults should be liable for failure to protect and report offences. However, the definition of "Commonwealth officer" in proposed s.273B.1 is not limited to adults. Although in practice it is unlikely many people under 18 would be engaged in roles that may bring them within the definition of 'Commonwealth Officer', for the sake of clarity we would recommend considering limiting the definition to adults.

³ Royal Commission Criminal Justice Consultation Paper, at p.245; Royal Commission Criminal Justice Report, Recommendation 36

⁴ This recommendation was made by knowmore in its submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper – Criminal Justice (31 October 2016), at p.25

⁵ Royal Commission Criminal Justice Report, Parts III to VI, at p.248

(ii) Failure to Report Risk of a Child Sexual Abuse Offence

knowmore supports the proposed s 273B.5 of the Bill, which creates a failure to report offence. The Royal Commission recommended the introduction of this type of offence. In our previous submission to the Royal Commission knowmore supported the creation of an offence which targeted institutional child sexual abuse offences and required those within institutions who had requisite knowledge of sexual abuse occurring within the institution to report to the police, We suggested the application of the offence provision should include staff, employees, office holders, board/committee members and volunteers.⁶

Many knowmore clients reported making a complaint about institutional sexual abuse at the time it was occurring to staff at the institution, which was never followed-up, investigated or referred to the police. knowmore clients have often reported that as children their complaints of sexual abuse made to other staff at the institution were not taken seriously, were dismissed or were simply not believed. These outcomes enabled perpetrators to continue offending against the complainant and potentially other children at the institution, and reinforced the powerlessness of the victims to stop the sexual abuse.

Many of these clients have expressed the view that institutions were more concerned about upholding their reputation than protecting children from abuse. Some knowmore clients have discovered years later that after making a complaint of sexual abuse to staff at the institution where the abuse was occurring, there was no report made to the police, but instead the perpetrator was simply moved to another section or location within the institution (such as another school or parish), which allowed the perpetrator to have continued access to children. Similar experiences are reported in Victoria's *Betrayal of Trust* report⁷ and the Royal Commission's Final Report.

Given our clients' experiences, knowmore considers that a failure to report offence targeting institutional child sexual abuse will increase accountability of institutions to report child sexual abuse; will create a more robust reporting culture within institutions; and will assist in the detection and prevention of institutional child sexual abuse.⁸

Further, criminal sanctions for failure to report institutional child sexual abuse reflect the seriousness of concealing child sexual offences in institutions. As institutional child sexual abuse usually occurs in private with no direct witnesses save for the child victim, and in circumstances where the child may be too young to fully understand what is happening or to

⁶ knowmore, Ssubmission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper – Criminal Justice (31 October 2016), at p.20

⁷ 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, November 2013, p.91, 94, 108-110. The Report provided that where victims reported sexual abuse as a child and were not believed "*many felt unable to raise their experience again until decades later, or sometimes never*" and "*the actions of perpetrators were very rarely reported as crimes*". It further provided that "*victims had hoped that reporting the criminal abuse to the organization would result in consequences for the perpetrator – in particular, seeing the perpetrator stood down from their position and reported to police. However, many victims told of experiences in which the organisation did not remove the alleged perpetrator from their position or report them to police, but instead moved the perpetrator to another position in a different location.*"

⁸ 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, November 2013, p.332, 489

later report it, or may lack connections with anyone independent whom they could tell, reporting by staff, officials and volunteers is essential in detecting and preventing such offending.⁹

In responding to the Royal Commission's Criminal Justice Consultation Paper, knowmore supported the enactment of a failure to report offence provision in addition to the existing mandatory welfare reporting systems, noting in our previous submission that mandatory reporting schemes prioritise the protection of 'at-risk' children, while police reporting focuses on catching, prosecuting and convicting offenders. We further noted that the mandatory reporting legislation across Australia's various jurisdictions did not cover all types of institutions providing services to children.¹⁰

We also supported the introduction of a targeted failure to report offence, as opposed to a broader offence provision, such as s. 316(1) of the *Crimes Act 1900 (NSW)*, on the basis that a broader failure to report offence applying to all serious criminal offences does not take into account the complex circumstances surrounding child sexual offending. As such, there is a concern that a broad offence could apply in unintended situations; e.g. to victims and their family members, or to other children who may be aware of abuse and above the age of criminal responsibility.

As such, we support the enactment of the proposed s.273B.5 of the Bill, which creates a new offence in the Criminal Code where a Commonwealth officer, exercising care or supervision over children, knows of information that would read a reasonable person to believe or suspect that another person has or will engage in conduct that constitutes sexual abuse of a child, and the Commonwealth officer fails to report that information as soon as practicable to police.

We are pleased to see that the proposed s 273B.5 creates liability for a Commonwealth officer exercising care or supervision over children on the basis of knowing information that would lead a reasonable person to either believe or suspect that child sexual abuse was occurring or going to occur, as opposed to only having actual knowledge or belief. The Royal Commission supported this approach after hearing a number of senior representatives of institutions denying knowledge or suspicion of abuse taking place "*in circumstances where their denials [were] very difficult to accept.*"¹¹

(a) Consideration of 10-year end date

knowmore suggests that it would be useful to give further consideration, in enacting s.273B.5, to Recommendation 33.d.iii of the Royal Commission; i.e. that there be an end date for a failure to report offence of 10 years, where the relevant knowledge is gained or the suspicion

⁹ 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, November 2013, p.478

¹⁰ knowmore, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper – Criminal Justice (31 October 2016), at p.21

¹¹ Royal Commission Factsheet, Criminal Justice Report: Failure to report offence – see https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/factsheet_-_criminal_justice_report_-_failure_to_report_offence.pdf

is or should have been formed after the failure to report offence commences.¹² We note that proposed s 273B.5 does not have such an end date and on its face appears to establish a continuing duty to report on the Commonwealth officer, even in the case of suspected historical sexual abuse where a survivor may not want the abuse to be reported.

In this context, the Royal Commission noted:

“... we consider that there should be some limit on the obligation to report knowledge or suspicions of abuse that is known to have occurred or is suspected of having occurred well before the knowledge is gained or the suspicion arises or should have arisen. We consider that the limit should be based on circumstances where there may be a current risk to the child or to other children.”¹³

We note that State mandatory reporting requirements for some professionals, such as teachers, may supersede any end date or right for a survivor to request that abuse not be reported.

In our experience, some knowmore clients do not wish to participate in any police investigative process, particularly where the sexual abuse occurred years or even decades earlier. This process can be traumatising and unsafe for the survivor. We are concerned that if criminal sanctions apply for failure to report regardless of the age or views of survivors, some survivors may be discouraged from making a complaint, providing information to an institution (or a Commonwealth officer) or even participating in an institutional redress scheme where they are aware that their personal details must be disclosed to the police by the institution without their specific consent.

The Royal Commission ultimately determined that:

... whether suspicions arise before or after the offence commences, staff and volunteers of institutions should not be relieved of the obligation to report because of their belief that the victim or survivor does not want them to report. We are satisfied that the risk of conflict between the duty and interest of staff and volunteers of institutions is too great and that the focus must be on protecting children.

In our view, the adoption of the 10-year time limit, coupled with mandatory reporting obligations where the alleged abuser still presents a risk to children, is an appropriate way to balance the competing interests here.

Additionally, reporting Commonwealth officers should ensure survivors are appropriately supported through the reporting process, such as referring survivors to external counselling

¹² knowmore previously submitted that the appropriate age of the survivor to decide whether to report to the police without criminal sanctions applying to staff or volunteers for failure to report should be 18 and above. We agree that the Royal Commission’s recommendation of not requiring reporting after 10 years is a reasonable compromise that balances the needs of survivors with the potential danger to children that may be posed by an offender who continues to work with children. knowmore submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper – Criminal Justice, at pp.20-23

¹³ Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Final Report, Parts III to VI, at p. 212

or other support services to assist with the implications and effects of police reporting.

(b) Consistency in definition of responsible person

We note that the scope of s.273B.5 includes a Commonwealth officer that has a child “under their care or supervision,” while s.273B.4 includes a Commonwealth officer with a child “under their care, supervision or **authority**.” The Explanatory Memorandum to the Bill does not address the reason for not including ‘authority’ in s 273B.5. We would therefore suggest consideration be given to including ‘authority’ in s 273B.5, for consistency.

(c) whistle-blower protection

knowmore has previously advocated for legislative protection for whistle-blowers who disclose institutional child sexual abuse from detrimental action, such as dismissal from their employment or other reprisals, including harassment.¹⁴

In our experience, some knowmore clients who work at institutions have expressed reluctance to disclose child sexual abuse occurring at the institution or to provide information, due to their fear of dismissal or reprisals in their workplace. We consider that robust legislative protections for whistleblowers are important in encouraging staff at institutions to report institutional child sexual abuse occurring, and to co-operate in its investigation.

Accordingly, we are pleased to see the proposed s.273B.9 of the Bill, providing some protections for persons complying with their reporting obligations. We would further support an extension of these provisions to including a criminal offence based on the taking of reprisal action against a whistleblower engaging in ‘protected conduct’, and the capacity to seek injunctive relief and compensation to prevent and/or help to redress adverse consequences arising in relation to a whistleblower’s employment.

(iii) Possession of Child-like Sex Dolls, Child Pornography / Child Abuse Material Obtained / Accessed using a Carriage Service

knowmore welcomes the Government’s commitment to further implementing Australia’s obligations under Articles 19 and 34 of the Convention on the Rights of the Child by criminalising dealings with child-like sex dolls.

We note that one of the research papers commissioned by the Royal Commission explored the link between child exploitation material and institutional child sexual abuse. While it described no direct causal link between child exploitation material offences and contact child sex offences, it was noted that:

¹⁴ knowmore submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper – Criminal Justice, at pp.23-24

“Still, there is an association between the two behaviours since, taken as a whole, a significant percentage of CEM [child exploitation material] offenders appear to have committed hands-on offences.”¹⁵

We note that in enacting legislation to prohibit the importation and transportation of child sex dolls in the United States of America, the Senate and House of Representatives in Congress made the following findings:

- i. There is a correlation between possession of the obscene dolls, and robots, and possession of and participation in child pornography.*
- ii. The physical features, and potentially the “personalities” of the robots are customizable or morphable and can resemble actual children.*
- iii. Some owners and makers of the robots have made their children interact with the robots as if the robots are members of the family.*
- iv. The robots can have settings that simulate rape.*
- v. The dolls and robots not only lead to rape, but they make rape easier by teaching the rapist about how to overcome resistance and subdue the victim.*
- vi. For users and children exposed to their use, the dolls and robots normalize submissiveness and normalize sex between adults and minors.*
- vii. As the Supreme Court has recognized, obscene material is often used as part of a method of seducing child victims.*
- viii. The dolls and robots are intrinsically related to abuse of minors, and they cause the exploitation, objectification, abuse, and rape of minors.¹⁶*

For these reasons, knowmore considers that the amendment of existing offence provisions to ensure the prevention of the identified dealings with child-like sex dolls in Australia is important. As the Explanatory Memorandum to the Bill notes, it is important to implement these amendments *“to keep pace with the evolving threats posed by paedophiles.”*

Further, we note that the mere existence of child-like sex dolls in Australia is likely to be highly traumatising to survivors of child sexual abuse. We note that many knowmore clients told their stories to the Royal Commission with the hope that Australian laws would be amended to prevent future child sexual abuse. Introducing these amendments acknowledges those wishes of survivors and the recommendations of the Royal Commission designed to better protect Australia’s children.

In looking at the drafting of the Bill, we note the possession offence in s.273A.1 refers to a doll or object *“intended to be used by a person to simulate sexual intercourse”* [paragraph (c)]. The current drafting is in a limited form. In order to avoid any potential technical obstacles to prosecuting offenders we suggest amending this part of the offence provision in a way that

¹⁵ Jeremy Prichard and Caroline Spiranovic, *“Child Exploitation Material in the Context of Institutional Child Sexual Abuse”* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, September 2014), at p.20. See www.childabuseroyalcommission.gov.au/research.

¹⁶ See the Curbing Realistic Exploitative Electronic Pedophilic Robots Act of 2017 (the CREEPER Act of 2017), HR 4655 www.congress.gov/bill/115th-congress/house-bill/4655/text

reflects the United States CREEPER Act of 2017, which refers to intended use of the child sex doll “for use in sexual acts.”¹⁷

(iv) Persistent child sexual abuse outside Australia

knowmore supports amending the existing provisions in the *Criminal Code Act 1995* criminalising persistent child sexual abuse, by reducing the number of underlying occasions of child sexual abuse to be found from three to two. We note that, in its commentary in support of Queensland’s offence of maintaining an unlawful sexual relationship with a child,¹⁸ the Royal Commission stated that “*many children who are subjected to repeated occasions of child sexual abuse in similar circumstances are unlikely to be able to distinguish the particular occasions of abuse from each other.*”¹⁹ As the Explanatory Memorandum to the Bill notes, the proposed amendment is more compatible with the way in which children recall repeated and regular abuse and will reduce the difficulties associated with requiring victims to particularise different occasions of offending.

(v) Defence of marriage/Forced marriage

We note that the Bill expands the definition of forced marriage in the *Criminal Code* to explicitly include all marriages involving children under 16 years of age. The Bill also restricts the defence to overseas child sex offence based on a valid and genuine marriage.

We support these proposals, and particularly welcome the steps to criminalise sexual offences committed overseas with a child between the ages of 16 and 18, where the defendant is in a position of trust or authority in relation to the young person. Knowmore’s client group as a whole has expressed grave concern regarding the power imbalance that exists in favour of an abuser over children, where he or she is in a position of trust or authority. This could foreseeably include coercing a marriage to perpetrate and/or continue the abuse.

knowmore notes the Bill will still provide for a narrower defence for people in positions of trust or authority, who engage in sexual activity with a young person over the age of 16 but less than 18 years, on the basis that a valid and genuine marriage was entered into. We are concerned, for the reasons noted above, that the power imbalance in such relationships is such that they are inherently exploitative, as the Explanatory Memorandum notes. We suggest that consideration be given to removing this defence. Its removal would still enable the defence of valid marriage to be invoked in appropriate cases where the adult is not in a position of trust or authority and the child was 16 or over.

3. Conclusion

knowmore supports the Australian Government’s efforts to promote the protection of children against sexual exploitation through legislative reform of the criminal law, and we

¹⁷ HR 4655 <https://www.congress.gov/bill/115th-congress/house-bill/4655/text>

¹⁸ *Criminal Code Act 1899 (Qld)* s.229B

¹⁹ Royal Commission Criminal Justice Report Parts III – VI, at p.68

commend the Government for implementing the recommendations of the Royal Commission and its commitments to the Convention on the Rights of the Child.

We recommend the Bill be passed, with further consideration given to the drafting issues identified in our submission.

We again thank the Committee for the opportunity to make this submission. We have no concerns about its publication.