knowmore
free legal help for survivors

Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

30 September 2019

Contents

About knowmore

Our service

knowmore legal service (knowmore) is a nation-wide, free and independent community legal centre providing legal information, advice, representation and referrals, education and systemic advocacy for victims and survivors of child abuse. Our vision is a community that is accountable to survivors and free of child abuse. Our mission is to facilitate access to justice for victims and survivors of child abuse and to work with survivors and their supporters to stop child abuse.

Our service was established in 2013 to assist people who were engaging with or considering engaging with the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). knowmore was established by and operates as a program of Community Legal Centres Australia, 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, Community Legal Centres Australia 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 to provide trauma-informed, client-centred and culturally safe legal assistance to clients. knowmore has offices in Sydney, Melbourne, Brisbane and Perth. Our service model brings together lawyers, social workers and counsellors, Aboriginal and Torres Strait Islander engagement advisors and financial counsellors to provide coordinated support to clients.

Our clients

In our Royal Commission-related work, from July 2013 to the end of March 2018, knowmore assisted 8,954 individual clients. The majority of those clients were survivors of institutional child sexual abuse. Almost a quarter (24%) of the clients assisted during our Royal Commission work identified as Aboriginal and/or Torres Strait Islander peoples.

Since the commencement of the National Redress Scheme for survivors of institutional child sexual abuse on 1 July 2018 to 31 August 2019, knowmore has received 21,365 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 4,948 clients. A quarter (25%) of knowmore's clients identify as Aboriginal and/or Torres Strait Islander peoples. Just over a fifth (21%) 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.

knowmore's submission

This section outlines knowmore's overall position on the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (the Bill), and details knowmore's comments on a number of specific amendments in the Bill.

knowmore's overall position on the Bill

knowmore commends the Government's commitment to ensuring that criminal justice responses are available to victims and survivors of child sexual abuse, including institutional child sexual abuse, and that they are supported in seeking these criminal justice responses.

knowmore welcomes the introduction of the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (the Bill) and the opportunity to provide comments on the Bill. knowmore notes that a previous iteration of this Bill was introduced to the House of Representatives on 13 September 2017 (2017 Bill).[1] The 2017 Bill failed to proceed in the Senate, and thereafter lapsed at the end of the previous Parliament. Many provisions in the Bill replicate those contained in the 2017 Bill, and knowmore has therefore had regard to the views expressed by previous Parliamentary Committees and stakeholders on the 2017 Bill.

While knowmore is generally supportive of the Bill's objects, knowmore is concerned that some of the proposed amendments depart in some respects from the findings and recommendations of the Royal Commission.

knowmore submitted to the Royal Commission

> '[f]or many knowmore clients, the criminal justice system is essential to seeking justice for past wrongs, holding the perpetrator accountable for their criminal offending and reducing the risk of the perpetrator offending against other children.'[2]

In knowmore's view, the complete and holistic implementation of the Royal Commission's recommendations is essential in enhancing justice outcomes for victims and survivors of child sexual abuse. The introduction of this Bill provides an important opportunity for the Government to implement some of those key recommendations in such a manner.

[1] Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017, available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5964.

[2] knowmore, *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper – Criminal Justice*, 2016, available at https://www.childabuseroyalcommission.gov.au/consultation-papers.

Comments on specific amendments in the Bill

The evidence of victims and survivors

The Royal Commission acknowledged the significance of complainants' evidence in child sexual abuse proceedings

> '…child sexual abuse offences are generally committed in private, and typically the complainant's evidence is the only direct evidence of the abuse. The complainant's ability to give clear and credible evidence is therefore critically important to any criminal investigation and prosecution.'[3]

However, giving evidence in court can be a daunting and difficult experience for victims and survivors of child sexual abuse. Many of knowmore's clients have reported difficulties in persisting with their complaint due to the stress and trauma of appearing and being examined in court. When the experience of giving evidence either discourages victims and survivors from participating in the criminal justice process, or hinders their ability to give their 'best evidence'[4], it can lead to significant injustices.

In knowmore's view, a key way of addressing this issue is to embed a trauma informed approach to working with victims and survivors at every level of the criminal justice system.[5] This includes the adoption of special measures to assist victims and survivors to participate in the criminal justice process and to reduce the stress and trauma of giving evidence.

The Royal Commission closely examined the use of special measures in child sexual abuse proceedings in Australian jurisdictions, and made important recommendations to improve their availability and effectiveness.[6] knowmore's comments on the amendments contained in Schedule 2 and 3 of the Bill draw on these findings and recommendations.

Removing the requirement to seek leave before a recorded interview of a vulnerable witness can be admitted as evidence in chief

Part IAD of the *Crimes Act 1914* (Cth) contains special measures to protect vulnerable complainants and witnesses in Commonwealth criminal proceedings, including child sexual abuse proceedings. This includes section 15YM, which allows certain vulnerable complainants and witnesses to have a recording of their police interview admitted at trial as their evidence in chief.

[3] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII-X and Appendices*, 2017, p.3.
[4] The Royal Commission used the term 'best evidence' to describe '…the most complete and accurate evidence a witness is able to give', *Criminal Justice Report: Parts VII-X and Appendices*, p.5.
[5] See knowmore, *Submission to the Royal Commission: Consultation Paper – Criminal Justice*, p.6.
[6] See Royal Commission, *Criminal Justice Report: Parts VII-X and Appendices*, Chapter 30.

Schedule 2 of the Bill amends section 15YM to remove the requirement that a court must give leave before a video recording can be admitted. knowmore welcomes the amendments in Schedule 2 which remove procedural barriers to the use of video recordings, therefore making it easier for recordings to be admitted and relied upon in child sexual abuse proceedings. However, knowmore submits that further amendments are required to bring this special measure in line with the recommendations of the Royal Commission.

The Royal Commission recommended that governments should ensure the relevant legislative provisions, physical resources and procedures are in place to allow for the prerecording of the entirety of a witness's evidence in child sexual abuse proceedings, including the use of pre-recorded investigative interviews as some or all of the witness's evidence in chief and the availability of pre-trial hearings to record cross-examination and re-examination (see recommendations 52-55). The Royal Commission made further recommendations requiring the audio-visual recording of evidence given by complainants and witnesses during trial, and allowing these recordings to be relied on as the relevant person's evidence in any subsequent trial or retrial (see recommendations 56-58).
The Royal Commission concluded that such special measures are '…likely to have clear benefits for both the witness and the parties in a prosecution.'[7] These benefits may include:

- Providing witnesses with more certainty about when they are going to give their evidence, and ensuring they are able to give their evidence sooner.
- Avoiding or limiting the need for witnesses to recount their abuse in court, minimising the trauma associated with participating in the criminal justice process.
- Improving the accuracy of the evidence provided, therefore ensuring witnesses are able to give their 'best evidence'.
- Reducing delays and increasing the likelihood of early guilty pleas.[8]

knowmore strongly supports the full implementation of special measures recommended by the Royal Commission relating to the prerecording and recording of the evidence of victims and survivors. Consistent with the views of the Royal Commission, these measures should be made available for all complainants in child sexual abuse proceedings, including adults in proceedings involving historical allegations of child sexual abuse.[9]

Currently, section 15YM(1A) limits the application of the special measure to a child witness for a child proceeding; a vulnerable adult complainant in a vulnerable adult proceeding; and a special witness for whom an order is in force. As a result of the operation of sections 15Y(2) and 15YAA, an adult complainant in a proceeding involving historical allegations of child sexual abuse is not considered to be a vulnerable adult complainant under Part IAD of the Act. Therefore, they are not eligible for this special measure, and will not benefit from the use of video recordings unless a court makes specific orders under the special witness provisions.[10]

[7] Royal Commission, *Criminal Justice Report: Parts VII-X and Appendices*, p.88.
[8] Royal Commission, *Criminal Justice Report: Parts VII-X and Appendices*, Chapter 30.
[9] Royal Commission, *Criminal Justice Report*, recommendations 53 and 56.
[10] Special measures in Part IAD of the *Crimes Act 1914* (Cth), such as section 15YM relating to the use of video recordings, will

This is a significant shortcoming, given that:

- A considerable proportion of complainants in child sexual abuse proceedings are adults, due to the fact that many survivors take years, even decades, to disclose their abuse.[11]
- Many adult survivors of child sexual abuse remain vulnerable. As the Royal Commission stated: *It is clear to us, including from what we have heard in public hearings and private sessions, that many survivors of institutional child sexual abuse who are now adults and do not have disability are 'vulnerable', particularly when they are describing their experiences of abuse and particularly in the very unfamiliar and stressful environment of a court*.[12]

knowmore's position, as articulated in a recent submission to the Victorian Law Reform Commission, is that

> '… at a minimum, existing special measures should be made available to all complainants in child sexual abuse cases. This is consistent with the approach taken in the ACT, where the full range of special measures is available to all complainants in sexual offence proceedings,[13] and in Queensland, South Australia and the Northern Territory, where all complainants in sexual offence proceedings are considered "special" or "vulnerable" witnesses to whom various special measures are available...[14]

knowmore urges the Government to introduce further amendments to Part IAD of the *Crimes Act 1914* (Cth) to include adult victims and survivors of child sexual abuse within the definition of 'vulnerable adult complainant', therefore ensuring that this and other existing special measures are available to them. However, knowmore nevertheless considers it appropriate for them to continue to have the option to give evidence at special hearings or live in court, if they choose to do so.[15]

Finally, knowmore submits that the Government should ensure that other relevant and complementary recommendations of the Royal Commission are fully implemented, including recommendations relating to enhancing physical resources for the recording and use of interviews, specialist training for interviewers and regular quality assurance (see recommendation 9 of the Final Report).

---

only apply to adult complainants in proceedings involving allegations of historical child sexual abuse where a court declares them to be a 'special witness' and a court order is in force under subsection 15YAB(3). According to section 15YAB of the *Crimes Act 1914* (Cth) a court may declare a person to be a special witness if satisfied that the person is unlikely to be able to satisfactorily give evidence because of a disability, or intimidation, distress or emotional trauma. Such a declaration may be made on the court's own initiative or on application.

[11] The Royal Commission reported that survivors who participated in private sessions took, on average, 23.9 years to disclose the abuse to someone (*Final Report: Volume 4, Identifying and Disclosing Child Sexual Abuse,* 2017, p.9).

[12] Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 91.

[13] Section 43, Table 43.4, *Evidence (Miscellaneous Provisions) Act 1991*.

[14] Part 2, Division 4, *Evidence Act 1977* (Qld); section 13A, *Evidence Act 1929* (SA); Part 3, *Evidence Act 1939* (NT). In all three jurisdictions, the special measures available to complainants are similar to the measures available to all witnesses in sexual offence proceedings in Victoria under section 360 of the Criminal Procedure Act. However, the provisions in these other jurisdictions go further, including in allowing all complainants to record their evidence and have it played back in the court [s. 21A(2)(e), Evidence Act (Qld); s. 13A(2)(b), Evidence Act (SA); s. 21B(2), Evidence Act (NT)].

[15] Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p.91.

Preventing children and other vulnerable witnesses from being cross-examined at committal proceedings

Schedule 3 of Bill inserts section 15YHA in Part IAD of the *Crimes Act 1914* (Cth) to prevent the cross-examination of certain vulnerable complainants and witnesses during committal or other preliminary hearings.

knowmore supports reforms to committal and pre-trial proceedings that help to promote the timely resolution of matters and reduce the stress and trauma of giving evidence for victims and witnesses. The Royal Commission heard from many survivors who had adverse and distressing experiences of being cross-examined, including during committal proceedings. According to the Royal Commission

> '[s]ome survivors told us that the cross-examination process was as bad as the child sexual abuse they suffered. Many survivors told us that they found the process re-traumatising and offensive.'[16]

This is illustrated in the stories of two survivors who gave evidence in private hearings.

Rita's story

Rita was groomed and sexually abused by a teacher at her state school in the early 1970s.

In the late 1970s, a local youth support worker contacted Rita and raised concerns about the teacher. After Rita disclosed her history, the support worker helped her to make a police statement.

The teacher was charged, and the police found another former student who was willing to give evidence. However, after enduring the committal hearing both women felt unable to continue

> '[t]he court case was traumatic, he was committed to trial, and that means a lot to us. When I found out that meant I had to do it all again, I just broke and said "I can't". A couple of weeks later, I tried to kill myself again. I was in hospital for a while, I was very sick. The DPP decided not to continue, but we weren't given an explanation as to why.'

Many years later, in the early 2000s, Rita discovered that the perpetrator was still working as a teacher. This news was distressing to Rita, who felt 'a tremendous surge of guilt' for not pursuing the case. She later wrote anonymous letters to the police, politicians and the school about the perpetrator's history.

Source: Adapted from Royal Commission, Narratives: Rita's story, <https://www.childabuseroyalcommission.gov.au/narratives/ritas-story> Real names of individuals have not been used.

[16] Royal Commission, *Criminal Justice Report: Parts VII-X and Appendices,* p.5.

Quentin's story

At the age of 9, Quentin was sexually abused by Brother Mordecai while a student at a Christian Brothers school in Melbourne. The abuse took place in the late 1950s and continued for several months.

When Quentin's family discovered the abuse they reported it to the school principal, who stated that Brother Mordecai had been dealing with difficult family matters and was taking his frustrations out on Quentin. Although the abuse came to an end following this meeting, Brother Mordecai stayed at the school. Quentin's parents did not discuss the matter further.

As an adult Quentin attempted suicide many times and became estranged from his family. He eventually sought support from a centre against sexual assault. In the 1990s with his counsellor's support, he reported the abuse he experienced as a child to the police. Although giving his statement was a painful process, he felt respected and supported by the police. However, this was not the case when the matter came to court for the committal hearing

> '[t]he demeaning, denigrating ordeal of that cross-examination convinced Quentin not to pursue the matter to trial …'

Quentin later accepted compensation of $15,000 from the Christian Brothers, and received a payment as a victim of crime. However, he continues to be affected by the impact of the abuse.

Source: Adapted from Royal Commission, Narratives: Quentin's story, <https://www.childabuseroyalcommission.gov.au/narratives/quentins-story> Real names of individuals have not been used.

knowmore notes that while proposed section 15YHA will apply to some victims and survivors of child sexual abuse, like other existing special measures in Part IAD it will not apply to adult survivors of child sexual abuse as they do not fall within the meaning of vulnerable adult complainant.

knowmore urges the Government to consider extending the application of new section 15YHA, as well as other existing special measures in Part IAD, to all complainants in child sexual abuse proceedings, including adult survivors of child sexual abuse. As detailed above, this is likely to result in considerable benefits not only for adult survivors, but also the broader criminal justice process by reducing delays and improving reporting and participation rates in child sex offence prosecutions.

Increased penalties and sentencing reforms

knowmore advocates for a nationally consistent approach to sentencing in child sexual abuse cases, to provide victims and survivors with confidence that perpetrators are treated consistently and appropriately for their crimes, irrespective of the jurisdiction in which the crime took place.[17]

Increasing the maximum penalties for certain Commonwealth child sex offences

knowmore has considerable experience working with victims and survivors of child sexual abuse, and through its work, receives regular feedback regarding their views on the sentencing of those convicted of child sex offences. As knowmore submitted to the Royal Commission

> '[t]he common view of survivors is that sentences for child sexual offences should be more severe, based upon the increasing societal understanding of the ongoing impact of the abuse on the survivor. Survivors also report feeling let down after the stress and often trauma of the trial process, when they find that the offender has received what they consider to be a lenient sentence. This is especially difficult for survivors when actual imprisonment is not imposed, particularly so when the advanced age or ill-health of the accused is a factor in a non-custodial sentence being imposed.'[18]

Schedule 5 of the Bill introduces increased maximum penalties for specified Commonwealth child sex offences. As a result of the amendments, the maximum penalties for those offences will generally increase by between 3 to 5 years, with the most significant penalties applying to persistent child sexual abuse offences and other aggravated offences in which the child has a mental impairment or is under the care, supervision or authority of the defendant.

knowmore supports legislative reforms which strengthen the penalties for child sexual abuse offences and bring them more in line with increasing societal understanding of the seriousness of these offences and the enduring impact that child sexual abuse can have on the life of survivors. knowmore supports the amendments in Schedule 5. Increasing the maximum penalties for these offences provides a clear indication of the views of the Parliament, and the community, about the seriousness of these offences, and will provide guidance to the judiciary for sentencing purposes.

Introducing a mandatory minimum sentencing scheme to apply to the Commonwealth child sex offences that attract the highest maximum penalties, and all other Commonwealth child sex offences if the offender is a repeat child sex offender

Schedule 6 of the Bill amends the *Crimes Act 1914* (Cth) to introduce minimum mandatory sentences for specified Commonwealth child sex offences in Divisions 272, 273, 471 and 474 of the Commonwealth Criminal Code. The proposed minimum penalties for these offences range from 5 to 7 years' imprisonment.

---

[17] knowmore, *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper – Criminal Justice*, 2016, p.34.
[18] knowmore, *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper – Criminal Justice*, 2016, p.33.

Schedule 6 of the Bill also introduces minimum mandatory sentences for second or subsequent offences. New section 16AAB provides that where a person is convicted of a Commonwealth child sexual abuse offence and has been previously convicted of a child sexual abuse offence, mandatory minimum sentences apply for the subsequent conviction, with the penalty ranging from 1 to 4 years' imprisonment. While new section 16AAC allows for exclusions and reductions in minimum sentences, these provisions apply in limited circumstances only; for example, where the offender was a minor at the time of the offence.

As stated above, knowmore supports legislative reforms which will result in strengthened sentencing outcomes for child sex offences that are more in line with increasing societal understanding of the seriousness of these offences and the enduring impact of such offences on survivors. knowmore acknowledges and has heard firsthand about the disappointment and distress experienced by survivors when the person who harmed them receives what they perceive to be an unduly lenient sentence.

However, knowmore is concerned by the lack of evidence supporting the effectiveness of mandatory sentencing policy in achieving the Bill's stated aims. The Royal Commission expressed concerns with mandatory sentencing policy, warning that it '…imposes a significant or complete constraint on judicial discretion…'[19] According to the Royal Commission

> '[t]he criminological evidence is that mandatory sentences are not as effective as deterrents, do not reduce crime rates and generally operate in such a way that discriminates against certain minority groups.[20] In terms of consistency, rather than leniency of sentences, mandatory sentencing has the effect of treating unlike cases as like, creating a form of unfairness analogous to the situation where there is too much discretion and where like cases are treated differently.'[21]

This view is shared by a number of key stakeholders, including the Australian Law Reform Commission which recommended against the imposition of mandatory sentences for federal offences,[22] as well as the Law Council of Australia which, in their position paper on mandatory sentencing, stated

> '[t]he community is rightly concerned that law and order policies are effective in reducing crime and recidivism. However, there is a lack of any persuasive evidence that mandatory sentencing leads to these outcomes. Rather the evidence points to the significant financial and social cost of mandatory sentencing to individuals and to the community without a

[19] '*Sentencing for child sexual abuse in institutional contexts: Report for the Royal Commission into Institutional Responses to Child Sexual Abuse*', July 2015, p.189. Conducted by Emeritus Professor Arie Freiberg, Hugh Donnelly and Dr Karen Gelb. Available at https://www.childabuseroyalcommission.gov.au/research.

[20] According to the Law Council of Australia, mandatory sentencing regimes result in unjust outcomes for Indigenous peoples, juveniles, persons with mental illness or cognitive impairment, and the impoverished, see Law Council of Australia, Mandatory Sentencing Policy Position, May 2014, available at: https://www.lawcouncil.asn.au/resources/policies-and-guidelines.

[21] Royal Commission, *Criminal Justice Report: Parts VII-X and Appendices,* p.327.

[22] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report* (Report No. 133, 2017), 314, Recommendation 21-3.

corresponding benefit in crime reduction.'[23]

knowmore is of the view that sentencing reforms should be evidence based, and any substantial departures from accepted sentencing principles and standards must be necessary and proportionate. Ultimately, any move to imposing mandatory sentencing is a matter for Parliament to decide. As acknowledged by a number of stakeholders, there is a considerable risk that the lack of judicial flexibility and discretion will result in injustices in individual cases, and may have a disproportionate impact on already vulnerable groups.[24]

If these reforms are adopted, we would recommend that the impact of any such reforms be carefully monitored in order to ascertain whether the amendments are having the intended effect upon addressing current sentencing practices that are perceived to be inadequate. Such monitoring and research should also address any disproportionate impacts on vulnerable groups and whether the exclusions and reductions in section 16AAC are sufficient.

Creating presumptions in favour of cumulative sentences and actual imprisonment for Commonwealth child sex offences

Schedule 10 of the Bill amends the *Crimes Act 1914* (Cth) to restrict the circumstances in which concurrent sentences can be imposed. Specifically, it prevents sentencing orders from being made that would have the effect that a term of imprisonment imposed on a person for a Commonwealth child sex offence be served partly cumulatively, or concurrently, with an uncompleted term of imprisonment for another Commonwealth child sex offence or a State or Territory registrable child sex offence. The amendments contain an exception where the court is satisfied that the order would nevertheless result in sentences that are of an appropriate severity, and requires the court to state and record its reasons for applying this exception.

In a submission to the Royal Commission, knowmore stated

'[s]urvivors also report being disappointed by concurrent sentencing decisions. Survivors are living with the impact of each offence against them and feel that this reality should be reflected in the prison time served by the perpetrator.'[25]

[23] Law Council of Australia, Mandatory Sentencing Policy Position, May 2014, available at: https://www.lawcouncil.asn.au/resources/policies-and-guidelines.
[24] Queensland Sentencing Council, *Community-based sentencing orders, imprisonment and parole options: Final report,* July 2019, p.88.
[25] knowmore, *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper – Criminal Justice*, 2016, p.33.

The Royal Commission heard from many survivors who felt that the current approach to sentencing is unjust, and in some instances significantly out of step with community and survivor expectations. Some survivors who spoke to the Royal Commission called for a reduction in concurrent sentencing, which they believed resulted in sentences that were too lenient.

Max William's story

Over a two-year period in the 1950s, Max was repeatedly sexually abused by a parish priest, Father Jim McMahon. The abuse started when Max was 13 years old.

In years later it transpired that McMahon had sexually abused many boys and girls over decades. Complaints made about him throughout that time, including one made by Max William, had been dismissed or denied and he'd been moved between numerous Victorian parishes over a 50-year period.

In the 1990s, people started to make reports to Victoria Police about their experiences of being abused by McMahon. Max made his own statement to police.

In court, McMahon pleaded guilty and was sentenced to serve more than a year for each charge brought against him. However, he was permitted to serve each sentence concurrently and in the end was released early, something Max thought was a 'travesty of justice.'

Source: Adapted from Royal Commission, Narratives: Max William's story, <https://www.childabuseroyalcommission.gov.au/narratives/max-williams-story> Real names of individuals have not been used.

After considering concurrent sentencing practices across Australian jurisdictions, the Royal Commission concluded that

> '[w]hile we accept the reasoning that leads to concurrency for sentences that arise from the same course of criminal conduct, we also consider that sentencing for multiple offences should, to the greatest degree possible, provide separate recognition for separate episodes of child sexual abuse offending, and certainly for multiple victims.'[26]

However, the Royal Commission was not satisfied that a presumption in favour of cumulative sentencing would achieve this aim. Instead, the Royal Commission recommended that legislation be introduced to require courts, in such cases, to indicate the sentence that would have been imposed for each offence had separate sentences been imposed (recommendation 75); and to require courts to set sentences in accordance with the sentencing standards at the time of sentencing, instead of at the time of offending (recommendation 76).

[26] Royal Commission, *Criminal Justice report: Parts VII-X and Appendices*, see discussion at pp.299-307.

knowmore supports the implementation of the Royal Commission's recommendations in relation to cumulative and concurrent sentencing and suggests that the provisions of Schedule 10 be further considered so as to fully implement recommendation 75.

An aggravating factor in sentencing if a federal offender used their standing in the community to assist in the commission of an offence

Schedule 8 of the Bill inserts section 16A(2)(ma) into the *Crimes Act 1914* (Cth), requiring a court to have regard to whether a person used their standing in the community to aid in the commission of an offence, and if so, to treat that as an aggravating factor for the purposes of sentencing.

Due to the nature and context of institutional child sexual abuse, perpetrators often hold positions of trust or authority within their relevant institutions, and are generally well regarded within their community. According to the findings of the Royal Commission

> '[i]n 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.'[27]

As a result of this finding, the Royal Commission developed recommendation 74 of its Criminal Justice report, requiring governments to introduce legislation to ensure that evidence of good character is excluded as a mitigating factor in sentencing for child sexual abuse offences in cases where the good character facilitated the offending.[28]

The experience of many of knowmore's client reflects the findings of the Royal Commission in this regard, and we support the full implementation of recommendation 74. However, knowmore notes that the proposed amendment in Schedule 8 substantially departs from the Royal Commission's recommendation.

First, rather than excluding good character as a mitigating factor in sentencing, section 16A(2)(ma) seeks to establish it as an aggravating factor. While this approach has been adopted in England and Wales,[29] the Royal Commission concluded that it was unnecessary in the Australian context given that other relevant factors, such as breach of trust or authority or the special vulnerability of the victim, can already be taken into account as aggravating factors.[30] This is the case in relation to relevant offences in the Commonwealth Criminal Code, for example section 272.10(1). In light of this, knowmore recommends the Government consider the necessity and utility of introducing section 16A(2)(ma) in its current form.

[27] Royal Commission, *Criminal Justice report: Parts VII-X and Appendices*, p.299.
[28] Royal Commission, *Criminal Justice report*, recommendation 74.
[29] Sentencing Council for England and Wales, *Sexual Offences: Definitive Guideline*, in force from 1 April 2014, last undated December 2017.
[30] Royal Commission, *Criminal Justice report: Parts VII-X and Appendices*, p.299.

Secondly, in order for the provision to apply in a particular case, the good character of the perpetrator must "aid" in the commission of the offence. In developing recommendation 74, the Royal Commission considered section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which requires that the good character "was of assistance" to the offender in the commission of the offence. The Royal Commission expressed concern with the requirement that the good character specifically aid the offence, noting that it '…may limit the application of the provision, both in some institutional offending and in offending that is not in an institutional context.'[31] In light of these concerns, the Royal Commission adopted a broader approach, requiring that the good character need only "facilitate" the offending. A similarly broad approach has since been adopted in the ACT.[32] knowmore raises these issues for further consideration.

Amendments limiting bail

Introducing a presumption against bail for persons charged with, or convicted of, certain Commonwealth child sex offences

Schedule 7 inserts new section 15AAA which provides that a bail authority must not grant bail to a person who is charged with or convicted of Commonwealth child sex offences, unless the bail authority is satisfied by the person that circumstances exist to grant bail. knowmore notes that the presumption against bail only applies to certain prescribed offences, being the same offences for which minimum penalties have been proposed in Schedule 6. These offences include Commonwealth child sex offences, including persistent child sexual abuse offences, aggravated offences, as well as offences relating to child pornography or child abuse material, and the use of postal or telecommunications services to commit such offences. knowmore considers these offences sufficiently serious to warrant additional regulation.

While the Royal Commission did not specifically make recommendations relating to bail, victims and survivors appearing before the Royal Commission spoke of how decisions to grant bail had adversely impacted their recovery, and their ability to effectively access justice when the perpetrator breached their bail conditions. For example, in one case from the early 2000s, the perpetrator was granted bail, despite committing persistent child sexual abuse with a child under the age of 10. On being granted bail, the perpetrator absconded overseas, and at the time of the Royal Commission's private hearing a warrant for his arrest remained outstanding. The survivor spoke of how she has since tried to get on with her life, but the unresolved matter is "always there".[33]

knowmore has considered the positions of relevant stakeholders, including Bravehearts, which supports a presumption against bail for child sex offenders due to the gravity of the offences, the impact on the victim, and the inherent risks of release on bail.[34] In Bravehearts' view, this presumption should only be waived if exceptional circumstances exist.[35]

---

[31] Royal Commission, *Criminal Justice report: Parts VII-X and Appendices*, p.293.
[32] Section 34A(b), *Crimes Sentencing Act 2005.*
[33] Adapted from Royal Commission, *Narratives: Hannah's story,* available at: https://www.childabuseroyalcommission.gov.au/narratives/hannahs-story.
[34] Bravehearts, *Position Statement on Bail Presumptions for Child Sex Offenders,* last updated 2017, p.2.
[35] According to Bravehearts, exceptional circumstances may include that the offender has an intellectual disability, requires

The proposed presumption in new section 15AAA is akin to "show cause" provisions in state and territory jurisdictions.[36] knowmore supports the inclusion of serious Commonwealth child sex offences as "show cause" offences.

Subsection 15AAA(2) provides a non-exhaustive list of matters that are relevant to the exercise of the bail authority's discretion to waive the presumption against bail, including: whether the person was aged 18 years or over at time of the offence; and whether the person, having pleaded guilty or having been convicted, is likely to comply with bail conditions relating to rehabilitation or treatment. Furthermore, the provision also includes a number of procedural safeguards, including a requirement that the court must state and record its reasons for granting bail, and that both the DPP and the defendant have a right to appeal the decision of a bail authority. knowmore is satisfied that the proposed amendments strike the right balance between upholding the rights of both the survivor and the perpetrator, and protecting the community.

However, knowmore submits that the Government should regularly review all matters affected by prolonged delays to ensure that persons whose bail has been refused under section 15AAA are not at risk of arbitrary detention, and should ensure that the criminal justice system is sufficiently resourced to resolve matters in a timely manner, which is in the interests of all parties.

urgent medical attention, or the offender no longer poses a risk to the community. See Bravehearts, *Position Statement on Bail Presumptions for Child Sex Offenders,* last updated 2017, p.1.

[36] For example, the *Bail Act 2014* (NSW) introduced show cause offences for which a bail authority must refuse bail unless the accused shows that his or her detention is not justified. Section 16B of the Act lists the relevant show cause offences, which include serious indictable offences that involve an intent to have sexual intercourse with a person under 16 years.

Conclusion

knowmore is supportive of the Bill's objects, and supports a number of amendments contained in the Bill, including those relating to the provision of special measures for victims and survivors in proceedings for Commonwealth child sex offences and the introduction of increased maximum penalties.

However, knowmore is concerned that some of the proposed amendments depart, in some respects (as noted above) from the findings and recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. knowmore supports a nationally consistent approach to criminal justice reforms, and the implementation of the Royal Commission's recommendations in full. This Bill provides an important opportunity for the Government to further align the Commonwealth criminal justice system with the recommendations of the Royal Commission, and therefore improve protections and justice outcomes for victims and survivors of child sexual abuse.

Brisbane
Level 20, 144 Edward St
Brisbane QLD 4000
t 07 3218 4500

Melbourne
Level 15, 607 Bourke St
Melbourne VIC 3000
t 03 8663 7400

Perth
Level 5, 5 Mill St
Perth WA 6000
t 08 6117 7244

Sydney
Level 7, 26 College St
Sydney NSW 2000
t 02 8267 7400

knowmore is a program of Community Legal Centres Australia.
ABN 67 757 001 303 **ACN** 163 101 737.

Community Legal Centres Australia acknowledges the traditional owners of the lands across Australia upon which we live and work. We pay deep respect to Elders past and present.

knowmore
free legal help for survivors