knowmore
free legal help for survivors

Open Justice: Court and Tribunal Information: Access, Disclosure and Publication

Submission to the NSW Law Reform Commission

2 August 2021

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About knowmore

Our service

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

Our service was established in 2013 to assist people who were engaging with or considering engaging with the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). From 1 July 2018, knowmore has been funded to deliver legal support services to assist survivors of institutional child sexual abuse to access their redress options, including under the National Redress Scheme.

knowmore is funded by the Commonwealth Government, represented by the Attorney-General's Department and the Department of Social Services.

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 30 June 2021 knowmore has received 48,936 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 9,261 clients. Of knowmore's clients, 31% 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.

Our clients in New South Wales

knowmore has a significant client base in New South Wales — 20 per cent of our current clients reside in the state. We therefore have a strong interest in New South Wales law reform relevant to victims and survivors of child sexual abuse.

knowmore's submission

knowmore made a preliminary submission to the NSW Law Reform Commission dated June 2019.[1] knowmore made a further submission in response to a number of the issues raised in the December 2020 Consultation Paper.[2] We reiterate some of the key points from these submissions below and provide specific comments to the questions and recommendations in the Draft Proposal paper.

A new Act

> Key proposal:
>
> There should be a new Act containing general powers to make non-publication, suppression, exclusion and closed court orders. However, these powers should be different for each type of departure, given their different purposes and intended effects (see chapter 4).

knowmore broadly supports the creation of a new Act that would contain general powers regarding non-publication, suppression, exclusion and closed court orders. We note that the new Act proposes to make "general powers to do the following":

- prohibit or restrict the publication or disclosure of information ("non-publication orders" and "suppression orders")
- exclude certain people, or classes of people, from the whole or any part of proceedings ("exclusion orders"), and
- both exclude all people from the whole or any part of proceedings and operate as suppression orders to prohibit the disclosure of information given in those proceedings ("closed court orders").[3]

The intention of the general powers is to "operate in circumstances that are otherwise not covered by existing subject-specific legislation".[4] The Act therefore aims to contribute to a greater transparency on the grounds orders can be made, how orders can be applied for and the circumstances in which orders can be lifted. The Act is proposed to be modelled on the *Court Suppression and Non-publication Orders Act 2010* (NSW) ("*CSNPO Act*"),[5] adopting

1 knowmore, Preliminary Submission PCI35, June 2019, <www.lawreform.justice.nsw.gov.au/Documents/Current- projects/Court%20information/PCI35.pdf>.
2 knowmore, Submission CI10, 18 February 2021, <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Court%20information/CP%20submissions/CI10.pdf>.
3 Open Justice Draft Proposals, at para 4.1.
4 Open Justice Draft Proposals, at para 4.2.
5 Open Justice Draft Proposals, at para 4.3 and 4.10-4.14.

many of its definitions and similar provisions. knowmore supports this approach insofar as it contributes to the uniformity of the law in NSW. knowmore further supports necessary deviations from the *CSNPO Act* in order to enhance the protections of children, domestic violence complainants, and people with cognitive impairments.

The scope of the proposed Act is limited to apply only to certain courts as defined in the Act. Accordingly, this does not include any NSW Tribunals or the Coroners Court. Proposal 4.1 outlines that the Act should define "court" as "the Supreme Court, Land and Environment Court, District Court, Local Court and Children's Court… this would include sub-jurisdictions of those courts (such as the Drug Court of the District Court)".[6] knowmore supports this proposal, however, acknowledges that a new Act can become an example or guide for future legislation. Subsequently, the drafting of this proposed Act must aim to include best practice principles, which may in turn be adopted or implemented by Acts governing other forums of justice within NSW. Overall, this would contribute to improving the administration of justice and open justice principles in NSW as a whole.

Proposed principles

Proposal 4.2: Principles

The new Act should provide that when deciding whether to make an order under this Act, the following principles should be taken into account:

(a) open justice is a fundamental aspect of the administration of justice and plays a critical role in:

(i) maintaining public confidence in the administration of justice

(ii) maintaining the integrity and impartiality of courts, and

(iii) enabling the fair and accurate reporting of court proceedings.

(b) orders should only be made if, and to the extent necessary, on one or more of the grounds specified in Proposal 4.14, Proposal 4.19 or Proposal 4.22, and

(c) orders should be made in a way that is clear, consistent and of limited scope and duration.

knowmore broadly supports the principles of the proposed Act. knowmore stresses the particular importance of orders being made to the minimum extent necessary. Further, we note that the clarity and consistency of orders is of fundamental importance. Both aspects are a cornerstone of the administration of justice and ensures that there is uniformity for the individuals whom such orders impact on most.

Additionally, orders should be made in accessible language, ensuring that they are interpretable by a broad range of individuals. Factors for consideration include cultural

6 Open Justice Draft Proposals at para 4.9.

diversity, neurodiversity, age, and individuals with limited literacy. Insofar as this is not possible, appropriate supports should be made available in order to make such orders accessible. knowmore recommends that consultation on developing accessible language should be made with the assistance of appropriate stakeholders, particularly including consultation with Aboriginal and Torres Strait Islander people. In our work, we regularly encounter survivors of institutional child sexual abuse who struggle to decipher the legal complexities around their cases and options. We have worked to develop resources that assist survivors in interpreting their legal rights and options. People are then able to be informed about their options, allowing them to feel empowered as opposed to disengaged. This is a transferable approach that this Act can implement. It would allow for greater compliance, understanding, and accountability of orders that are issued.

In addition to the principles outlined above, knowmore submits that when making an order under the new Act that impacts upon a child, a court must take into account the best interests of the child, as per Article 3(1) of *Convention on the Rights of the Child*,[7] which provides:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*.

We submit that this is an integral inclusion, as the impacts that orders can have on children can be particularly severe and different to that of adults. Including this principle would help to ensure that children, whether offenders or victims of crime, are offered the appropriate protection. Public confidence in the administration of justice commands that the best interests of the child are considered at every stage of the legal process.

Procedures for making orders

Proposal 4.7 provides procedures for making orders and specifies who is entitled to be heard when the court is considering making an order. knowmore supports consistent procedures for making orders as set out in Proposal 4.7. However, we note in particular Proposal 4.7(2).

7 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

Proposal 4.7: Procedure for making an order

(2) The following people are entitled to appear and be heard when a court is considering whether to make an order, either on its own initiative or on the application of a person listed in Proposal 4.7(1)(a)–(b):

(a) the applicant for the order

(b) a party to the proceedings concerned

(c) the government (or an agency of the government) of the Commonwealth or a state or territory

(d) a journalist or legal representative of a news media organisation, and

(e) any other person who, in the court's opinion, has a sufficient interest in the question of whether an order should be made.

knowmore is supportive of provisions that allow a range of people to be heard prior to an order being made, as offering fair opportunity for standing to be heard is a fundamental component in ensuring the administration of justice. However, knowmore submits that an additional express provision should be included to ensure the rights of any relevant child are recognised in consistency of procedure. Inclusion of such an express provision, specifically recognising a right of appearance and hearing for a representative of a child - rather than leaving such circumstances to be addressed under paragraph 2(e) - would in knowmore's view enhance the administration of justice while strengthening and forming open justice principles in line with human rights obligations.

Giving reasons

Proposal 4.8: Requirement to give reasons on request

The new Act should provide that a court must provide reasons for making an order when requested by:

(a) the applicant for the order

(b) a party to proceedings in which the order was made

(c) the government (or an agency of the government) of the Commonwealth or of a state or territory

(d) a journalist or legal representative of a news media organisation, or

(e) any other person who, in the court's opinion, has a sufficient interest in whether an order should have been made or should continue to operate.

While knowmore strongly supports the requirement under Proposal 4.8 to give reasons for orders "when requested to do so", we submit that reasons for orders should be given at the time an order is made, irrespective of whether they were requested or not. In the alternative, we submit that reasons should be given as soon as practicable after the request

for them is made. A lengthy waiting period or drawn-out process in accessing reasons for a decision has a negative impact on the principles of open justice and the administration of justice as a whole. We support the view that making reasons available would "enable interested people to understand why an order has been made and facilitate reviews and appeals".[8]

In our work with the National Redress Scheme for Institutional Child Sexual Abuse ("NRS"), a decision maker's reasons for decisions are only provided on request. In our experience in requesting these reasons, we often experience lengthy delays. This has a profound impact on survivors, meaning they have to wait an even longer time to know or understand why a determination was made. As recently set out in the Second Anniversary Review of the NRS,[9] it was found that:

> *Statements of reasons are useful for people affected by decisions to understand the decision and be able to appeal decisions in an informed manner… Additionally, the Review was advised that statements of reasons are only provided to applicants on request. It should be standard practice that each outcome letter include a statement of reasons for the purposes of transparency of decision-making.*[10]

knowmore therefore recommends that where possible, reasons for making orders are provided to parties at the time that an order is made. This will increase the transparency of the decision-making process. Alternatively, we recommend that reasonable timeframes for producing reasons be established and inserted in the Act, so that any lengthy delays can be mitigated. We acknowledge the reasoning provided that:

> *Our proposal would not require a court to give reasons in every case, as this may not be necessary and may be time-consuming…Requiring the court to give reasons for such orders may disrupt proceedings and impact court resources.*[11]

The formulation of reasons is inextricably linked to making a decision. Thus, providing those reasons, even in brief, should not be overly burdensome. Further we note that the reasons for giving orders need not be extensive or complex, in order to support the principle of accessibility of justice.

8 Open Justice Draft Proposals, at para 6.5, see also Proposal 6.4.
9 Final Report of the Second Year Review of the National Redress Scheme, 23 June 2021, available at: https://www.nationalredress.gov.au/document/1386.
10 Ibid, pages 87-88.
11 Open Justice Draft Proposals, at para 4.34.

Appeals

> Proposal 4.9: Appeals of orders
>
> (3) The following people can apply for leave to appeal, and can appear and be heard on an appeal:
>
> (a) the applicant for the order
>
> (b) a party to the proceedings in which the order or decision subject to appeal was made
>
> (c) the government (or an agency of the government) of the Commonwealth or of a state or territory
>
> (d) a journalist or legal representative of a news media organisation, and
>
> (e) any other person who, in the appellate court's opinion, has a sufficient interest in the decision that is the subject of appeal.

Proposal 4.9 relates to appeals of orders. In relation to Proposal 4.9(3)(d), it is unclear why a journalist or legal representative of a news media organisation should be given standing to apply for leave to appeal, appear for an appeal and be heard on an appeal, when not a party to the proceedings in which the order or decision subject to appeal was made. As Proposal 4.9(3)(b) covers parties to a proceeding, this supposes that journalists and the media would be a third party in such a situation. Subparagraph 3(e) would already provide for the standing of a 'non-party' appellant who can persuade the court they hold a 'sufficient interest'. We are particularly mindful of matters involving orders that relate to children. We submit that the standing afforded to journalists and representatives of a news media organisation should be revised when an order relates to a child victim or a child offender, in recognition of the overarching need to protect the rights of children.

In our work, we recognise the paramount importance that survivors of childhood sexual abuse place on privacy. We have consistent experience in survivors telling us that even where predominantly de-identified information is published, they are at risk of being identified. This is an issue of particular concern for Aboriginal and Torres Strait Islander people, particularly where people are actively engaged within their community, or live in small community settings. The stigma associated with survivors of childhood sexual abuse, the trauma that results from it and the overarching feelings of shame that survivors experience, must be key considerations in determining whether any third party has the right to publicise attributable and identifiable information.

This relates closely to Proposal 4.14 which sets out that the proposed Act will establish certain grounds for making non-publication and suppression orders. The grounds relating to this proposal include: "…to protect the safety of a person; or where it is otherwise necessary

in the public interest and that public interest significantly outweighs the public interest in open justice".[12] Proposal 4.14 closely references section 8(1)(d) of the *CSNPO Act*, which:

> *…allows for non-publication or suppression orders to be made where it is necessary to avoid causing undue distress to a party (including a complainant) or witness in criminal proceedings for an offence of a sexual nature*.[13]

In our preliminary submission, we made comprehensive submissions regarding suppression orders. knowmore relies on that submission, and maintains those views. In particular, we reproduce below the following points from our earlier submission:

> *knowmore supports protecting the anonymity of complainants in proceedings for sexual offences, through legislation generally prohibiting the publication of identifying information. It is not appropriate to place the onus on survivors to apply for suppression orders; many would not be able to accomplish this due to a variety of reasons including the ongoing impacts of complex trauma arising from their experience of abuse and other issues, including mental health issues, lack of education and support, lack of access to legal services, cultural diversity and disability.*
>
> *It is common ground that sexual offences are amongst the most under-reported of all crimes, with accompanying high attrition rates during the investigation and prosecution processes.[14] If survivors were to face a situation where they needed to assert their claim to privacy, and/or that a publication order relating to their details may be granted against their wishes, and at the application of the media or another party, this is likely to have a chilling effect upon complaints of sexual offending being made*.[15]

Contrary to provisions in s 8(1)(d) and 8(3) of the *CSNPO Act*, the Draft Proposal paper proposes that:

> *… the new Act should not expressly allow an order to be made on the ground that the order is necessary to avoid causing undue distress or embarrassment to a defendant in sexual offence proceedings (in exceptional circumstances). We do not consider that protecting defendants in such cases, solely on the basis of distress or embarrassment, is a sufficient ground to justify a departure from the principle of open justice*.[16]

We submit that this proposal should not apply to child defendants. Further, we submit that a provision must be inserted that looks beyond "causing undue distress or embarrassment to a defendant", and instead consider how the identification of a defendant can impact a victim. This must be a paramount consideration in cases concerning children or child sexual

12 Open Justice Review, Draft Proposal paper, at para 4.53.
13 Ibid para 4.54.
14 Royal Commission into Institutional Responses to Child Abuse, Criminal Justice Report, pp. 9-10.
15 knowmore, Preliminary Submission PCI35, June 2019, pp 2-3. <www.lawreform.justice.nsw.gov.au/Documents/Current- projects/Court%20information/PCI35.pdf>.
16 Open Justice Review, Draft Proposal paper, at para 4.55.

abuse. As noted above, the identification of a defendant, even in part, can directly contribute to identifying vulnerable victims. This is partly covered in Proposal 4.14(1)(f) which provides that the new Act should contain a provision allowing an order to be made where it is necessary to avoid causing undue distress or embarrassment to "a child who is a party or witness in any civil proceeding".[17] Consequently, knowmore strongly supports Proposal 4.14(1)(f). As stated in the Draft Proposal paper, Proposal 4.14(1)(f) "aligns with the guiding principle that departures from open justice are appropriate to protect vulnerable people, including children". In addition, the proposal acknowledges that the "identity of children involved in criminal proceedings is already protected by a statutory prohibition on publishing this information"[18] as contained in the *Children (Criminal Proceedings) Act 1987* (NSW).[19]

Further, knowmore is also in broad support of Proposal 4.14(1)(e) which:

> *…reflects the fact that complainants of domestic violence related offences, like complainants of sexual offences, often experience stigma, distress and humiliation as a result of being involved in court proceedings. Our proposal is also meant to encourage reporting of domestic violence related offences, by making it clear that suppression and non-publication orders are available to protect complainants in domestic violence related proceedings.*[20]

In conclusion, knowmore supports the proposed provisions in the Act that are in the best interests of children.

Enhancing protections

Key proposal:

The new Act should enhance protections for domestic violence complainants, children and people with cognitive impairment who are giving evidence (Proposal 4.19).

knowmore unequivocally supports the strongest possible protections for domestic violence complainants, children and people with cognitive impairments who give evidence. We submit that the enhancement of these protections, as well as a recognition of the true needs of such groups, must be implemented in consultation with the people it aims to protect. Trauma informed practice is crucial in this regard and relevant training must be undertaken by decision makers and legislative drafters to ensure such principles are met. In this regard, knowmore supports the deviations noted in Proposal 4.19 from the *CSNPO Act.* In particular, knowmore is supportive of the following statement made in the Draft Proposal paper:

17 Ibid para 4.57, see also Proposal 4.14(1)(f).
18 Ibid para 4.59.
19 See in particular s 15A.
20 Open Justice Review, Draft Proposal paper, at para 4.58.

> *The new Act should include an additional ground where the exclusion order is necessary to support a child or a person with a mental health impairment or cognitive impairment to give evidence in any proceeding (criminal or civil) (Proposal 4.19(1)(c)). Children and people with a mental health or cognitive impairment may find giving evidence in public distressing or challenging, and this may adversely impact their ability to communicate*.[21]

This is in furtherance of existing law in NSW that recognises children and people with cognitive impairment may require additional supports to give evidence.[22] knowmore accordingly supports the variety of ways it is proposed that children or people with cognitive impairment can give evidence including: "in the form of a recording of the police interview, outside the courtroom via CCTV or in the courtroom using alternative arrangements such as screens or planned seating arrangements".[23]

In our preliminary submission, we noted:

> *Many of knowmore's clients have shared with us their experiences within the criminal justice system, including about giving evidence at trials and working with the staff of prosecuting agencies.*
>
> *Many of those clients also provided the detail of these experiences to the Royal Commission; by giving evidence at public hearings; in private sessions; or through the provision of statements. These survivors were provided with the opportunity to be heard and believed, which is a process every survivor should have access to*.[24]

This submission highlights the extent of evidence options that are appropriate to our clients and how important and empowering providing evidence can be. Consequently, knowmore encourages that provisions supporting alternative forms of evidence are included in the proposed Act.

21 Ibid para 4.75.
22 See for example, Criminal Procedure Act 1986 (NSW) ch 6 pt 6.
23 Open Justice Review, Draft Proposal paper, at para 4.76.
24 knowmore, Preliminary Submission PCI35, June 2019, p 3. <www.lawreform.justice.nsw.gov.au/Documents/Current- projects/Court%20information/PCI35.pdf>.

Statutory prohibitions on publication or disclosure

Proposal 5.5: Duration of certain prohibitions protecting information likely to lead to the identification of children and young people
The prohibitions in s 15A of the Children (Criminal Proceedings) Act 1987 (NSW), s 45 of the Crimes (Domestic and Personal Violence) Act 2007 (NSW and s 65 of the Young Offenders Act 1997 (NSW) should be amended to:
(a) prohibit the publication of information likely to lead to the identification of the person before, during and after proceedings, and
(b) not apply to publishing information likely to lead to the identification of the person if:
(i) that person is deceased, and
(ii) the publication does not identify any other living person whose identity must not be published.

It may not be appropriate for all statutory prohibitions to state a duration. Some statutory prohibitions may apply to particularly sensitive information that should be protected from publication or disclosure for a long, or indefinite, period of time. We seek your views about whether there are statutory prohibitions on publication or disclosure that may fall into this category.

We seek your views as to whether the criminal conduct of a person while a child should be able to be published after their death, notwithstanding that they have been totally rehabilitated.

knowmore welcome Proposals 5.1-5.3, 5.5(a), 5.6, and 5.13. In our previous submission, we advocated for anonymity persisting beyond the death of a sexual offence complainant (the removal of section 578A(4)(f)).[25] We pointed to appropriate considerations when deciding exceptions including the views of the deceased complainant (if known), and the views of family members.[26] We are pleased to see that these considerations have been adopted in Proposal 5.13.

However, knowmore is particularly concerned about Proposal 5.5(b) that seeks to amend prohibitions to allow publishing information that is likely to lead to the identification of deceased children. It appears that Proposal 5.5(b) intends to cover deceased child victims, as well as deceased child offenders. In our view, publishing the names of a deceased child, victim or offender, does not strike the right balance between the rights of victims and witnesses, privacy, confidentiality, and the public interest in open justice.

[25] Ibid page 6.
[26] Ibid.

With regard to deceased child victims, knowmore appreciates the concern that the current provision can negatively operate to protect the privacy of the offender where the child's killer is a parent or a relative.[27] However, where this is not the case, we suggest that the prohibition remain given that its purpose is to provide the family of the deceased victim privacy.[28] This should still be a relevant consideration. In addition to this, the identification of deceased persons can have particular significance in Aboriginal and/or Torres Strait Islander communities. Cultural needs in this context must be considered and we recommend that consultation regarding this specific proposal occur with Aboriginal and Torres Strait Islander people and relevant Aboriginal and Torres Strait Islander Community Controlled organisations.

In the alternative, we suggest that the prohibition remain with consent exceptions. A court may be able to grant leave for publication of a deceased child's identity, taking into account the views of family members, unless the family member is also the alleged or convicted offender (similar to the provision in Proposal 5.13(b)). As above, we are of the view that courts must be required to consider the cultural needs of the deceased person and their family.

With regard to deceased child or young offenders, it is our view that although rehabilitation prospects are no longer relevant, it remains inappropriate to publish the criminal conduct of a person, while a child, after their death. We believe that this is inappropriate in circumstances both where the deceased individual is still a child or young person at the time of their death, as well as where the individual is an adult at the time of their death but was convicted of offences committed as a child. It does not appear that publishing the criminal conduct of a person in either scenario is of any benefit to the public or legitimately in the public interest.

We are concerned that such a provision has a range of potential impacts for our client group. The Royal Commission found that there is research signifying a link between experiences of child sexual abuse and subsequent criminal offending.[29] The Royal Commission cited a study that found that child sexual abuse survivors were almost five times more likely to be charged with an offence than their peers from the general population.[30] Furthermore, the link between being placed in out of home care, future

27 Open Justice Review, Draft Proposal paper, at para 5.22.

28 NSW Legislative Council Standing Committee on Law and Justice, inquiry into the prohibition on the publication of names of children involved in criminal proceedings, 2008, paras 5.44-5.45.

29 Royal Commission Final Report, Vol 4, Contemporary detention environments, p. 100.

30 Ibid; MC Cutajar, JR Ogloff & P Mullen, *Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study*, Criminology Research Council, Australia, 2011; JR Ogloff, MC Cutajar, E Mann, P Mullen, FTY Wei, HAB Hassan & TH Yih, Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study, The Australian Institute of Criminology, Canberra, 2012, pp 36, 48.

offending behaviour and subsequent detention has been well established.[31] This link has been continually evidenced in reports establishing that a significant proportion of children in the juvenile justice system grew up in out of home care.[32] The 2019 independent review of Aboriginal Children and young people in out of home-care (OOHC) in NSW, the *Family is Culture* report, found that "it has now been demonstrated that placement in OOHC exacerbates the existing risk that maltreated children will become involved in criminal offending".[33] Notably, Aboriginal and/or Torres Strait Islander children are over-represented in both the out of home care system *and* the criminal justice and youth detention systems.[34]

We are concerned that this provision will disproportionately impact specific groups of vulnerable and disadvantaged people including those who have experienced child sexual abuse, and Aboriginal and/or Torres Strait Islander peoples. Therefore, the policy reason behind the existing statutory prohibition cited by the Draft Proposal paper (to prevent stigmatisation), is very much still applicable.[35]

It is our view that it is inappropriate for all statutory prohibitions to state a duration, particularly ones with a future event such as on the subject of the prohibition's death, especially in the context of children, as outlined above.[36]

31 Catia G Malvaso, Paul H Delfabbro and Andrew Day, *'Risk factors that influence the maltreatment-offending association: A systematic review of prospective and longitudinal studies'* (2016) 31 Aggression and Violent Behavior 1, 6; Independent review of Aboriginal children and young people in OOHC, Family is Culture (2019), 236.

32 Independent review of Aboriginal children and young people in OOHC, Family is Culture (2019), 40.

33 Ibid 236.

34 Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, 8 August 2017, A/HRC/36/46/Add.2, available at <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/46/Add.2>, at para 74.

35 Open Justice Review, Draft Proposal paper, at para 5.6.

36 Ibid para 5.19.

Informed consent

Proposal 5.12: Consent exception in relation to the prohibition on publishing the identity of a living sexual offence complainant
(1) The consent exception in s 578A(4)(b) of the Crimes Act 1900 (NSW) should be amended to provide:
(a) in the case of a living complainant of a sexual offence, who is under the age of 16 at the time of publication, a court can grant leave to publish the complainant's identity, taking into account their views, considered in light of their age and understanding
(b) in the case of a living complainant of a sexual offence, who is over the age of 16, but under the age of 18, at the time of publication, the complainant can give consent to publishing their identity on the advice of an Australian legal practitioner about the implications of giving consent, and
(c) in the case of a living complainant over the age of 18 at the time of publication, the complainant can give consent to publication of their identity.
(2) A living complainant cannot give consent under Proposal 5.12(1) if publication will result in the identification of another complainant:
(a) who does not give consent to the publication of their identity, or
(b) is under 18 years of age, unless the person is over the age of 16 and has given consent to the publication of their identity after receiving legal advice from an Australian legal practitioner about the implications of giving consent

In our previous submissions, we noted that there are circumstances where a survivor should be able to provide informed consent to allow publication of their identifying details.[37] We therefore strongly support Proposal 5.12. We acknowledge that for some survivors, an integral part of their healing process is to be heard and to tell their story and we welcome avenues that enable them to do so.[38]

However, in noting our support for the consent exceptions, we reiterate the points we made in our previous submissions about the need for mechanisms to be in place to ensure that a survivor's consent to publication is truly informed - including from a mental health, cultural safety and legal perspective. It must be noted that many survivors reported to the Royal Commission that there was a lack of cultural competence and disability awareness among service providers and the DPP.[39]

The Draft Proposal provides:

37 knowmore, Submission CI10, 18 February 2021, p. 5; knowmore, Preliminary Submission PCI35, June 2019, p. 3.
38 Royal Commission Final Report, Vol 4, p.16.
39 Ibid.

> *This proposal aims to ensure that living sexual offence complainants who are children or young people have access to advice, either from the court or a legal practitioner, before they consent to their identity being published.*[40]

While we appreciate the aim behind this proposal and the proposed requirement for the consent of survivors between the ages of 16-18 to be given on advice of an Australian legal practitioner, we are concerned that the concept of informed consent is not being fully implemented.

In our view, the process and criteria for obtaining a survivor's informed consent to revoke a suppression order, and/or make a publication order, should be thorough and include cultural, mental health and legal safety checks. All survivors, regardless of their age when engaging with the criminal justice system, should have access to this. We have reproduced important points about informed consent from our preliminary submission below, and expanded on areas particularly relevant to Proposal 5.12.

We are concerned that survivors experiencing circumstances of vulnerability will not have the resources or capability to obtain an independent evaluation of the potential ramifications of their consent, meaning that such consent is not truly 'informed' in nature, and possibly only 'situational' in its nature. There is also the risk of third parties such as the media harassing and/or exploiting victims to consent, including in exchange for financial compensation, at a time when they are most vulnerable. We therefore suggest that *all* survivors, regardless of age, that are considering providing consent to the publication of identifying information be at least provided with free, independent legal assistance regarding their decision before they proceed.

In cases where the survivor is an Aboriginal and/or Torres Strait Islander person, we suggest that they be provided with appropriate support to ensure their cultural safety and an informed understanding of the issues. The same opportunity should be provided to those with disability and those from culturally and linguistically diverse backgrounds. Consideration should also be given to providing access to counsellors for survivors thinking of consenting to their details being published. Any such decision is likely, in our experience, to carry with it significant risks of re-traumatisation for many survivors of sexual crimes. Counsellors could discuss with survivors the potential mental health and well-being implications.

The Royal Commission found that the foundational principles necessary to ensure that services are responsive to the specific needs of survivors of child abuse were that such services are trauma-informed and have an understanding of institutional child sexual abuse;

40 Open Justice Review, Draft Proposal paper, at para 5.47.

and also be collaborative, available, accessible, acceptable, high-quality and inclusive of Aboriginal and Torres Strait Islander healing approaches.[41]

Independent assistance is necessary, especially in light of the possibility that victims may erroneously assume that the prosecution represents their interests in these issues.[42] The DPP represents the interest of the public at large, and this is often in conflict with individual rights of survivors in sexual assault cases.[43] Community legal centres that assist survivors of sexual and related offences, such as knowmore and the Women's Legal Service, are well-placed to provide survivors with independent, trauma-informed, and client-centred legal assistance and related supports, to empower them to make informed decisions about these issues. Additional resourcing would be required to support such service delivery in order not to impact upon current services.

We emphasise the need for courts to ensure that the consent given is indeed informed in the holistic manner described above, especially in the case of more vulnerable members of society, such as those with disability, cultural differences that may impact on their understanding, and those that are of a young or an advanced age. This is of particular importance given that Proposal 5.12 would allow a survivor who is under the age of 16 to provide their view on the publication of their identity.

Powers to make non-publication and suppression orders

knowmore strongly supports that the development of the law must be in a manner that is uniform and consistent. Accordingly, knowmore is supportive of the aims of Proposals 6.1-6.8 to achieve consistency with subject-specific legislation. This goal is broadly contained in the guiding principle of the Proposal "that any legislation that departs from the principle of open justice should be uniform and consistent".[44] In achieving uniformity and consistency, knowmore submits that the new Act, where deviating from existing legislation, must set best practice standards. This requires that shortcomings within existing legislation are addressed and protections that are lacking in current legislation, are strengthened in the new proposed Act. Aiming for uniformity should not be the primary goal where improvements can be made, and other legislation can be amended accordingly. Herein, we acknowledge and support the Draft Proposal paper's position that:

> *We do not propose that the grounds for making non-publication and suppression orders be made uniform across the statutes. Such grounds should remain specific to*

41 Royal Commission, Final Report, Vol.9, pp.60-61.
42 Royal Commission, Criminal Justice Report, p.272
43 Ibid.
44 Open Justice Review, Draft Proposal paper, at para 6.4; see also Chapter 1.

the circumstances in which the power operates. This is consistent with our aim of retaining unique provisions in existing statutes where appropriate.[45]

Where a court may make an exclusion or closed court order

Proposals 7.7 – 7.11 set out powers relating to exclusion orders.[46] In relation to Proposal 7.12, which includes a "requirement for courts to consider the public interest in open justice before making an exclusion order",[47] knowmore acknowledges the importance of public interest considerations. knowmore submits that setting the parameters for public interest, should be done through consideration of the interests of a range of stakeholders. This will ensure that the public interest is reflective of the people that exclusion orders will likely be experienced by, or impact upon. Further to this, knowmore notes that this requires appropriate cultural consultation with Aboriginal and Torres Strait Islander people and organisations.

Proposals 8.3-8.9 apply to "discretionary powers to make a closed court order".[48] We note the Review's position that:

> *We propose that these should be amended in a uniform way to achieve consistency between these statutes and the closed court provisions in the new Act. As these matters are largely procedural in nature, we see no reason for them to differ across the statutes. This also aligns with the principle that any legislation that departs from the principle of open justice should be uniform and consistent*.[49]

In particular knowmore supports that Proposal 8.2 aims to define "closed court order" in order to make it "clearer and simpler for all powers to make closed court orders" by using the same language.[50] Clarity and simplicity in language is paramount not only in aiding transparency in the administration of justice, but also to support the public's understanding and interpretation of such orders. As addressed above in relation to Proposal 7.12, knowmore emphasises its views on the consideration of the public interest, in relation to Proposal 8.9.[51]

45 Open Justice Review, Draft Proposal paper, at para 6.4; see also Chapter 1.
46 Ibid para 7.20.
47 Ibid para 7.21.
48 Ibid para 8.10.
49 Ibid para 8.11, see also Chapter 1.
50 Ibid para 8.12.
51 Ibid para 8.13.

Key proposal:

Some changes should be made to requirements to make exclusion and closed court orders in subject-specific legislation, including clarifying the meaning and effect of these orders (Proposals 7.1–7.5, 7.13–7.16 and 8.1).

Notably, Proposal 7.2 relates to the requirement to make an exclusion order in children's criminal proceedings for traffic offences.[52] knowmore supports the view that:

> … *allowing members of the public to be present in traffic offence proceedings may cause distress to child defendants. Providing that an exclusion order must be made in such cases aligns with the principle that departures from open justice are appropriate to protect vulnerable people, such as children involved in court proceedings*.[53]

Proposals 7.3-7.5 relate to proceedings for closed court orders. knowmore is concerned with the notion that in instances where the general public is excluded, journalists would be able to be present with the court's consent. The Draft Proposal paper states:

> *Publicity concerning proceedings involving children, domestic violence and sexual offending is often in the public interest. Facilitating media access to and reporting of these proceedings may generate public awareness and discussion of these issues, encourage reporting of offences and reduce the stigma that might otherwise lead to underreporting*.[54]

While we recognise that generating public awareness and discussion of issues surrounding sexual offences is important, we do not support the view that journalists' access to closed court proceedings is the only, or even a viable, option in facilitating this. Publicity surrounding child sex offending can have differing impacts upon those who have experienced such crimes and consequently, complex trauma. For example, many of our clients repeatedly inform us that hearing about child sexual offences in the media is triggering and re-traumatising for them. Triggering media coverage, particularly coverage that questions a complainant's account, will discourage, rather than encourage some survivors from coming forward. Instead it spirals them back into instances of trauma, making them less likely to report, and extending the amount of time it may take for them to come forward. This indicates that the media is not in itself the appropriate mechanism to achieve the aims of encouraging the reporting of offences.

Further, reducing the stigma relating to underreporting is not a benefit that should be gained at the expense of protecting the privacy of survivors in closed court. Even where identifying details are not publicised, and the overarching aim of journalist access is not to

52 Ibid para 7.9.
53 Ibid para 7.10.
54 Ibid para 7.13.

report on the specifics of the offending, the public interest is not outweighed. knowmore would therefore support an approach where it is not just at the court's discretion to allow the presence of journalists, but also with the express consent of the victims of such crimes. Providing this choice and empowerment is more broadly in the public interest than allowing journalists access to closed court proceedings without appropriate consultation.

knowmore supports that Proposal 8.1 is largely intended to ensure that legislation is expressed in a consistent way, with uniformity in both terminology and definitions. In particular, knowmore acknowledges that the variety of expressions used in legislation to essentially refer to the same thing, has an impact on public understanding in the administration of justice. knowmore supports that the law should be broadly accessible to the public and that efforts in this regard should be pursued wherever possible. More broadly, this aids the overall consistency in decision making and supports the notion that open justice must also provide for easily interpretable justice.

Offence provisions

> Proposal 9.1: Maximum penalties for offences
>
> All statutory offences for breaching a prohibition on publication or disclosure, or a non-publication, suppression, exclusion or closed court order made under subject-specific legislation, should have a maximum penalty of no more than:
>
> (a) for an individual: two years' imprisonment and/or a fine of 100 penalty units, and
>
> (b) for a corporation (where relevant): a fine of 500 penalty units.

Our submission on the Consultation Paper highlights that the current maximum penalty for an offence against section 578A(2) of the *Crimes Act 1900* (NSW) is among the lowest of all Australian jurisdictions.[55] Currently, the penalty for contravening section 578A(2) of the *Crimes Act* is 50 penalty units ($5,500) and/or six months imprisonment for individuals.

In our above submission, we supported increasing the penalties for individuals in section 578A(2) of the *Crimes Act*.[56] knowmore is of the view that raising the maximum penalty is important to adequately reflect the gravity of unlawfully publishing information likely to lead to the identification of a complainant without their consent. knowmore supports Proposal 9.1 in the context of raising the proposed maximum penalty available under section 578A(2) of the *Crimes Act.*

55 knowmore, Submission CI10, 18 February 2021, p. 7. <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Court%20information/CP%20submissions/CI10.pdf>.

56 Ibid.

However, the maximum penalty for contravening section 16 of the *CSNPO Act* is currently 1,000 penalty units ($110,000) or imprisonment for 12 months, or both, for an individual or 5,000 penalty units ($550,000) for a body corporate. A person has committed an offence under section 16 of the *CSNPO Act* where they have engaged in conduct that constitutes a contravention of a suppression order or non-publication order and are reckless as to whether the conduct constitutes a contravention of a suppression order or non-publication order.

If Proposal 9.1 has the effect of reducing the maximum penalty available for contravening section 16 of the *CSNPO Act*, we suggest further consideration be given to the message this sends. Although the maximum imprisonment time for an individual would be increased, the maximum penalty is significantly reduced for individuals (from $110,000 to the proposed maximum penalty of $11,000) and for corporate bodies (from $550,000 to the proposed maximum penalty of $55,000).

Maximum penalties reflect the view of Parliament and, by extension, the community, about the comparative seriousness of an offence. We note that the Draft Proposal paper flags that the purpose of the proposals in this section are to achieve a comprehensive and uniform offence regime.[57] However, if Proposal 9.2 acts to reduce the maximum penalties available for individuals and corporate bodies under the *CSNPO Act,* this is of concern. In particular, we are concerned that this reduction will not recognise the potential for "deliberate, flagrant or repetitive breaches" and that it will be unable to provide for significant punishments in such circumstances.[58] Such conduct not only has serious adverse impacts on the individual complainant, but it can also deter other victims and survivors of sexual abuse from reporting their abuse and/or engaging in criminal proceedings. This is clearly not in the interests of justice.

Departures from justice

Proposal 9.3: Standardised offences

(1) All statutory prohibitions on publication or disclosure, and provisions in existing subject-specific legislation that relate to non-publication, suppression, exclusion or closed court orders should include an offence of breaching the prohibition or order.

(2) All such offences should provide that a person contravenes the offence if the person:

(a) engages in conduct that breaches the prohibition or order, and

(b) knows of the existence of the prohibition or order.

57 Open Justice Review, Draft Proposal paper, at para 9.6.

58 Tasmania Law Reform Institute, Protecting the Anonymity of Victims of Sexual Crimes, p. 46.

knowmore supports a more comprehensive and uniform offence regime that monitors and enforces departures from justice. Proposal 9.5 suggests the establishment of a searchable online register of non-publication, suppression and closed court orders made by NSW courts and tribunals. The register would allow notifications to be sent to each person who has registered an interest in the case, and any other relevant person, after an order is made.

Proposal 9.3 aims to ensure that only deliberate ("knowing") conduct is captured by the offences. Accidental breaches would not constitute an offence.[59] The Draft Proposals do not address potential difficulties with establishing the element of "knowing" conduct.

Section 23 of the *Open Courts Act 2013* (VIC) states that, for the purposes of the offences under the *Open Courts Act*, a person will, in the absence of evidence to the contrary, be considered aware that a proceeding suppression order, interim order or broad suppression order is in force if a court or tribunal has "electronically transmitted notice" of it to them.

We suggest that, similar to the above provision, in the absence of evidence to the contrary, a person or body corporate is to be considered aware that a proceeding suppression order, interim order or broad suppression order is in force if a court or tribunal has "electronically transmitted notice" of it to them by way of the proposed notification system.

Access to records on the court file

While the majority of our above comments have been focused on the interests of victims and survivors, the following comments relate to circumstances where we assist clients who have themselves been convicted of criminal offences.

In our previous submission, we explained the circumstances in which knowmore will seek to obtain further information, typically remarks on sentence, about a client's conviction and sentence.[60] We reproduce this explanation below. It is in this context that we make the following suggestions to the proposed access framework.

Under the National Redress Scheme, survivors of institutional child sexual abuse who have been sentenced to imprisonment for five years or longer for any offence are not automatically entitled to redress. Rather, the Operator of the Scheme must first make a determination that providing redress to the person would not bring the Scheme into disrepute, or adversely affect public confidence in, or support for, the Scheme. In making this determination, the Operator must consider matters such as the nature of the offence, the length of the sentence and any rehabilitation of the person. The NRS can make a

59 Open Justice Review, Draft Proposal paper, at para 9.11.

60 knowmore, Submission CI10, 18 February 2021, p. 12. <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Court%20information/CP%20submissions/CI10.pdf>.

preliminary assessment that proposes to make a determination that is not in favour of the survivor. Survivors then have 60 days to provide additional information before a final decision is made.

In our previous submission we explained that we often encounter problems when accessing information to assist our clients, such as sentencing remarks, from NSW courts. These problems include that the process is overly difficult and can be expensive.[61] knowmore supports any changes that would make sentencing remarks and related materials tendered at sentence hearings, more readily accessible where access is sought by the person sentenced. Therefore, knowmore supports a new legislative framework within the proposed Act that will govern access to records on the court file. In particular, we support Proposal 10.12(1) that provides that an accused person in a criminal proceeding and a complainant or victim in a criminal proceeding or protected person are exempt from paying any prescribed fee for access. However, we note that this proposal does not cover persons convicted and sentenced for a criminal offence. We suggest consideration be given to fees being waived for any party to the proceedings, including any person convicted and sentenced at the conclusion of proceedings.

We also suggest that consideration be given to introducing a standard timeframe for processing and providing access to the records sought. This would be of great benefit where the ambit of a request is limited and timeframes for responses that require the records sought are set by other entities. Additionally, we suggest that the access framework should detail guidelines for legal representatives. These guidelines should clarify the avenue for access where the person is a legal representative for the person sentenced (a different legal representative than the one engaged at the time of the proceedings). In the context of legal engagement, we suggest that Proposal 10.13 include an exception to ensure that legal representatives and their clients can discuss the contents of a court file they have been granted access to within the confines of legal professional privilege and confidentiality. We also suggest that where access to records applications is denied, reasons be provided. This would increase transparency of the decision making process.

61 Ibid.

Conclusion

As outlined above, knowmore broadly supports the establishment of a new Act.

knowmore supports embodying within the proposed Act the principle that for any orders made concerning a child, the best interests of the child should be a primary consideration.

knowmore welcomes the proposals that provide anonymity persisting beyond the death of a sexual offence complainant and the applicable exceptions. We also welcome the proposals that allow survivors to consent to be heard and to tell their stories.

We have made suggestions to the proposals regarding appeals, the presence of journalists in closed courts, obtaining informed consent, enhancing protections for vulnerable people giving evidence, and maximum penalties contained within the offence provisions. We have also provided reasons as to why it is inappropriate for all statutory prohibitions to state a duration.

knowmore supports transparency in decision making with regard to providing reasons for making orders and for denied records access applications.

In knowmore's view, the measures recommended in our submission are critical in striking a balance between protecting vulnerable groups, the rights of victims and witnesses, privacy, confidentiality, the proper administration of justice, public safety, the right to a fair trial, and the public interest in open justice.

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

knowmore acknowledges the Traditional Owners of the lands across Australia upon which we live and work. We pay our deep respects to Elders past, present and emerging.

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