

Preliminary submission to the NSW Law Reform Commission

Court and tribunal
information: access,
disclosure and
publication

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1. Introduction

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 the National Association of Community Legal Centres (NACLC), with funding from the Australian Government, represented by the Attorney-General's Department. knowmore also receives some funding from the Financial Counselling Foundation.

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

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

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. knowmore brings together lawyers, social workers and counsellors, Aboriginal and Torres Strait Islander engagement advisors and financial counsellors to provide coordinated support to clients.

In our Royal Commission related work, from July 2013 to 31 March 2018 knowmore assisted 8,954 individual clients. The majority of those clients were survivors of institutional child sexual abuse. 24% of the clients assisted during our Royal Commission work identified as Aboriginal and/or Torres Strait Islander peoples.

Since the commencement of the National Redress Scheme for survivors of institutional child sexual abuse on 1 July 2018, to 30 April 2019 knowmore has received 16,193 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 4,115 clients. 25% of knowmore's clients identify as Aboriginal and/or Torres Strait Islander people.

knowmore has a significant client base in New South Wales (NSW); around 19% of our current clients reside in the State. We therefore have a strong interest in NSW law reform that will provide enhanced access to justice for survivors.

2. knowmore's submission

knowmore welcomes the review into the operation of suppression and non-publication orders and access to information in NSW courts and tribunals, and in particular the inclusion of the findings of the Royal Commission within the Terms of Reference.

The focus of our initial submission is on the appropriateness of legislative provisions that impact upon the identification of complainants in proceedings for sexual offences. In this context, knowmore recognises the importance of the principle of open justice in maintaining the integrity of the courts and strengthening public confidence in the judicial system. However, as acknowledged in the Terms of Reference, it is important to strike the proper balance between protecting complainants in sexual offence proceedings and the public interest in open justice.

knowmore supports legislation that requires an order suppressing the identity of a victim of a sexual offence. The details suppressed should include anything relevant that could lead to the disclosure of the victim's identity, at the discretion of the Court.

However, knowmore submits that a suppression order must be lifted if a survivor over 18 years old provides informed consent, other than in very limited circumstances discussed below.

The recently passed Victorian Act, *Open Courts and Other Acts Amendment Act 2019* (Vic), is a strong acknowledgement of survivors' rights and, as we suggest below, is in line with the recommendations of the Royal Commission and may be used as a guiding structure in the context of NSW law reform.

i. Protecting the Anonymity of Sexual Assault Complainants

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.¹ 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

¹ Royal Commission into Institutional Responses to Child Abuse, *Criminal Justice Report*, pp. 9-10

the application of the media or another party, this is likely to have a chilling effect upon complaints of sexual offending being made.

We further support the expanded protection of victims' information by giving courts additional discretion to make specific suppression orders that prevent the publication of specific information that may lead to the identification of the victim or that may cause them harm, distress, humiliation or distress.

However, as noted below, there are circumstances where a survivor should be able to provide informed consent to allow publication of their identifying details. This is an important right.

ii. Many Child Sexual Abuse Survivors Want an Option to Lift Suppression Orders

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.

For some, the stigma they have experienced that has been associated with their child sexual abuse was lifted, at least to some extent, by the work of the Royal Commission.² This has inspired some survivors to want to continue to share their stories, to not only heal themselves but to influence reform, raise awareness and to prevent the future abuse of children.

Survivors have shared stories with knowmore of being silenced as children,³ which often led to them being silenced for decades out of shame, embarrassment and fear of not being believed.⁴ The Royal Commission found that it took survivors (who came forward in private sessions), on average 23.9 years to disclose childhood sexual abuse.⁵

Some survivors have told us that when later they had the opportunity to see their perpetrator prosecuted and to tell their story in those proceedings, they were told they could not publicly discuss the details of their abuse due to suppression orders. For some, this process was re-traumatising as they felt that they had effectively been silenced again. A concern voiced by some survivors involved in court proceedings against their perpetrators was that they felt that prosecuting agencies did not view their welfare as a priority, because they were prevented from sharing their story due to suppression orders. Some felt like they were treated like a

² Royal Commission, Final Report, Vol 9, p.14

³ For in depth examination of why child sexual abuse survivors often do not disclose abuse, see Royal Commission Final Report, Vol. 4

⁴ For examples, see 'What it means to be called something other than Survivor 577,' Georgie Burg, 1/5/19, *Hobart Mercury*; Royal Commission, Final Report, Vol 4, p.10

⁵ Royal Commission, Final Report, Vol 4, p.9

number, which was especially traumatic for some that had significant childhood experiences of being institutionalised.⁶

Conversely, some survivors shared with knowmore and the Royal Commission that they felt vulnerable and not prioritised by the prosecution. Some clients said that they felt like they were exploited by the prosecution and that their identity was not protected enough.⁷

Some survivors living in jurisdictions that permit a suppression order being lifted in some circumstances, with the victim's consent, expressed that they felt it was transformative to their recovery that they were able to exercise their right to be named after participating in the criminal justice process.⁸

iii. Informed Consent Should Lead to Lifting a Suppression Order in Most Cases

knowmore continues to advocate for a shift in focus in sexual offence proceedings to the welfare and safety of the victim. This includes the right to disclose sexual abuse, share abuse stories and be identified as a victim of a sexual offence. We acknowledge that for some survivors, an integral part of their healing process is to be heard and tell their story.⁹

We propose that courts and tribunals be required to revoke a suppression order and/or make a publication order regarding a victim's details upon obtaining their written and informed consent, except in very limited circumstances (for example when the disclosure of a victim's identity would lead to the identification of another victim that has not provided consent to disclosure).

While we support the implementation of an exception to suppressing a victim's identity in the case of obtaining a survivor's consent, we emphasise the need for courts to ensure that the consent given is indeed informed, 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.

iv. The Process and Criteria for Obtaining Informed Consent

It is vital to ensure that any consent being given by a survivor is truly informed 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.¹⁰

⁶ Georgie Burg, above n 3

⁷ Royal Commission, Final Report, Vol 9, p.11

⁸ Georgie Burg, above n 3

⁹ Royal Commission Final Report, Vol 4, p.16

¹⁰ Royal Commission Final Report, Vol 4

We recommend that the process and criteria for obtaining a survivor's informed consent to revoke a suppression order be thorough and include cultural, mental health and legal safety checks where appropriate.

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. 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 survivors considering providing consent to the publication of identifying and other related 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. Counsellors could discuss with survivors the potential mental health and well-being implications.

Independent assistance is necessary, especially in light of the possibility that victims may erroneously assume that the prosecution represents their interests in these issues.¹¹ 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.¹²

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; and also be collaborative, available, accessible, acceptable, high-quality and inclusive of Aboriginal and Torres Strait Islander healing approaches.¹³

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 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.

¹¹ Royal Commission, Criminal Justice Report, p.272

¹² Ibid

¹³ Royal Commission, Final Report, Vol.9, pp.60-61

v. Comparable Legal and Practical Arrangements in Australia

knowmore supports the approach of the Victorian Parliament in the recently passed *Open Courts and Other Acts Amendment Act 2019*, which requires a court or tribunal to make an order revoking an order suppressing the identity of a sexual offence victim over 18 years old upon obtaining their consent (except in exceptional circumstances¹⁴). It specifically prohibits the lifting of the suppression order unless the victim consents.¹⁵

This legislation supports the rights of survivors to be able to tell their stories in almost all circumstances.

We suggest that the Victorian approach strikes the proper balance between protecting complainants in sexual offence proceedings and the public interest in open justice. It empowers adult survivors to decide whether they wish to have their personal details disclosed, which may benefit the public through education and prevention of future abuse, while also providing them with expanded privacy protection if desired, which honours a person's ultimate right to privacy.

As the LRC will be aware, Tasmania is also currently looking at section 194K of the *Evidence Act 2001*, following the Tasmania Law Reform Institute's 2013 report *Protecting the Anonymity of Victims of Sexual Crimes*.

vi. Additional Considerations for Aboriginal and/or Torres Strait Islander Survivors

The Royal Commission recognised the need for cultural safety when engaging with survivors that are Aboriginal and/or Torres Strait Islander people. We suggest including a legislative provision similar to that in the Victorian Act, which specifically prohibits publication of:

the names of—

- (i) any relative of the person; or*
- (ii) any other person having the care of the person; or*
- (iii) in addition to subparagraphs (i) and (ii), in the case of an Aboriginal person, a member of the Aboriginal community of the person.¹⁶*

We have been informed by many of our clients that are Aboriginal and/or Torres Strait Islander people that they do not wish to be identified or name their perpetrator due to family and other cultural issues.

These concerns would continue even after they pass away.

¹⁴ *Open Courts and Other Acts Amendment Act 2019* (Vic), s.10 (1C)

¹⁵ See para 10(3)

¹⁶ *Open Courts and Other Acts Amendment Act 2019* (Vic) s.13

We submit that non-publication orders should remain in effect after the death of the survivor out of respect for their wishes, as there may be unintended effects on surviving relatives if orders are not honoured.

We support making these court orders binding on anyone that has actual or constructive notice of them, considering the rise in sharing information over the internet and social media.

3. Conclusion

knowmore supports legislation that prohibits publication of the identity of a survivor of a sexual offence. The details suppressed should include anything relevant that could lead to the disclosure of the victim's identity, or otherwise cause victims distress or harm, at the discretion of the Court.

knowmore further suggests that the relevant legislation should provide that a suppression order must be lifted if a survivor over 18 years old provides informed consent, which is obtained through a rigorous and supportive process specific to the survivor's needs, and the disclosure of their identity would not lead to identification of other survivors (such as other victims of a common perpetrator) that have not consented. knowmore supports enacting legislation similar to that recently adopted by Victoria regarding obtaining the informed consent of survivors for publication of identifying information.

As discussed above, we strongly suggest that victims and survivors be provided with an opportunity to obtain independent, free, culturally appropriate and trauma-informed support and legal advice when determining whether to seek a court order regarding the publication of their identifying details.

The approach is in the public interest because it supports open justice while protecting the rights of survivors of child sexual abuse and sexual offences.

We have no objection to publication of this submission.