Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019

Submission to the Legal Affairs and Community Safety Committee

6 January 2020

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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). knowmore was established by and operates as a program of Community Legal Centres Australia (formerly the National Association of Community Legal Centres), 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 30 November 2019, knowmore has received 25,330 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 5,508 clients. Just over a quarter (26%) of knowmore's clients identify as Aboriginal and/or Torres Strait Islander peoples. Over a fifth (23%) 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 Queensland

knowmore has a significant client base in Queensland — 28 per cent of our current clients reside in the state. We therefore have a strong interest in reforms to the Queensland criminal justice system that will better protect children from sexual abuse, and provide enhanced access to justice for victims and survivors.

knowmore's submission

This section outlines knowmore's overall position on the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 (the Bill), and details knowmore's comments and recommendations in relation to a number of specific provisions.

knowmore's overall position on the Bill

knowmore strongly supports the objectives of the Bill, noting that it contains many amendments intended to implement recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) in its 2017 Criminal Justice Report. Five years of work by the Royal Commission produced a significant body of evidence demonstrating the need for these reforms, and knowmore is committed to supporting the implementation of the Royal Commission's recommendations.

On this point, we note that there are a number of areas in which the amendments in the Bill depart from the Royal Commission's recommendations, or fail to fully implement the recommendations as the Royal Commission intended. In some cases, we understand the government's reasons for this; in other cases, the reasons are unclear. Given the tremendous amount of work done by the Royal Commission to develop evidence-based recommendations informed by both careful policy analysis and the experiences of survivors of child sexual abuse, we believe that any significant departures from its recommendations should be clearly justified.

In light of this, we have made a number of recommendations to amend the provisions in the Bill to better achieve the outcomes sought by the Royal Commission. Several of these recommendations seek to address gaps in the protection of older children (that is, children aged 16 or 17 years) from sexual abuse by adults in positions of authority. Other recommendations are aimed more generally at enhancing the Bill's effectiveness in improving the capacity of Queensland's criminal justice system to protect children from sexual abuse and ensure perpetrators are brought to justice. All of our recommendations are listed below, and detailed comments on the key issues are provided in the following sections.

List of recommendations

Recommendation 1 (page 8)

That in Clause 25, new section 229BC(1), paragraph (b) be amended to read:

(b) at the relevant time, the child is or was—
(i) under 16 years; or
(ii) a person with an impairment of the mind; or
(iii) under the authority of the alleged offender.

Consequential amendments will be required to make clear that 'the alleged offender' means 'another adult' as referred to in subsection (1), paragraph (a).

Recommendation 2 (page 9)

That in Clause 25, an additional provision be inserted into new section 229BC to make explicit that being concerned about the interests of the perpetrator or an organisation will not constitute a reasonable excuse for a person failing to report child sexual abuse to police. Section 327(4) of the *Crimes Act 1958* (Vic) provides a suitable model for this.

Recommendation 3 (page 9)

That in Clause 25, additional provisions be inserted into new section 229BC to require the Director of Public Prosecutions to approve a prosecution for the offence in cases where the alleged offender is a victim of family violence. Sections 327(8) and (9) of the *Crimes Act 1958* (Vic) provide a suitable model for this.

Recommendation 4 (page 9)

That in Clause 25, additional provisions be inserted into new section 229BC to:

a. make it a criminal offence to take reprisal action against a person who, in good faith, discloses information to police under the section; and
b. enable a person to seek injunctive relief and compensation to prevent and/or help to redress adverse consequences arising in relation to their employment as a result of a disclosure made, in good faith, to police under the section.

Recommendation 5 (page 10)

That in Clause 25, new section 229BB(1), paragraph (d) be amended to read:

(d) the child is either—
(i) under 16 years; or
(ii) a person with an impairment of the mind; or
(iii) aged 16 years or 17 years, and under the authority of the alleged offender; and

Recommendation 6 (page 11)

That in Clause 25, new section 229BB(1), paragraph (a) be amended to refer to 'a substantial risk' rather than 'a significant risk'.

Recommendation 7 (page 11)

That in Clause 25, an additional provision be inserted into new section 229BB to make clear that in a prosecution for an offence against subsection (1), it is not necessary to prove that a child sexual offence has been committed. Section 49O(4) of the *Crimes Act 1958* (Vic) provides a suitable model for this.

Recommendation 8 (page 11)

That in Clause 25, an additional provision be inserted into new section 229BB to clarify the circumstances in which a person 'negligently fails' to reduce or remove a risk. Section 49O(3) of the *Crimes Act 1958* (Vic) provides a suitable model for this.

Recommendation 9 (page 14)

That in Clause 13, new section 218B(2) be amended to make it an offence for a person to engage in grooming conduct in relation to 'a person who has care or supervision of, or authority over, a child', rather than 'a person who has care of a child'. Consequential amendments to new section 218B(1), paragraphs (b) and (c) and new section 218B(12) will also be required. Section 37 of the *Crimes Act 1958* (Vic) provides a suitable model for defining a person who has care or supervision of, or authority over, a child.

Recommendation 10 (page 15)

That additional amendments be included in the Bill to extend section 229B of the Criminal Code in line with Recommendation 22 of the Royal Commission. These amendments should make it an offence for an adult to maintain an unlawful sexual relationship with a child aged 16 years or 17 years who is under the special care of the adult. Section 56 of the *Crimes Act 1900* (ACT) provides a suitable model for this, including in defining a person under the special care of an adult [subsection (13)].

Recommendation 11 (page 16)

That in Clause 11, new section 207A, paragraph (b) of the definition of child abuse object be amended to read:

(b) the doll, robot or other object has been used, or a reasonable adult would consider it is likely intended for use, in an indecent or sexual context including, for example, engaging in a sexual activity.

Recommendation 12 (page 17)

That all references in the Bill to 'child abuse object/s' be replaced with 'child exploitation object/s'.

Recommendation 13 (page 18)

That in Clause 53(5), new section 9(6A) of the *Penalties and Sentences Act 1992* be amended to refer to good character that 'enabled', rather than 'assisted', the offender to commit the offence. Consideration should also be given to including examples in new section 9(6A) similar to those in section 34A of the ACT's *Crimes (Sentencing) Act 2005*.

Recommendation 14 (page 20)

That the Bill be amended to incorporate the provisions in Clause 11 of the Queensland Government's August 2019 Consultation Draft Bill, in order to amend section 632(3) of the Criminal Code regarding corroboration and implement part c of Recommendation 65 from the Royal Commission.

Provisions to create a new offence for failing to report child sexual abuse

We note that the new offence for failing to report child sexual abuse in Clause 25 (new section 229BC) will apply to any adult who has information that causes them to believe, or ought reasonably cause them to believe, that a sexual offence has been committed against a child. This differs to the failure to report offence included in the government's Consultation Draft Bill, which was targeted at institutional abuse.[1] We note the Attorney-General's comments when introducing the Bill that this change reflects "strong concerns… that the complexity of the failure-to-report offence made the offence extremely difficult to apply and enforce".[2] knowmore was supportive of the targeted offence included in the Consultation Draft Bill, given its consistency with Recommendation 33 from the Royal Commission,[3] and has mixed views about the new provisions in the Bill.

On the one hand, there is clearly value in a failure to report offence that applies to all adults in Queensland. As the Attorney-General has noted, it "sends a strong message to the entire community that child sexual abuse is not something that can be ignored by any adult".[4] Given also the seriousness of child sexual abuse and the importance of safeguarding the best interests of children, in principle no distinction should be made between institutional and non-institutional child sexual abuse and the duty to report. We strongly support any measure that will protect children from sexual abuse, regardless of where it occurs, and the failure to report offence in the Bill certainly has the potential to do this. We also consider it important for

1 Clause 14, new section 229BB, Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019: Consultation Draft — August 2019.

2 Queensland Legislative Assembly (Hon. YM D'Ath), *Record of Proceedings (Hansard): First Session of the Fifty-Sixth Parliament*, Introduction of the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019, 27 November 2019, p. 3875.

3 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III–VI*, 2017, pp. 213–214.

4 Queensland Legislative Assembly (Hon. YM D'Ath), *Record of Proceedings (Hansard): First Session of the Fifty-Sixth Parliament*, Introduction of the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019, 27 November 2019, p. 3875.

there to be legislative consistency across jurisdictions, and so we acknowledge the value of a broader offence in this regard too.[5]

On the other hand, the provisions in Clause 25 depart significantly from Recommendation 33, and we are concerned that the broad offence proposed for Queensland will be less effective than the targeted offence recommended by the Royal Commission in protecting children from abuse in institutional settings where weak reporting cultures have been identified as a specific and significant problem. Many of our clients have told us that they complained to institutional staff about sexual abuse at the time that it was occurring, but their complaints were never followed up or referred to the police. Many of our clients have expressed the view that those within institutions were more concerned about upholding the institution's reputation than protecting children from abuse. The Royal Commission likewise heard a number of senior representatives of institutions deny having knowledge or any belief or suspicion of abuse taking place "in circumstances where their denials [were] very difficult to accept".[6] In light of this, the Royal Commission's main concern in recommending a failure to report offence was:

> *...to identify a sufficiently lower standard of knowledge or belief to ensure that the sorts of allegations that a number of our case studies have revealed, and which were not reported to police, would be required to be reported to police in order to avoid committing the offence.*[7]

This led to its recommendation for an offence targeted at people in institutions who had information that led or should have led them to *suspect* child sexual abuse.

The broader offence proposed for Queensland necessitates a higher threshold for reporting information to police — one of *belief*. Not only does this mean that the obligation to report applies in a narrower range of circumstances, where the person has more certainty of the abuse, but belief has also previously been found very difficult to prove. This was illustrated in the case of former archbishop Philip Wilson, who had his conviction for concealing a priest's child sex offending overturned on appeal.[8] In determining the archbishop's appeal, Ellis DCJ of the NSW District Court made the following comments about the element of belief (it being necessary for the Crown to prove beyond reasonable doubt that at the relevant time the archbishop had believed that the reported offender had indecently assaulted a child, who had allegedly complained about that to the archbishop):

> *75. I note that the requirement of belief cannot be satisfied by suspicion, even strong suspicion. Being suspicious that an allegation may be true is a state of mind that falls well short of actually believing that the allegation is in fact true. Similarly being suspicious that an allegation may NOT be true is a state of mind that falls well short of an actual belief that the allegation is false.*
>
> *76. In my view a person who believes that a particular event actually occurred can reach such a positive state of mind as a result of personally witnessing an event, by acquiring knowledge from a source or sources that they trust, by suspicion and inference, by being motivated by bias or prejudice, by uncritical acceptance of untested media, public or private opinion and/or by a combination of some or all of these factors. Believing something to be true and accurate does not mean that it is true and accurate but it does mean that the individual has formed a clear opinion that is belief, that the something is in fact true and accurate.*
>
> *77. The reality is that people demonstrate a wide range of readiness or preparedness to form beliefs, from those who quickly form beliefs to those who are far more reticent to do so. For example, some individuals form beliefs very quickly and at times on scant or one sided*

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5 New South Wales (s. 316A, *Crimes Act 1900*), Victoria (s. 327, *Crimes Act 1958*), Tasmania (s. 105A, *Criminal Code Act 1924*) and the ACT (s. 66AA, *Crimes Act 1900*) have all introduced broad failure to report offences.

6 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 210.

7 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 209.

8 *R v Wilson* [2018] NSWDC 487 (6 December 2018).

> *information. On the other hand some individuals are far more reluctant to form beliefs and then only do so if they consider they have all the necessary information or at least have heard both sides of the story. That an individual reserves their opinion or belief as they have insufficient information or only one side of the story is not unusual at all. Where an individual falls on this continuum can depend on personality, decisiveness, prejudices, circumstances, issues relating to potential consequences, life experiences and the significance of the belief.*
>
> *78. Therefore, keeping an open mind on receiving allegations from a one sided perspective should not be seen as an unlikely or unusual approach for intelligent individuals with experience in conflict as between friends, work friends or indeed in this case parishioners.*
>
> …
>
> *95. Having carefully read and re-read the transcript of the evidence of Philip Wilson I have reached a different conclusion than Magistrate Stone. A close consideration of the appellant's evidence in chief and cross examination leads me to conclude that Philip Wilson maintained during extensive and at times repetitive cross-examination that he maintained an "open mind" without forming a belief or disbelief in relation to the allegations or to use the words of EB he "sat on the fence" or the words of CB "he answered like a politician"…*
>
> *96. Having regard to these factors I am of the view that there is no proper basis upon which I can rely to reject the evidence of the appellant…*[9]

We are concerned that there may be similar difficulties with the application of new section 229BC, reducing the protective effect of the offence and failing to address the specific issues identified by the Royal Commission with respect to institutional abuse.

Another concern we have is that broadening the application of the failure to report offence to non-institutional contexts may have unintended consequences. In particular, we are concerned that new section 229BC could criminalise non-reporting of child sexual abuse by victims of family violence. While we note that paragraph (d) of subsection (4) goes some way towards addressing this — by providing that at an adult has a reasonable excuse for not reporting to police if they believe that disclosing the information to a police officer would endanger the safety of themselves or another person (other than the alleged offender) *and* failing to disclose the information to a police officer is a reasonable response in the circumstances — this may not always apply. We also acknowledge that subsection (4) does not limit what may be a reasonable excuse for not reporting to police. Nevertheless, we remain concerned, as the Royal Commission did, that the broader offence does not take into account all of the complex circumstances surrounding child sexual abuse and may unfairly criminalise non-reporting by victims of family violence.[10] Similar concerns about the application of Victoria's failure to report offence were identified by the Victorian Royal Commission into Family Violence in 2016.[11]

Notwithstanding these concerns, we recognise that the government has made a decision to depart from the Royal Commission's recommendation and the focus should now be on ensuring that the proposed offence is as effective as possible in protecting children from sexual abuse, especially in institutional settings. To this end, we recommend that several changes be made to the Bill:

- New Section 229BC(1), paragraph (b) should be amended to ensure that the obligation to report extends to information about sexual offences against a child aged 16 or 17 years if the alleged offender is in a positon of authority in relation to the child. As discussed in the next section, the Royal Commission specifically recommended that the failure to protect offence apply in these circumstances, and it is logical that the failure to report offence should be consistent in this regard. We note that this was the

9 *R v Wilson* [2018] NSWDC 487.

10 Royal Commission, *Consultation Paper: Criminal Justice*, 2016, p. 237.

11 Royal Commission into Family Violence (State of Victoria), *Volume II: Report and Recommendations*, 2016, pp. 176–178, 198–199.

case in the Consultation Draft Bill, and the reason for the change is not clear to us — in our view, obliging adults to report sexual offences against older children under the authority of the alleged offender is as appropriate for a broad offence as for one targeted at institutions. Such an approach would also increase consistency between the Queensland provisions and those in New South Wales, Tasmania and the ACT, where the comparable failure to report offences all extend to information about child abuse offences committed against children aged 16 or 17 years.[12]

- A provision should be inserted into new section 229BC to make explicit that being concerned about the interests of the perpetrator or an organisation will not constitute a reasonable excuse for a person failing to report child sexual abuse to police. This would be consistent with the comparable provisions in Victoria.[13] Given that many of our clients saw institutions as being more concerned with protecting their reputations than protecting children, we consider this to be a very important inclusion in the Victorian provisions and one that should be similarly captured in Queensland's.
- Provisions should be inserted into new section 229BC to address the issues identified above in relation to non-reporting of child sexual abuse by victims of family violence. In response to Recommendation 30 of the Victorian Royal Commission into Family Violence,[14] the Victorian Government amended its failure to report offence in 2017 to provide that a) a prosecution for a failure to report offence cannot be commenced without the consent of the Director of Public Prosecutions (DPP) and b) in determining whether to consent, the DPP must consider whether a person "has been subjected to family violence… that is relevant to the circumstances in which the offence is alleged to have been committed".[15] Similar provisions should apply in Queensland.
- Provisions should be inserted into new section 229BC to make it a criminal offence to take reprisal action against a person who discloses information to police under the section, and to enable a person to seek injunctive relief and compensation to prevent and/or help to redress adverse consequences arising in relation to their employment as a result of their disclosure. We acknowledge that subsection (5) will ensure that a person who discloses information to a police officer in good faith will not be liable civilly, criminally or under an administrative process for making the disclosure. However, we believe that more is required to protect whistleblowers who report sexual abuse in institutional contexts, consistent with Recommendation 7.5 from the Royal Commission's Final Report.[16] Some knowmore clients who worked at institutions expressed reluctance to disclose or provide information about child sexual abuse occurring at the institution because of their fear of dismissal or reprisals in the workplace. We therefore consider it important for the new offence to be accompanied by robust legislative protections for whistleblowers that will encourage and support institutional staff to report child sexual abuse, particularly given our other concerns about the offence's effectiveness in institutional contexts.

Recommendation 1

That in Clause 25, new section 229BC(1), paragraph (b) be amended to read:

(b) at the relevant time, the child is or was—
(i) under 16 years; or
(ii) a person with an impairment of the mind; or
(iii) under the authority of the alleged offender.

Consequential amendments will be required to make clear that 'the alleged offender' means 'another adult' as referred to in subsection (1), paragraph (a).

12 Section 316A(9), definition of a child, *Crimes Act 1900* (NSW); section 105A(1), definition of a child, *Criminal Code Act 1924* (Tas); section 66AA and Dictionary, definition of a child, *Crimes Act 1900* (ACT).

13 Section 327(4), *Crimes Act 1958* (Vic).

14 Royal Commission into Family Violence (State of Victoria), *Volume II: Report and Recommendations*, p. 205.

15 Sections 327(8)–(9), *Crimes Act 1958* (Vic).

16 Royal Commission, *Final Report: Volume 7, Improving Institutional Responding and Reporting*, 2017, p. 107.

Recommendation 2

That in Clause 25, an additional provision be inserted into new section 229BC to make explicit that being concerned about the interests of the perpetrator or an organisation will not constitute a reasonable excuse for a person failing to report child sexual abuse to police. Section 327(4) of the *Crimes Act 1958* (Vic) provides a suitable model for this.

Recommendation 3

That in Clause 25, additional provisions be inserted into new section 229BC to require the Director of Public Prosecutions to approve a prosecution for the offence in cases where the alleged offender is a victim of family violence. Sections 327(8) and (9) of the *Crimes Act 1958* (Vic) provide a suitable model for this.

Recommendation 4

That in Clause 25, additional provisions be inserted into new section 229BC to:

a. make it a criminal offence to take reprisal action against a person who, in good faith, discloses information to police under the section; and
b. enable a person to seek injunctive relief and compensation to prevent and/or help to redress adverse consequences arising in relation to their employment as a result of a disclosure made, in good faith, to police under the section.

We also call on the Queensland Government to ensure that the new offence is supported by appropriate and effective community engagement and education. The new offence will not be effective in protecting children from sexual abuse unless all adults in the community are aware of their obligation to report. People need to understand how the offence applies to them, what it obligates them to do and in what circumstances, and how they can meet their reporting obligations in practice. We suggest that the government consider the experiences of other states and territories in developing effective strategies to ensure awareness and understanding of the offence throughout the community. We note, for example, the factsheets produced by the ACT and Victorian governments to accompany the introduction of the failure to report offences in those jurisdictions.[17]

Provisions to create a new offence for failing to protect a child from institutional child sexual abuse

knowmore supports the provisions in new section 229BB of the Criminal Code, as per Clause 25, which will make it an offence for an accountable person to fail to reduce or remove a significant risk of institutional child sexual abuse that they have the power or responsibility to address. This is consistent with Recommendation 36 from the Royal Commission,[18] and will bring Queensland into line with Victoria, New South Wales and the ACT.[19] We believe that the failure to protect offence will encourage organisations to implement effective systems for preventing and responding to institutional child sexual abuse. It will also place increased responsibility on staff with leadership roles to foster effective organisational cultures in this area. These are clearly important outcomes, particularly given the negative experiences of our clients highlighted on page 6.

Despite our overall support for the new offence, we note that the provisions depart significantly from the Royal Commission's recommendation in not applying in circumstances where there is a risk of a sexual

17 ACT Government, *All Adults Must Report Child Sexual Abuse: Factsheet*, ACT Government, Canberra, 2019, <www.act.gov.au/__data/assets/pdf_file/0007/1397662/Failure-to-Report-Offence-Royal-Commission-Criminal-Justice-Legislation-Amendment-Act-2019.pdf>; Victorian Government, *Betrayal of Trust: Factsheet — The 'Failure to Disclose' Offence*, Victorian Government, Melbourne, 2017, <www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2018/07/f0/bbce5bd2b/failure_to_disclose_betrayal_of_trust_factsheet_2017.pdf>.

18 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 249.

19 Section 49O, *Crimes Act 1958* (Vic); section 43B, *Crimes Act 1900* (NSW); section 66A, *Crimes Act 1900* (ACT).

offence being committed against a child aged 16 or 17 years where the alleged offender is in a position of authority in relation to the child. In formulating this part of Recommendation 36, the Royal Commission emphasised the importance of "protecting older children who, despite being old enough to consent to sex, remain vulnerable to sexual abuse by those who hold positions of authority in relation to them".[20] We concur with this, and consider that Queensland is failing to adequately protect the best interests of older children by excluding these types of risks from the scope of the new offence. We therefore recommend that the failure to protect offence be amended to fully implement the Royal Commission's recommendation and ensure that accountable people within institutions are also responsible for addressing sexual abuse risks that arise in relation to a child aged 16 or 17 years under the authority of the alleged offender, as was the case in the Consultation Draft Bill.[21] We note that the provisions in both New South Wales and the ACT impose obligations to protect older children in these circumstances (and in others, in New South Wales),[22] and we consider that older children in Queensland should be not be afforded any less protection.

Recommendation 5

That in Clause 25, new section 229BB(1), paragraph (d) be amended to read:

(d) the child is either—
(i) under 16 years; or
(ii) a person with an impairment of the mind; or
(iii) aged 16 years or 17 years, and under the authority of the alleged offender; and

knowmore considers that the new failure to protect offence would be strengthened even further by incorporating other provisions found in other jurisdictions. Specifically, we recommend that:

- Subsection (1)(a) be amended to refer to "a substantial risk" rather than "a significant risk". This would better reflect the intent of the Royal Commission's recommendation and impose an obligation on institutional staff to reduce or remove risks to children in a broader range of circumstances. The comparable offence provisions in Victoria (which formed the basis of the Royal Commission's recommendation) and the ACT both refer to substantial risks.[23]
- A provision be inserted into new section 229BB explicitly stating that it is not necessary in proceedings for an offence against that section to prove that a sexual offence has been committed, as in Victoria, New South Wales and the ACT.[24]
- "Negligently" be defined, as in Victoria and the ACT. This clarifies that a person negligently fails to reduce or remove a risk if the failure "involves a great falling short of the standard of care that a reasonable person would exercise in the circumstances".[25]

In our view, these changes would all help to ensure that the offence better serves to protect children against the risk of child sexual abuse, and avoid any potential barriers to prosecution. They would also increase consistency between Queensland and other jurisdictions. This is particularly important given the likelihood of some relevant institutions operating in multiple jurisdictions — differences in legislation may make it more difficult for staff to understand and comply with their obligations, to the detriment of children's safety.

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20 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 248.

21 Clause 14, new section 229BC, paragraph (d)(ii), Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019: Consultation Draft — August 2019.

22 Sections 43B(1)(c) and 43B(3), definition of a child, *Crimes Act 1900* (NSW); sections 66A(1)(b)(ii) and 66A(5), definition of a young person, *Crimes Act 1900* (ACT).

23 Section 49O(1)(b), *Crimes Act 1958* (Vic); section 66A(1)(b), *Crimes Act 1900* (ACT).

24 Section 49O(4), *Crimes Act 1958* (Vic); section 43B(2), *Crimes Act 1900* (NSW); section 66A(2)(b), *Crimes Act 1900* (ACT).

25 Section 49O(3), *Crimes Act 1900* (Vic); section 66A(3), *Crimes Act 1900* (ACT).

Recommendation 6

That in Clause 25, new section 229BB(1), paragraph (a) be amended to refer to 'a substantial risk' rather than 'a significant risk'.

Recommendation 7

That in Clause 25, an additional provision be inserted into new section 229BB to make clear that in a prosecution for an offence against subsection (1), it is not necessary to prove that a child sexual offence has been committed. Section 49O(4) of the *Crimes Act 1958* (Vic) provides a suitable model for this.

Recommendation 8

That in Clause 25, an additional provision be inserted into new section 229BB to clarify the circumstances in which a person 'negligently fails' to reduce or remove a risk. Section 49O(3) of the *Crimes Act 1958* (Vic) provides a suitable model for this.

Provisions to ensure that the new failure to report and failure to protect offences apply to information or knowledge gained during, or in connection with, a religious confession

knowmore strongly supports subsection (3) of new section 229BC, which will ensure that the obligation to report extends to information about sexual offences against children obtained during religious confessions. In doing so, Queensland will join the ACT, Victoria and Tasmania, where comparable laws have already been passed.[26] We also support the addition of subsection (2) in new section 229BB, which will ensure that there is no gap with respect to the new failure to protect offence.

These reforms are consistent with Recommendation 35 from the Royal Commission,[27] which heard numerous examples of child sexual abuse being disclosed during confessions, by both perpetrators and victims, where no action was taken to stop the offending or ensure that it was dealt with by police.[28] The accounts of the many victims who made a disclosure of abuse during confession are particularly startling.[29] In many of these cases, the victim's disclosure during confession was the first and only time as a child that they had told someone about the abuse they had suffered. The failure of the priests in question to act appropriately on the information they were given meant that the perpetrators were allowed to continue — and in some cases escalate — their abuse. The enormously damaging impacts of this are illustrated in the stories of two Queensland survivors heard by the Royal Commission.[30]

26 Section 66AA(3), *Crimes Act 1900* (ACT); sections 16 to 18, *Children Legislation Amendment Act 2019* (Vic); section 105A(5), *Criminal Code Act 1924* (Tas).

27 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 224.

28 Royal Commission, *Criminal Justice Report: Parts III–VI*.

29 These have been identified from the narratives published by the Royal Commission based on accounts provided by survivors at the private sessions (<www.childabuseroyalcommission.gov.au/narratives>).

30 Other examples of Queensland survivors disclosing their abuse during confession were highlighted by the Royal Commission in Case Study 26 (see *Criminal Justice Report: Parts III–VI*, p. 202), and the story of Billy (www.childabuseroyalcommission.gov.au/narratives/billys-story).

Gerard Patrick's story

Gerard Patrick grew up in Queensland in the 1960s. At the age of 10 or 11, when he was an altar boy at the local church, he was sexually abused by a priest.

Gerard told another priest about the abuse during confession. The priest said, "We all make mistakes. You have to forgive people because if you carry on, it's detrimental to both of you". The priest cried and told Gerard that it wasn't his fault, but did nothing about the abuse.

The perpetrator was moved from parish to parish each time he was caught sexually abusing children. He was eventually charged with offences against other boys, and went to jail.

For Gerard, there were long-term impacts of the abuse. As a young teenager, he spent time in youth detention, where he was sexually abused again. During his late teens and early 20s, he turned to alcohol and drugs. As an adult, Gerard spent time in prison, and was later diagnosed with post-traumatic stress disorder, mood disturbance and chronic anxiety.

Source: Adapted from Royal Commission, *Narratives: Gerard Patrick's story*, <www.childabuseroyalcommission.gov.au/narratives/gerard-patricks-story>. Real names of individuals have not been used.

Dwight's story

Dwight was sexually abused by Brother Stewart, the principal at the Christian Brothers primary school he attended in Queensland in the late 1950s and early 1960s.

Dwight moved on to high school, and never mentioned the abuse to anyone. But when he was 13 or 14, he realised that his youngest brother was about to start at Brother Stewart's school and wanted to protect him.

Dwight felt unable to tell his parents about what had happened to him, so he instead told his parish priest during confession. In response, the priest grunted and told him to get out.

Brother Stewart later attended Dwight's high school, telling him that he had to "pay penance for the lies" he had told the priest. Brother Stewart raped Dwight in the principal's office.

Dwight again kept silent about what had happened, although he did try to tell a young visiting priest during confession. The priest drew back the curtain, looked at Dwight and said, "Did you enjoy it?" Dwight left, unable to speak.

Dwight's grades dropped and he scraped through his last years at school. As a young adult he became rebellious and violent, joined a criminal gang and ran into trouble with the law.

Dwight remained silent about the abuse for another 35 years.

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

After some discussion during the Royal Commission's hearings about whether the seal of confession would apply to a child's disclosure about being the victim of sexual abuse,[31] it was confirmed that the position of the Catholic Church in Australia is that the priest hearing confession is not free to follow up any such

31 Royal Commission, *Public Hearing Transcript — Case Study 50: Institutional Review of Catholic Authorities (Day 245)*, 9 February 2017, pp. 25138–25140.

report, and can only seek to persuade the child to make a further report outside the confession (which of course may not be effective):

> *Disclosure by a child*
> *When in the sacrament the child reveals he/she has been abused, the priest-confessor should advise the child to tell another responsible person, not the priest-confessor, outside of the sacrament what has happened. Due to the seal of confession the priest-confessor is not free to follow this up. The initiative rests with the child, so the conversation in the sacrament between the priest-confessor and the child needs to be understanding, compassionate and encouraging.*[32]

Where a child discloses, it is inappropriate to place the "initiative" for further action on that child victim. Rather, every instance in which a child discloses sexual abuse during confession is an opportunity for intervention, and for that information to be taken to the police to bring perpetrators to justice and ensure that they can do no further harm to children. Whether these circumstances arise frequently or not, there can be no question that the protection of children should be paramount.

In light of the significant and repeated disclosures of child abuse made to priests in this context, as evidenced in the narratives published by the Royal Commission, knowmore believes it is essential for the new failure to protect and failure to report offences to apply to knowledge gained and information received during or in connection with a religious confession, as per sections 229BB(2) and 229BC(3). We note that these provisions are consistent with the principles concerning confessional privilege recently agreed to by the Council of Attorneys-General,[33] and we welcome this approach.

Provisions to extend the grooming offence to persons other than a child

knowmore supports the amendment in Clause 13, which will make it an offence for a person to groom a person who has care of a child with the intention of obtaining access to the child for sexual abuse. This amendment partly addresses Recommendation 26 from the Royal Commission,[34] which heard many examples of institutional offenders grooming the parents of their victims to enable them to have time alone with the child.[35]

Notwithstanding this, it appears that a 'person who has care of a child', as defined in new section 218B(12), will not capture as broad a range of people as intended by the Royal Commission. Our understanding is that the new provisions in section 218B relate to the grooming of parents and carers, as per the new title of the offence and comments made at the Committee's public briefing on 10 December 2019.[36] In contrast, we note that Recommendation 26 calls on governments to extend their grooming offences to "the grooming of *persons other than the child*" [emphasis added]. In this regard, the Royal Commission supported Victoria's grooming provisions, which capture conduct directed at any person with care or supervision of, or authority over, the child.[37, 38] This includes, for example, teachers, employers, youth workers and sports coaches.[39]

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32 Bishop Terence Curtin (Chair of the Australian Catholic Bishops Conference Commission for Doctrine and Morals), *Comments on the Sacrament of Confession Prepared for the Royal Commission for Panel 4.2*, 2017, p. 1.

33 Council of Attorneys-General, *Communique*, 29 November 2019, Adelaide, p. 2, <https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Documents/Council-of-Attorneys-General-communique-November-2019.pdf>.

34 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 97.

35 Royal Commission, *Criminal Justice Report: Parts III–VI*.

36 Legal Affairs and Community Safety Committee, *Public Briefing — Inquiry into the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019: Transcript of Proceedings* (Uncorrected proof), LACSC, Brisbane, 10 December 2019, p. 4.

37 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 97.

38 Section 49M, *Crimes Act 1958* (Vic).

39 Section 37, *Crimes Act 1958* (Vic).

knowmore considers it important that the extended grooming offence in section 218B is broad enough to capture conduct that occurs outside of parental or ordinary care-giving contexts. While the offence is unlikely to be charged often in these circumstances,[40] it would recognise the potential for grooming behaviour to be directed at a variety of people who can help facilitate an offender's access to children. For example, a key issue raised with the Royal Commission by People with Disability Australia was that perpetrators in disability services will groom people within the institution to gain access to their victims.[41] Perpetrators in schools have likewise been identified as likely to groom other employees to gain unsupervised access to students.[42]

To capture these types of situations and more faithfully implement the Royal Commission's recommendation, we submit that Clause 13 should be amended to make it an offence to groom a person who has care or supervision of, or authority over, a child. This would be consistent with the approach in Victoria, and also more consistent with the approach adopted in the ACT to implement the Royal Commission's recommendation.[43]

Recommendation 9

That in Clause 13, new section 218B(2) be amended to make it an offence for a person to engage in grooming conduct in relation to 'a person who has care or supervision of, or authority over, a child', rather than 'a person who has care of a child'. Consequential amendments to new section 218B(1), paragraphs (b) and (c) and new section 218B(12) will also be required. Section 37 of the *Crimes Act 1958* (Vic) provides a suitable model for defining a person who has care or supervision of, or authority over, a child.

Provisions to retrospectively apply the offence of maintaining a sexual relationship with a child under 16

knowmore supports the amendments in Clause 21 that will apply the offence of maintaining a sexual relationship with a child in section 229B of the Criminal Code to unlawful sexual acts that occurred before the introduction of the offence on 3 July 1989. These amendments are consistent with Recommendations 21 and 22 from the Royal Commission,[44] which supported the Queensland offence but noted it could be improved by being given retrospective operation.[45] Given the often lengthy delays in victims reporting child sexual abuse, particularly abuse by people in authority, this is an important change that will help to overcome barriers to prosecuting historical offences of this nature.

We do note, however, that the amendments in Clause 21 do not completely reflect the Royal Commission's recommendations for this offence. Specifically, the Model Provisions set out by the Royal Commission also make it an offence to maintain a sexual relationship with a child under the age of 18 where they were under "the special care of the adult in the relationship".[46] In contrast to the existing Queensland offence, which only relates to sexual offending against a child under the age of 16, this captures sexual offending against a child aged 16 or 17 by a person in authority, such as a parent, carer, school teacher, sports coach or custodial officer. The power imbalance in such relationships means that they are inherently exploitative and can cause significant long-term harm to victims. In recognition of this, the ACT and South Australia

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40 See similar comments made by the Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 97.

41 People with Disability Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Submission Regarding Criminal Justice*, 2016.

42 Parliament of Victoria Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations — Volume 2 of 2*, Parliament of Victoria, Melbourne, 2013.

43 Section 66(1)(c), *Crimes Act 1900* (ACT).

44 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 74.

45 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 68.

46 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, 2017, Appendix H, definition of a child.

have already enacted legislative changes to implement the Royal Commission's recommendation.[47] knowmore recommends that further amendments to section 229B be included in the current Bill to fully implement this recommendation in Queensland, and extend the offence to cases involving a child under the age of 18 who is under the special care of the adult in the relationship. The ACT provisions provide an appropriate model for this, particularly in defining "special care".[48]

> **Recommendation 10**
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> That additional amendments be included in the Bill to extend section 229B of the Criminal Code in line with Recommendation 22 of the Royal Commission. These amendments should make it an offence for an adult to maintain an unlawful sexual relationship with a child aged 16 years or 17 years who is under the special care of the adult. Section 56 of the *Crimes Act 1900* (ACT) provides a suitable model for this, including in defining a person under the special care of an adult [see subsection (13)].

As a final point, we note that the Tasmanian Government has recently released a consultation paper that includes a proposal to change the name of the comparable offence in Tasmania from 'maintaining a sexual relationship with a young person' to 'persistent child sexual abuse'.[49] This follows significant criticism from victims and their advocates that the current name of the offence normalises sexual abuse of children, and suggests that the child was "a willing participant in an equal relationship".[50] The Royal Commission raised similar concerns about the name of the offence in its report, noting that it was "uncomfortable with the language of 'relationship'", but ultimately concluding that it was "content to adopt it in the interests of achieving the most effective form of [the] offence".[51] Its view was that the name may help to emphasise the actus reus of the offence, particularly as compared to 'persistent sexual abuse of a child', the alternative name preferred by many victims. knowmore highlights this issue for the Committee's noting and further consideration.

Provisions to create new offences criminalising the possession, production and supply of "child abuse objects"

knowmore supports the amendments in Clause 16, which will make it an offence for a person to produce, supply or possess a "child abuse object".[52] We note that this is intended to help address the emerging problem of child exploitation material in the form of child-like sex dolls, robots and other objects, and follows recent amendments to Commonwealth legislation to criminalise the importation of these objects (among other types of conduct).[53] A recent media report noted that 32 child-like sex dolls have been seized by Australian Border Force officials since July 2019.[54]

The March 2019 Australian Institute of Criminology (AIC) research paper referred to in the Explanatory Notes highlighted a number of concerns about the possible impacts of child-like sex dolls. Specifically, the AIC reported that:

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47 See Section 56, *Crimes Act 1900* (ACT); section 50, *Criminal Law Consolidation Act 1935* (SA).

48 The South Australian provisions differ slightly in terms of referring to relationships where the adult is "in a position of authority" in relation to the child, but they nevertheless give effect to the Royal Commission's recommendation regarding offences against children under an adult's special care.

49 Department of Justice (Tasmania), *Proposal Paper — Renaming Sexual Offences: Removing Outdated Language in Chapter XIV of the Criminal Code Act 1924*, Tasmanian Government, Hobart, 2019, p. 9.

50 E Bevin, "Overhaul of sex abuse laws needed to remedy community confusion, advocates say", ABC News, 15 August 2019, <www.abc.net.au/news/2019-08-15/call-for-sexual-assault-laws-overhaul-in-tasmania/11414982>.

51 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 71.

52 South Australia has recently enacted similar legislation: section 4, *Criminal Law Consolidation (Child-Like Sex Dolls Prohibition) Amendment Act 2019* (SA).

53 Schedule 2, *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (Cth).

54 C Bickers, "Child-like sex doll crackdown: Australian Border Force stop dozens of illegal doll imports", *The Advertiser*, 30 December 2019.

- The use of child-like sex dolls may escalate users' sexual offending, from viewing child exploitation material, to engaging with child-like sex dolls, to committing contact offences against children.
- The use of child-like sex dolls may desensitise users from the harm that actual child sexual abuse causes to children.
- The sale of child-like sex dolls promotes the objectification and sexualisation of children, and risks child sex becoming a commodity.
- Child-like sex dolls may be used to groom children, as has occurred with adult sex dolls.[55]

Similar concerns were identified by the United States Congress, which further noted that such objects can facilitate sexual offences against children by "teaching [users]… how to overcome resistance and subdue the victim".[56]

In addition to the above concerns, we note that the mere existence and availability of child-like sex dolls is likely to be highly traumatising to survivors of child sexual abuse. For all of these reasons, knowmore considers that the amendments in Clause 16 are necessary and important. We note that the maximum penalties and defences for the new offences are consistent with those relating to similar offences regarding child exploitation material, and we consider this appropriate.

With regards to the definition of child abuse object in Clause 11, we note that it will capture dolls, robots and other objects that a reasonable adult would consider are "intended for use… in an indecent or sexual context, including, for example, engaging in a sexual activity". This is broader than the Commonwealth and South Australian definitions, which both refer to objects that a reasonable person would consider are "likely… intended to be used by a person to *simulate sexual intercourse*" [emphasis added].[57] As we noted in our submission on the Commonwealth legislation, we think the Commonwealth definition is limited and may lead to technical obstacles to prosecuting offenders.[58] As such, we welcome the broader approach adopted in the Bill in this regard. Notwithstanding this, we consider that the omission of the word "likely" from the proposed Queensland definition is unnecessarily limiting and may similarly pose technical obstacles to prosecutions. We therefore recommend that the proposed definition be amended to refer to the "*likely* intended" use of objects, in line with the definition previously included in the Consultation Draft Bill.[59]

Recommendation 11

That in Clause 11, new section 207A, paragraph (b) of the definition of child abuse object be amended to read:

(b) the doll, robot or other object has been used, or a reasonable adult would consider it is likely intended for use, in an indecent or sexual context including, for example, engaging in a sexual activity.

Finally, although we generally support the proposed definition, we suggest that "child exploitation objects" is a more suitable term than "child abuse objects". In our view, child exploitation objects is:

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55 R Brown and J Shelling, *Exploring the implications of child sex dolls*, Australian Institute of Criminology, Canberra, 2019.

56 See the Curbing Realistic Exploitative Electronic Pedophilic Robots Act of 2017 (H.R. 4655 — 115th Congress). This bill was passed by the House of Representatives on 13 June 2018, but was not passed by the Senate before the 115th Congress ended on 3 January 2019.

57 Section 273A.1, *Criminal Code Act 1995* (Cth); section 4(1), *Criminal Law Consolidation (Child-Like Sex Dolls Prohibition) Amendment Act 2019* (SA).

58 knowmore, *Submission to the Senate's Legal and Constitutional Affairs Legislation Committee: Inquiry into the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019*, 2019.

59 Clause 6, amended section 207A, Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019: Consultation Draft — August 2019.

- A more encompassing term that is more consistent with the definition's focus on objects intended for use in "an indecent or sexual context".
- More consistent with the possible use of child-like sex dolls to groom children, as noted by the AIC.
- In keeping with the Criminal Code's existing language, in the sense that it refers to child exploitation material, not child abuse material.

knowmore therefore recommends that consideration be given to amending the Bill to refer to child exploitation objects instead of child abuse objects.

Recommendation 12

That all references in the Bill to 'child abuse object/s' be replaced with 'child exploitation object/s'.

Provisions to exclude good character as a mitigating factor in sentencing where this has facilitated the offending

knowmore supports the amendment in Clause 53(5), which will prevent an offender's "good character" from being taken into account during sentencing for child sexual offences if it assisted them in committing the offences. This amendment is generally consistent with Recommendation 74 from the Royal Commission,[60] as well as a 2012 recommendation from the Queensland Sentencing Advisory Council.[61] In making its recommendation, the Royal Commission highlighted that:

> *In 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.*[62]

The experience of many knowmore clients reflects this, and we consider it entirely inappropriate in these circumstances for an offender's good character to be considered a mitigating factor in sentencing. While we note the Bar Association of Queensland's submission to the Royal Commission that "previous good character is not generally accepted as a significant mitigating factor" in child sexual abuse cases,[63] we consider it important for the legislation to specifically exclude its consideration where it facilitated the person's offending. This will also ensure Queensland is in line with other jurisdictions, namely New South Wales, South Australia and Tasmania, which have had similar provisions since 2009, 2014 and 2016 respectively,[64] and the ACT, which has already passed amendments to implement the Royal Commission's recommendation.[65]

We note that the comparable provision in the ACT has been drafted so as to apply in somewhat broader circumstances than the Queensland provision (and the provisions in the other jurisdictions). Specifically, it refers to circumstances where the offender's good character *enabled* — not assisted — them to commit the offence, and includes two examples:

> 1 *The offender's good character was one reason the offender was selected to supervise children on a camp. The offender began to establish a relationship with children at the camp to obtain their compliance in acts of a sexual nature.*

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60 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 299.

61 Queensland Sentencing Advisory Council, *Sentencing of Child Sexual Offences in Queensland: Final Report*, Sentencing Advisory Council, Brisbane, 2012, Recommendation 2.

62 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 299.

63 Bar Association of Queensland, *Response to the Criminal Justice Consultation Paper Published by the Royal Commission into Institutional Responses to Child Sexual Abuse*, 2016, p. 8.

64 Section 21A(5A), *Crimes (Sentencing Procedure) Act 1999* (NSW); section 11(4)(c), *Sentencing Act 2017* (SA); section 11A(2)(b), *Sentencing Act 1997* (Tas).

65 Section 34A(b), *Crimes (Sentencing) Act 2005* (ACT).

> 2 *A child's parents trusted the offender to care for the child because of the offender's authority in their community. The offender held authority in the community in part because of the offender's good character. The offender sexually abused the child including while the child was in the offender's care.*

We consider the ACT's approach to be more consistent with the overall intent of the Royal Commission's recommendation, which refers to circumstances where a person's good character "facilitated" their offending. The ACT's approach is intended to address concerns raised by the Royal Commission in relation to the New South Wales provision that "the requirement that the good character in question specifically *aid* the offence may limit the application of the provision, both in some institutional offending and in offending that is not in an institutional context" [emphasis in original].[66] As noted in the Explanatory Statement to the ACT amending bill:

> *Case law in NSW has affirmed that 'assistance' is a high threshold… In LB, an unreported decision of the NSW District Court (9 February 2012), a rugby coach who sexually abused a junior player on his team was found to be of good character, and further this good character did not assist him in committing the offences. Although Bennett DCJ held, 'in the broader context that his exposure to the victim was by reason of his role in junior rugby league, which he could only have had because of good character and lack of prior convictions'; however, this was merely 'coincidental with the commission of these offences'. The offender could rely on evidence of good character in mitigation of sentence, including evidence of 'the contribution he has made to the community... to the junior rugby league'.*[67]

Given the experiences of our clients and the findings of the Royal Commission, knowmore agrees with the ACT Government's position that:

> *The artificial separation of good character and commission of sexual offences does not reflect the realities of child sexual abuse, and the fact that it is often committed by trusted persons in positions of authority and who are well-regarded by the community, particularly in institutional contexts.*[68]

knowmore therefore recommends that Clause 53(5) be amended to reflect the broader scope of the ACT provision.

Recommendation 13

That in Clause 53(5), new section 9(6A) of the *Penalties and Sentences Act 1992* be amended to refer to good character that 'enabled', rather than 'assisted', the offender in committing the offence. Consideration should also be given to including examples in new section 9(6A) similar to those in section 34A of the ACT's *Crimes (Sentencing) Act 2005*.

Provisions to ensure that offenders convicted of historical abuse are sentenced in keeping with contemporary sentencing standards

knowmore supports the amendment in Clause 53(1) that will require courts to consider contemporary rather than historical sentencing practices, principles and guidelines when sentencing offenders for sexual offences against children (and for child exploitation material offences). This amendment is consistent with Recommendation 76 from the Royal Commission,[69] and is an important one for survivors. In historical cases of child sexual abuse, the current approach to sentencing can lead to injustice and dissatisfaction when offenders receive sentences that are now regarded as being significantly out of step with community and

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66 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 293. See page 23 of the Explanatory Statement to the Crimes Legislation Amendment Bill 2017 (No 2) (ACT).

67 Explanatory Statement to the Crimes Legislation Amendment Bill 2017 (No 2) (ACT), p. 23.

68 Explanatory Statement to the Crimes Legislation Amendment Bill 2017 (No 2) (ACT), p. 23.

69 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 322.

survivor expectations. Although the new provision will not result in significantly longer sentences in all cases, given that the maximum sentence applicable at the time of the offence will continue to apply, we are satisfied this approach is appropriate.

Provisions to reform jury directions on delay and forensic disadvantage

knowmore supports the amendment in Clause 39, which will prohibit judges from warning or suggesting to a jury that a delayed complaint has adversely impacted a defendant's ability to prepare their defence (the *Longman* direction), unless the judge is satisfied that the defendant has suffered a "significant forensic disadvantage" because of the delay. The provisions are largely consistent with part b of Recommendation 65 from the Royal Commission,[70, 71] which noted that use of the *Longman* direction has been detrimental to many prosecutions for child sexual abuse offences. We agree with previous criticisms that the *Longman* direction serves to reinforce "false stereotypes about the unreliability of [victims of sexual abuse]",[72] and we welcome the new provisions as a means of addressing this.

On a related matter, we note that the Bill does not include other proposed amendments regarding jury directions that were included in the government's Consultation Draft Bill.[73] Most significantly, the Bill does not include amendments to implement part c of Recommendation 65 and prohibit judges from directing or suggesting to a jury that it is "dangerous or unsafe to convict" on the uncorroborated evidence of the complainant, or that the uncorroborated evidence of the complainant should be "scrutinised with great care".[74] This is a particularly disappointing omission given the importance of this reform to victims of child sexual abuse. It reflects an understanding of the typically hidden, private nature of these offences, where corroboration of a victim's evidence is usually not possible. It is unfortunately common that many survivors of child sexual abuse, including many of knowmore's clients, have not been believed by those to whom they disclosed their abuse. Without the relevant amendments in Clause 11 of the Consultation Draft Bill, there remains a risk that jury directions repeat and compound these negative experiences by suggesting that a victim's evidence is questionable simply because it is uncorroborated.

We note the Attorney-General's comments that the changes in the provisions relating to jury directions "are in response to feedback and have regard to the approach in other jurisdictions…".[75] In this particular area, however, New South Wales and Victoria both have legislative provisions in place that reflect the intent of the Royal Commission in ensuring that jury directions based on out-of-date and incorrect assumptions about complainants do not unnecessarily hinder prosecutions in child sexual abuse cases. Specifically:

- Section 294AA(2) of the *Criminal Procedure Act 1986* (NSW) prohibits judges from warning a jury "of the danger of convicting on the uncorroborated evidence of any complainant".
- Section 164(4) of the *Evidence Act 2008* (Vic) prohibits judges from warning a jury "that it is dangerous to act on uncorroborated evidence" or giving a warning to the same or similar effect.

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70 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 194.

71 We note that the provisions in Clause 39 depart from the Royal Commission's recommendation in allowing a judge to give a direction as to delay and forensic disadvantage "on the judge's own initiative" (as well as on the application of a party to the proceeding). This is a change from the government's Consultation Draft Bill, though is consistent with other provisions in the *Evidence Act 1977*.

72 Victorian Department of Justice and Regulation (Criminal Law Review), *Jury Directions: A Jury-Centric Approach*, Department of Justice and Regulation, Melbourne, 2015, p. 64.

73 Clause 11, amended section 632, and Clause 22, new section 132BC, Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019: Consultation Draft — August 2019.

74 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 194.

75 Queensland Legislative Assembly (Hon. YM D'Ath), *Record of Proceedings (Hansard): First Session of the Fifty-Sixth Parliament*, Introduction of the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019, 27 November 2019, p. 3877.

The provisions included in Clause 11 of the Consultation Draft Bill were consistent with these approaches (and also with a previous recommendation from the Queensland Law Reform Commission).[76] With these provisions being omitted from the current Bill, we are concerned about not only the failure to fully implement Recommendation 65 in the apparent absence of any compelling rationale, but also the failure to ensure Queensland's criminal justice system is as responsive to child sexual offending and its victims as systems elsewhere in Australia. In light of this, knowmore recommends that the provisions in Clause 11 of the Consultation Draft Bill be re-inserted into this Bill, consistent with part c of Recommendation 65 and existing provisions in New South Wales and Victoria.

> **Recommendation 14**
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> That the Bill be amended to incorporate the provisions in Clause 11 of the Queensland Government's August 2019 Consultation Draft Bill, in order to amend section 632(3) of the Criminal Code regarding corroboration and implement part c of Recommendation 65 from the Royal Commission.

Provisions to create an intermediary scheme

We welcome the Queensland Government's commitment to funding a pilot intermediary scheme supported by ground rules hearings, consistent with Recommendations 59 and 60 from the Royal Commission.[77] The benefits of intermediaries were made very clear by the Royal Commission, particularly in assisting the most vulnerable victims of child sexual abuse, such as children and those with significant communication problems, to give their best evidence when they would not otherwise be able to do so.[78] Intermediaries who can ensure witnesses' communication needs are taken into account during questioning by police and in court are essential for making the criminal justice more accessible to survivors and increasing the likelihood of perpetrators being brought to justice. A powerful example of this in New South Wales was highlighted at the Royal Commission.

> *We recently did an intermediary matter at Ballina, and although it was outside of the pilot scheme, [the Department of Justice] assisted us in interviewing a little girl there who was suffering from cerebral palsy.*
>
> *It was a matter that, more than likely, police wouldn't have been able to gain a disclosure from the child. Because of the input from the intermediary, the police were enhanced in relation to the way that they interviewed that child and they got a full disclosure from that child, and, as a result of that disclosure, the person pleaded guilty and got a custodial sentence. That more than likely wouldn't have happened unless for that intermediary.*[79]

In light of this, we strongly support the amendments in Clause 44 that will provide the legislative basis for Queensland's pilot intermediary scheme. We note that the provisions are largely consistent with those in Victoria and New South Wales,[80] where witness intermediaries have been used in varying capacities since 2018 and 2016, respectively.[81]

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76 Queensland Law Reform Commission, *A Review of Jury Directions: Report Volume 2*, QLRC, Brisbane, 2009, p. 524, Recommendation 16-1: "Section 632 of the Criminal Code (Qld) should be amended to state that warnings to a jury about the unreliability of evidence must not use expressions such as 'scrutinise with great care', 'dangerous to convict' or 'unsafe to convict'".

77 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 101.

78 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*.

79 Evidence of Detective Chief Inspector P Yeomans, New South Wales Police Force Child Abuse Squad, cited in Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 69.

80 Part 8.2A, *Criminal Procedure Act 2009* (Vic); Schedule 2, Part 29, Divisions 1, 3 and 4, *Criminal Procedure Act 1986* (NSW).

81 The ACT is also establishing an intermediary program. The *Evidence (Miscellaneous Provisions) Amendment Act 2019* (ACT) was notified on 31 October 2019, and the program will commence in early 2020.

Acknowledging the government's intention for a pilot scheme, we support the inclusion of paragraph (d) in new section 21AZL(1). As indicated in the Explanatory Notes, this will allow flexibility should it become apparent that additional classes of vulnerable witnesses need intermediaries to give their best evidence. On this point, we consider that intermediaries should be made available to:

- All children in child sexual abuse proceedings, noting that the Victorian scheme extends to all witnesses under 18 years. This would also be more consistent with the existing provisions in Division 4A of the *Evidence Act 1977* (Qld), which extend to children aged 16 and 17 years in some circumstances.[82]
- Any adult complainant in a child sexual abuse proceeding who requires one, given that many adult survivors of child sexual abuse are 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.*[83]

It may be that these types of witnesses will be sufficiently captured by the provisions in new section 21AZL if their age or vulnerability leads to them being regarded as having 'difficulty communicating'. If not, paragraph (d) provides an avenue for addressing any identified gap.[84]

As a final point, we note that the legislative provisions in Clause 44 are not sufficient to implement Recommendations 59 and 60 in and of themselves. To be effective in reducing the stress experienced by vulnerable witnesses in child sexual abuse proceedings and enabling them to give better evidence, Queensland's intermediary scheme must be adequately resourced and appropriately supported by the judiciary and legal practitioners. The Queensland Government should ensure that these and other practical matters critical to the success of intermediaries[85] are addressed in the operationalisation of the scheme.

Provisions to give the Director of Public Prosecutions a limited right of interlocutory appeal

knowmore supports the amendments in Clauses 19 and 20, which will give the Queensland Director of Public Prosecutions (DPP) a limited right to appeal pre-trial directions and rulings and orders staying proceedings or further proceedings on an indictment. These amendments are generally consistent with Recommendation 79 from the Royal Commission,[86] which concluded that:

> *Given the significant role that interlocutory appeals have in correcting errors of law before trial, it is important that the DPP in each jurisdiction has adequate rights of interlocutory appeal to reduce the possibility of error in the trial.*[87]

We note the potential for increased rights of appeal to prolong proceedings, as previously flagged by the Queensland DPP.[88] We know that the length of time taken for matters to be resolved and the experience of delays is a significant source of stress and trauma for victims and survivors of child sexual abuse in the

82 Section 21AD(1) and section 21A(1), definition of a special witness, *Evidence Act 1977* (Qld).

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

84 An evaluation of New South Wales's Child Sexual Offence Evidence Pilot, of which witness intermediaries were a key component, found that there was very strong support for expanding the use of intermediaries and other special measures to other groups including vulnerable adults and child defendants (J Cashmore and R Shackel, *Evaluation of the Child Sexual Offence Evidence Pilot: Final Outcome Evaluation Report*, Social Policy Research Centre, University of New South Wales, Sydney, 2018).

85 See Tasmania Law Reform Institute, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?*, TLRI, Hobart, 2018.

86 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 342.

87 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 341.

88 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 340.

criminal justice system. It is essential, therefore, that the Queensland Government also implement Recommendation 80 and ensure that there are sufficient resources in place to support these legislative amendments and ensure the timely resolution of interlocutory appeals.[89]

The absence of provisions to facilitate increased admissibility of propensity and similar fact evidence

We note that provisions included in the Consultation Draft Bill to facilitate increased admissibility of evidence of other allegations or convictions of child sexual abuse against accused persons[90] are not included in this Bill. We acknowledge the complexity of this issue, but are disappointed that these reforms are not being addressed now given the need for reform.

The Royal Commission concluded that the laws relating to the admissibility of propensity and similar fact evidence have become "unfairly protective of the accused",[91] to the detriment of complainants and the community. This reflected a number of instances it identified where significant injustices had resulted from these types of evidence being excluded from criminal proceedings, preventing juries from getting a true picture of the perpetrator's alleged offending.[92] In light of these problems, we urge the Queensland Government to progress legislative reforms to implement Recommendations 44 to 51 of the Royal Commission as soon as possible.

89 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 342.

90 Clauses 21 and 22, amended section 132A and new section 132BA, Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019: Consultation Draft — August 2019.

91 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 591.

92 Royal Commission, *Criminal Justice Report: Parts III–VI*.

Conclusion

The amendments in the Bill, if passed, will see Queensland make considerable progress on the Royal Commission's criminal justice-related recommendations. In a number of areas, however, we have identified ways in which we consider the Bill needs to be changed to truly deliver on the Royal Commission's intent. As we noted in our opening comments, the exceptional work done by the Royal Commission to develop evidence-based recommendations informed by both careful policy analysis and the experiences of survivors means that recommendations should not be left unimplemented or partly implemented without a compelling justification.

Some of our recommendations also reflect a desire to increase consistency between Queensland and other states and territories. The need for consistency across jurisdictions is an underlying theme in many of the Royal Commission's recommendations. In our view, legislative differences should be minimised wherever possible to ensure that children in Queensland are no less safe than children elsewhere in Australia, and that victims and survivors of child sexual abuse in Queensland do not have more difficult and unsatisfactory experiences with the criminal justice system because of where they live.

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