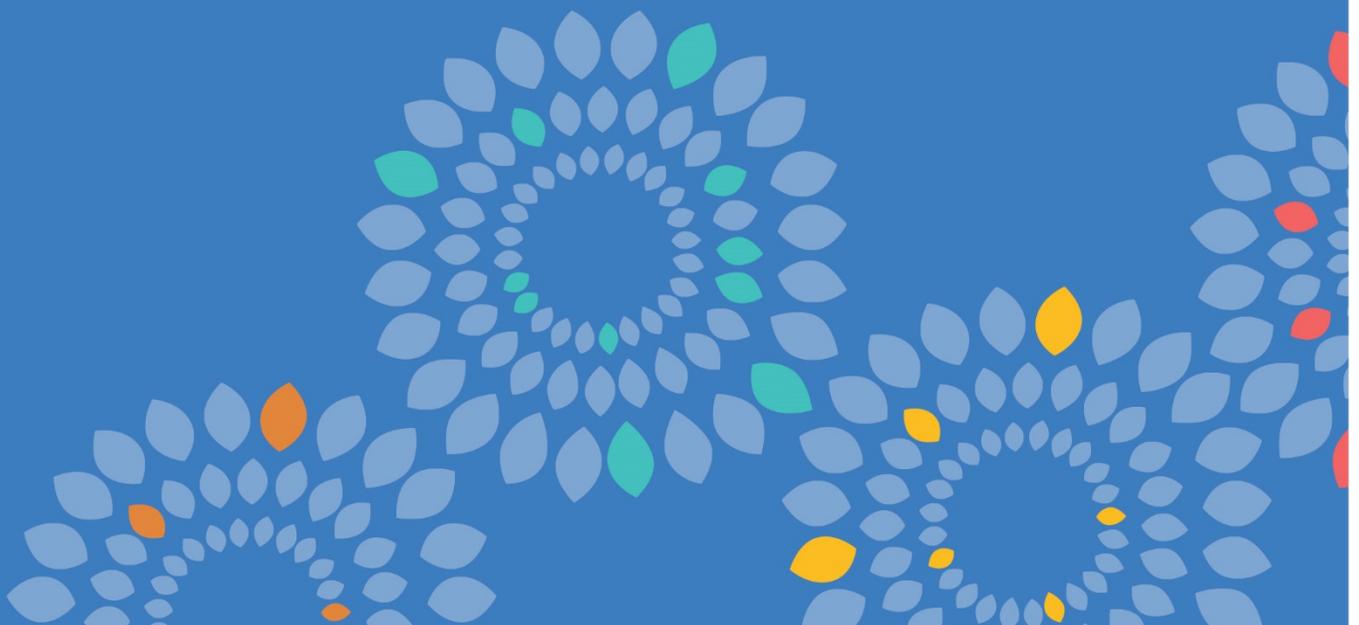




Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse:

Consultation Paper - Criminal Justice

31 October 2016



1. Introduction

1.1 About knowmore legal service

knowmore legal service (**knowmore**) is a free legal service established to assist people engaging or considering engaging with the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Royal Commission'). Advice is provided through a national telephone service and at face to face meetings, including at outreach locations.

knowmore has been established by the National Association of Community Legal Centres, with funding from the Australian Government, represented by the Attorney-General's Department, and has offices in Sydney, Brisbane, Melbourne and Perth.

Our service was launched in July 2013 and since that time we have assisted over 5,500 clients with legal advice or information relating to childhood sexual abuse within an institutional context. Many of the clients that we have assisted have either engaged, or have been seeking advice or information about engaging, with police and prosecution agencies.

Of the 5,500 clients **knowmore** has assisted:

- 61% were aged 45 years and over
- 41% identified as females
- 59% identified as males
- 21% identify as being of Aboriginal or Torres Strait Islander descent.

1.2 knowmore's submission

knowmore's clients have shared with us a large number of their experiences with the criminal justice system. Many clients have already provided the detail of these experiences to the Royal Commission; in giving evidence at public hearings; in private sessions; or through the provision of statements. We have drawn on our clients' experiences to address the following matters in the Commission's Consultation Paper:

- Chapter 2: The importance of a criminal justice response
- Chapter 3: Issues in police responses
- Chapter 4: Police responses and institutions
- Chapter 6: Third-party offences
- Chapter 9: Evidence of victims and survivors
- Chapter 12: Sentencing

In making this submission, we rely on the collective experience of our clients and our previous submissions to the Royal Commission, in particular our submission to Issues Paper 8 on the Experiences of Police and Prosecution Responses.¹ As we have not repeated the

¹ See **knowmore**, Submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse; Issues Paper 8: Experience of police and prosecution responses ('the **knowmore** Submission to Issues Paper 8').

recommendations or case studies we set out in our previous submission to Issues Paper 8, this submission should be read in conjunction with our previous submission.

knowmore recognises that there has been, and continues to be, substantial reform in the area of police and prosecution responses, which is having positive benefits for survivors. However, we would encourage police and prosecution agencies to not only seek to continually improve current responses, but also to address the legacy of past responses that have not been satisfactory.

2. Chapter 2: The importance of a criminal justice response

We welcome submissions that discuss the issues raised in Chapter 2. In particular, we seek the views of all interested parties on our proposed approach to criminal justice reforms and our view of the importance of seeking and obtaining a criminal justice response to any child sexual abuse in an institutional context.

2.1 Criminal justice for survivors

knowmore considers that an effective criminal justice response to institutional child sexual abuse matters is pivotal. For many **knowmore** clients, the criminal justice system is essential to seeking justice for past wrongs, holding the perpetrator accountable for their criminal offending and reducing the risk of the perpetrator offending against other children.

The decision to report child sexual abuse to the police is a significant personal step for survivors.² In our experience, many survivors do not report child sexual abuse immediately, but will do so after a significant period of time has elapsed.³ Despite the complexity in prosecuting historical child sexual abuse cases, many of **knowmore's** clients are reporting offences which were committed against them years or decades earlier. We agree with the Royal Commission's view that reporting their abuse to the police is important for many survivors, even in cases where the complaint does not progress further, and many survivors have felt that they were speaking on behalf of other survivors who were not able to report their abuse.⁴

2.2 The Royal Commission's approach to criminal justice reform

We support the Royal Commission's proposed approach to criminal justice reform and its aim of identifying areas where reform is warranted in the contemporary response of the criminal justice system.⁵

We support the Royal Commission's view that it is important for survivors to have an effective criminal justice response to both historical and current institutional child sexual abuse complaints, including in order to:

- punish the offender and recognise the harm to the victim;
- condemn the abuse as a crime against the victim and the wider community;
- increase awareness of the occurrence of, and circumstances surrounding, institutional child sexual abuse; and

² See **knowmore**, Submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse; Issues Paper 8: Experience of police and prosecution responses, p.7.

³ **knowmore** Submission to Issues Paper 8. Note: the Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report: Volume 1*, June 2014, p.48, provides that according to data from private sessions between 17 January 2013 and 30 April 2014, survivors took an average of 22 years to disclose their abuse after it began. See also: J Cashmore & R Shackel, 'The long-term effects of child sexual abuse', CFCA paper, no 11, Australian Institute of Family Studies, 2013, p.19.

⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, Consultation Paper on Criminal Justice, September 2016, p.69. ('the Consultation Paper').

⁵ See the Consultation Paper, p.69-70.

- deter further sexual abuse against children.⁶

We agree with the Royal Commission's view that reforms should be made in order to ensure that criminal justice responses are available to survivors who seek them; that survivors are appropriately supported; and the criminal justice system operates in the interests of seeking justice for society, including the complainant.⁷ We also support the Royal Commission's view that arrests and prosecutions are an important avenue for increasing awareness of institutional child sexual abuse among governments, organisations and the broader community.⁸

As noted in the Consultation Paper, the criminal justice system has often not been considered to be generally effective in responding to child sexual abuse complaints.⁹ Our clients have shared a range of both positive and negative experiences with engaging in the criminal justice system, some of which are set out in the **knowmore** submission to Issues Paper 8 and in section 3 below. While we recognise that there have been important reforms in the area of police and prosecution responses and improvements which have had positive benefits for survivors, we support continued reform of the criminal justice system.¹⁰

We acknowledge that there are inherent complexities in the prosecution of institutional child sexual abuse cases, particularly for historical matters.¹¹ As set out in the Consultation Paper, research indicates that for child sexual abuse cases there are lower reporting, charging and prosecution rates and fewer guilty pleas and convictions as compared to other types of offences.¹² Low reporting rates and ineffective criminal justice responses to institutional child sexual abuse complaints are of concern, as this is likely to lead to perpetrators avoiding detection and conviction and increases the risk of further offending against children.¹³ This underscores the need for reform.

(i) Encouraging police reporting

While respecting the decisions of individual survivors who do not wish to initiate a criminal justice process, we support the Royal Commission's approach that survivors should generally be encouraged to seek recourse from the criminal justice system, beginning with the police. That is, the barriers hindering survivors reporting to the police should be addressed and survivors should be supported effectively through the reporting and investigative process.¹⁴

⁶ Consultation Paper on Criminal Justice, September 2016, p.82.

⁷ See the Consultation Paper, p.83.

⁸ See the Consultation Paper, p.82.

⁹ See the Consultation Paper, p.70.

¹⁰ See **knowmore**, Submission to Issues Paper 8, p.2.

¹¹ In particular difficulties can arise in successfully prosecuting these matters due to death or incapacity of the offender, and a lack of evidence arising from delays in reporting and the absence of corroborative evidence given the nature of child sexual offending, which will often not involve direct witnesses other than the complainant. See **knowmore**, Submission to Issues Paper 8, p.7.

¹² See the Consultation Paper, p. 70-72.

¹³ See **knowmore**, Submission to Issues Paper 8, p.8.

¹⁴ See the Consultation Paper on Criminal Justice, p.82. Also see The Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report: Volume 1*, June 2014, Commonwealth of Australia, p.158-161

In our experience, significant barriers have remained for many **knowmore** clients in relation to reporting to the police¹⁵, including:

- feeling a sense of shame and fear of not being believed by the police;
- fears of being re-traumatised by the criminal justice process, particularly where they feel that they do not have the requisite resilience or support to proceed with what is often a lengthy and stressful experience;
- fears that their family, friends or community will discover that they are a survivor of child sexual abuse;
- past negative interactions with the police, particularly where a survivor attempted to report the sexual abuse to the police previously but was dismissed or where they had to convince the police to pursue the complaint, given its historical nature;
- a distrust of authority figures which may have arisen from the circumstances of the offending (as this may have involved a significant breach of trust by a person in authority over the child); and
- a distrust or aversion to the police, particularly for survivors who themselves have had a history of criminal offending.

(ii) Recognition of survivors

Further, we support the Royal Commission's approach to improving survivors' experiences with police and prosecution processes. We agree with the Royal Commission's view that the criminal justice system has faced challenges in recognising and supporting survivors while also focusing on its central role of "*protecting the public interest in identifying and punishing crimes*".¹⁶ Some **knowmore** clients have reported feeling marginalised in the criminal justice system, in that they felt that their interests were not paramount and that the prosecution process was weighted in favour of the perpetrator.¹⁷

knowmore clients have also reported difficulties in persisting with their complaint due to the stress and trauma associated with police and prosecution processes, and particularly, appearing and being examined in Court.¹⁸ These clients have highlighted a range of factors which have led to their negative experiences with the criminal justice process,¹⁹ including:

- feeling disbelieved and undermined by the police and other agencies;
- lack of adequate consultation on the progress of the matter and key decisions by the police and prosecuting agency;
- stress, uncertainty and re-traumatisation arising from an often lengthy process; and
- the lack of available and effective supports, particularly during the police investigation process.

¹⁵ See **knowmore**, Submission to Issues Paper 8, p.7-9.

¹⁶ Consultation Paper, p.76.

¹⁷ Consultation Paper, pp.75-76.

¹⁸ See **knowmore**, Submission to Issues Paper 8, pp.11-15

¹⁹ **knowmore**, Submission to Issues Paper 8, pp.11-15.

(iii) Trauma-informed approach

We recognise that the investigation and prosecution of institutional child sexual abuse cases is not straightforward and the very subject matter being addressed means that it is likely to be distressing for the survivor.²⁰

It is our submission that a key way of addressing this is to embed a trauma informed approach to working with survivors, at every level of the criminal justice system. We said the following in **knowmore's** submission to Issues Paper 8:

“knowmore’s primary recommendation is that police and prosecution agencies adopt trauma informed practices in dealing with survivors of childhood institutional sexual abuse. The adoption of trauma informed practices will be of benefit to both survivors and to police and prosecution agencies. It will improve the response to survivors of childhood sexual offences by maximising their well-being during a complex and stressful process of interacting with police and prosecution agencies. It will also enhance the ability of the criminal justice system to make offenders accountable for their criminal conduct.”²¹

Further, an increased understanding of the dynamics of sexual offending against children and the experiences of victims will assist in reducing negative inferences and misconceptions within police and prosecuting agencies.²²

A trauma informed approach is particularly important given the difficulties faced by particularly vulnerable survivors when engaging with the criminal justice system, including young children and survivors who have a disability, serious mental health issues or other chaotic life circumstances. This is likely to be relevant in a number of cases given the nexus between child sexual abuse and the development of complex trauma and mental health problems, such as depression, anxiety, substance abuse and self-harm.²³

There are also additional cultural barriers for survivors who are Aboriginal and Torres Strait Islander people, including due to mistrust in the police arising from negative intergenerational experiences, as well as a lack of cultural safety when engaging with the police and prosecuting agencies.²⁴ We support the Royal Commission taking into account these factors in developing reforms to the criminal justice system.

2.3 Other responses

(i) Restorative justice

In chapter 2 of the Consultation Paper, the Royal Commission considers the suitability of restorative justice as a criminal justice response to institutional child sexual abuse.²⁵ We

²⁰ Consultation Paper, p.82.

²¹ **knowmore**, Submission to Issues Paper 8, p.2.

²² Such as those surrounding delays in making complaints and inferences to be drawn from long delays.

²³ L Wall & A Quadara, ‘Acknowledging complexity in the impacts of sexual victimization trauma’, CFCA paper, no 16, Australian Institute of Family Studies, 2014, p.11.

²⁴ See **knowmore**, Submission to Issues Paper 8, pp.18-20.

²⁵ See the Consultation Paper, pp.78-80.

recognise that a restorative justice approach can be an important alternative to formal Court processes, particularly in relation to juvenile offending.²⁶ However, based on our experience assisting survivors of institutional child sexual abuse, in our submission a restorative justice approach is unlikely to be viewed by many survivors as a satisfactory alternative to formal prosecution, either in their matters, or generally.

The Consultation Paper has referred to three main barriers to adopting a restorative justice approach:

- the complex power dynamics and seriousness of institutional child sexual abuse offending;
- the unwillingness of survivors to seek a restorative justice outcome with the perpetrator; and
- the unwillingness and unavailability of perpetrators to participate, particularly given the frequency of delay in reporting.²⁷

We consider that these factors are likely to be significant barriers to the use of restorative justice approaches in institutional child sexual abuse matters. To them we would add the limited effectiveness of any restorative justice approach in operating to generally and publicly deter criminal conduct by others, so as to reduce the future incidence of child abuse.

We are concerned that the inherent power imbalance of the survivor vis-à-vis the perpetrator, implicit in institutional child sexual abuse, may be re-enacted through the restorative justice process.²⁸ It is difficult to see how the underlying power imbalance for survivors can be overcome or satisfactorily addressed through a restorative justice process. As the Commission notes, elements of a restorative justice approach may be present and available in the 'direct personal response' component of redress; that is, in a 'civil' justice alternative, rather than through the criminal justice system. Given that option, the seriousness of child sexual offending and the need to deter offenders and to protect vulnerable children, we believe that few survivors would seek to participate in a restorative criminal justice process as a preferred option, or would support such a process as an alternative criminal justice response.

(ii) Regulatory responses

We agree with the Royal Commission's view that it is important that regulatory responses focusing on child protection work effectively alongside police and prosecution processes, particularly where there is no criminal conviction.²⁹ We support reforms which enhance the

²⁶ J Bolitho and K Freeman, *The use and effectiveness of restorative justice in criminal justice systems following child sexual abuse or comparable harms*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 9.

²⁷ See the Consultation Paper, p. 80.

²⁸ J Bolitho and K Freeman, *The use and effectiveness of restorative justice in criminal justice systems following child sexual abuse or comparable harms*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 9, 60.

²⁹ See the Consultation Paper, p.83-84.

ability of institutions, regulatory bodies, child protection agencies and other relevant agencies to respond effectively to child sexual abuse alongside the criminal justice process.

(iii) Civil liability, redress and victims of crimes schemes

We agree with the Royal Commission that reforms to criminal justice need to be made in addition to reforms in other areas, including civil liability, redress and victims of crimes schemes. We refer to our previous submissions and recommendations in relation to these areas.³⁰

³⁰ See **knowmore** Submission to Issues Paper 8; **knowmore** Submission to Issues Paper 7: Victims of Crime, **knowmore** Submission to Issues Paper 6: Redress Scheme; **knowmore** Submission to Issues Paper 5: Civil Litigation; and **knowmore** Submission to the Consultation Paper on Redress and Civil Litigation.

3. Chapter 3: Issues in police responses

We welcome submissions on the possible principles and approaches we discuss, including on whether it is sufficient to address these issues by setting out general principles or approaches or whether we should consider making more specific recommendations – and, if we should consider making more specific recommendations, what should they be.

3.1 Overview

knowmore has heard both positive and negative stories from many survivors of their experiences of police responses. Our submission addressing proposed principles and approaches is based upon these experiences.

Consistent with what we have said above, it is imperative that any response by the police comes from a trauma-informed perspective. Police members need to be aware of the impact of childhood trauma and how to incorporate trauma-informed practices when working with survivors of childhood sexual abuse.

knowmore's submission to Issue Paper 8 provided a number of examples of failures in police and prosecution responses. Where there was a response perceived to be negative or inadequate by the survivor, this could result in a loss of faith in the police and the criminal justice system. These examples indicate a need for police to have trauma-informed training that covers both an understanding of trauma and its impacts and provides practical information about appropriate responses. It is our submission that it would be more effective to have protocols and rules so that police are directed as to what steps they need to take.

3.2 Principles

knowmore supports the following principles³¹ being included as part of such protocols:

- (i) Continuity in police staffing and victim liaison
- (ii) Regular communication with survivors
- (iii) Non-judgmental attitudes
- (iv) Assessment focussing on the credibility of the complaint, rather than simply the complainant

(i) Continuity in police staffing

As noted above, it can be very difficult for survivors to come forward to report to police. For survivors the first police officer they disclose to will be a very important person to them, who has the capacity to significantly influence the survivor's future conduct and co-operation. It therefore follows that after the initial disclosure, it becomes important for the survivor to see the same personnel continuing to help them going forward. We understand that this is potentially difficult for the police, but an effort should be made by police to keep at least one person involved throughout a matter, to show the client that there is continuity.

³¹ These principles are set out in the Consultation Paper on Criminal Justice, Chapter 3.

Perhaps more important than dealing with the same police officer, in terms of continuity, is making sure that if there are any personnel changes, the handover is effective and that there is no deficit in knowledge as a result. The survivor should be kept fully informed as to the change.

knowmore assisted one client who made a complaint to the appropriate taskforce and found his matter was moved from one police officer to the next, through three police officers, with little or no progress made by any officer. The client was unhappy with the lack of communication and limited assistance provided to him, resulting from the multiple changes in responsible officers.

Where 'hand-overs' need to occur they should be handled sensitively, with introductions and explanation and time to allow survivors to build a new relationship and trust. Obviously critical times of high stress (such as going to court), should not coincide with survivors receiving news about a key change in investigative or support personnel.

Gender issues are also important to many survivors. A number of our clients only feel comfortable working with a male or female police officer, as a result of the abuse they suffered as a child. Often their preferences are influenced by the gender of their abuser. Others may have gender preferences based on their cultural needs or other circumstances. **knowmore** has worked with clients who have clearly communicated their preference when engaging with the police. When there is a lack of continuity in police staffing or a matter is transferred to a new police officer who is of the non-preferred gender, this can cause unnecessary distress to the client and delay to the investigative process.

These matters further illustrate the need for continuity in police staffing and/or clear handover instructions.

(ii) Regular communication with survivors

Again, given the sensitive position of survivors coming forward to report their abuse, any lack of or deficiency in communication by police following a first report may result in the survivor discontinuing their complaint. Reporting by survivors is often done with concomitant fear and dread of others finding out about the abuse and of public humiliation. In the absence of regular contact with police, survivors can lose confidence and 'heart' in following through with the investigation and supporting a possible prosecution. Our work to date indicates that these issues are particularly acute for survivors of institutional abuse, many of whom will be approaching reporting with an existing and in some cases profound lack of trust in institutions generally, including the police and the law.

Often in child sexual abuse matters, the abuse may have taken place in the context of another existing relationship (such as a student and teacher, or a clergy and parishioner relationship), so that there may be an established connection between the victim and the perpetrator. Those Australians who lived in institutions as children may also have kept in contact with fellow residents, who may also be survivors or potential witnesses. A survivor will be anxious in these situations to be kept apprised about what is being done and who has been spoken to. For some survivors, if their perpetrator was, or has become, a prominent member of their

community, their need for police to keep in regular contact will be high. Where survivors are still living in the same community as that which they were abused in, then issues of their safety and welfare may require significant and supportive police contact.

One **knowmore** client's experiences demonstrate the benefit of regular communication and continuity of police contact. The client's complaint was assigned to a detective. This detective kept in regular contact with the client and her support worker throughout the investigation. The client spoke positively about the progress the detective was making finding witnesses and seeking statements. The client talked about the investigation in a way that indicated she felt she had a 'voice' in the process. Unfortunately as the investigation progressed, it was impacted by some prior proceedings. This information and its implications (it was determined the complaint could not proceed) was conveyed carefully to the client, in as much detail as was possible. While the client was understandably upset that the investigation could not progress further, she was positive about the actions of the detective and her interactions with this officer.

Another client made a complaint to police around two years ago. The investigation progressed slowly due to the complexity of the matter and uncooperative witnesses. The client instructs that there was little ongoing contact from the police. The client made many attempts at contacting the police, including sending numerous letters. Then, without having had any ongoing information about the progress of the case, the client was told that the investigation was being discontinued. This example illustrates the importance of police members undergoing trauma-informed training to ensure that they have an understanding of how trauma can impact a survivor's presentation and attempts to communicate.

It is important that police also have guidance and training about how best to communicate with a survivor, ensuring that they acknowledge through their communication the gravity of the offence and its impacts on the survivor. This is important even where they are not able to pursue a complaint any further due to insufficient evidence. **knowmore** has assisted a client who took the evidence she had to police and then received a letter in response saying that there was insufficient evidence to proceed. The police have not provided her with any further clarification or explanation, despite her requests.

(iii) **Non-judgmental attitudes**

We acknowledge that the nature of police work sometimes requires judgments and decisions to be made quickly. However, a negative or judgmental response by a police officer, particularly where a survivor first tries to report child sexual abuse, can lead to distrust of police and others involved in the investigation and prosecution processes. These reactions often arise where police have overtly not believed the survivor or where the survivor feels they have been judged summarily by the police officer, rather than the police officer carefully considering their complaint.

Many **knowmore** clients have told us about their experiences in attempting to report their abuse to police as children and not being believed. One client has told **knowmore** that he told his school teachers and a police officer about being abused as a child. The officer took the client to his mother. The alleged perpetrator was also present, and told the officer the client

was just 'acting out'. The police officer proceeded to tell the child he was lying. This has led to a lifelong distrust by that client of police and authority.

Other **knowmore** clients have reported police becoming 'disinterested' or communicating with them in such a way as to put them off going through with their complaint. They have perceived this situation arose because the officer who took their complaint did not believe them.

A number of clients have talked about running away from the home or institution where they were being abused, only to be picked up by the police who refused to believe their complaints of abuse, and returned them back to the institutions where they were being abused.

As noted above, these concerns need to be considered in the light of the pressures on police and the need to make timely decisions and judgments. However, in child sexual abuse matters, unless there is a need to make an immediate arrest for the purposes of protecting children or preventing an offender's escape, police should be directed and trained to withhold forming or expressing any judgment on the merits of the complaint at the initial stage, prior to making relevant enquiries and collecting evidence.

Particular sensitivity is required where the complaint is about a deceased perpetrator. Most survivors understand that a criminal matter cannot be prosecuted where a perpetrator is no longer alive. However, making a police report may still be important for the survivor, given the years it may have taken for them to reach the point in their lives where they felt they could approach the police. If survivors are told at the outset, as many have been, that there is no point making the report as the perpetrator is dead, this can have devastating consequences for them.

The reporting of a complaint by a survivor of child sexual abuse should be a positive experience. Police should be supportive, trauma-informed and be open to discussing with a survivor the possible outcomes of making a complaint. If the survivor raises issues, such as that they believe the perpetrator is dead, this should be noted but not automatically accepted. Once the reporting stage is completed, then the matter can be investigated.

(iv) Credibility of the complaint rather than complainant

Focusing on the credibility of the complaint rather than the complainant is an important principle. Many survivors have had negative ongoing interactions with the police and other services, including arising from circumstances of homelessness, substance abuse and mental health issues. Some survivors may have a criminal record and be known to police, which may have the effect of prejudicing the response they receive. A number of survivors have spent extensive periods of their life in prison or are making a complaint from prison. In these situations the police need to have an understanding of the impacts of childhood trauma and the link with criminal offending and ensure that they do not dismiss a complaint due only to the later criminal offending of the survivor.

In **knowmore's** submission to Issues Paper 8, we submitted that an experience of child sexual abuse is often strongly associated with a subsequent diagnosis of mental illness.³² This illness may impact the client's presentation to the police and lead to an unfair assessment of their credibility, rather than that of the details of the complaint.

3.3 Suggested protocols

knowmore supports the following suggested protocols:³³

- Police must ensure that to the extent possible, there is consistency of staff involved in any child sexual abuse matter that is the subject of a complaint and they provide regular, ongoing information to the survivor.
- Police must ensure that a police officer receiving any complaint of child sexual abuse:
 - has received adequate training in terms of working with survivors of child sexual abuse; and
 - possesses the appropriate 'trauma-informed' skills to receive the complaint from the complainant in question.
- Police must be non-judgmental at all times when they are receiving a complaint of child sexual abuse from a survivor.
- Police must ensure that no judgments or decisions are made in respect of any evidence received at the reporting stage of a child sexual abuse complaint.

3.4 Aboriginal and Torres Strait Islander Survivors

There are further protocols that should be followed when working with Aboriginal and Torres Strait Islander survivors. The barriers to reporting outlined in the Consultation Paper³⁴ are similar to experiences reported to us by Aboriginal and Torres Strait Islander clients. We support the suggestion for Aboriginal and Torres Strait Islander people to be employed as cultural advisors and liaison officers within the police and support services to both provide survivors with support to report and to advise the organisation in the provision of culturally appropriate and supportive services. This model has been adopted in the operations of our legal service and has proved essential to our service gaining the trust of so many Aboriginal and Torres Strait Islander clients.

Further, there may be additional barriers facing Aboriginal and Torres Strait Islander survivors in reporting, particularly in remote and regional communities where English is not the first language. In order for a detailed complaint to be made there should be a trained interpreter to assist, with whom the client feels comfortable. Assessing whether an interpreter is an appropriate person should take into account family relationships and cultural practices regarding who a person can speak to about these matters.

knowmore also works with Aboriginal and Torres Strait Islander clients who request to work with a non-Aboriginal or Torres Strait Islander person, due to concerns about close family

³² See **knowmore** Submission to Issues Paper 8, p.9-10

³³ See the Consultation Paper, p.125.

³⁴ See the Consultation Paper, p.118-119

relationships and confidentiality. It is important that these requests are accommodated in a confidential way to provide the person with the best opportunity to make a police complaint.

4. Chapter 4: Police responses and institutions

We welcome submissions that discuss the issues raised in Chapter 4.

In particular, we seek the views of state and territory governments, institutions and other interested parties on:

- *whether privacy and defamation laws create difficulties for institutions in communicating within the institution, or with children and parents, the broader community or the media; and possible solutions, including communication by police or child protection agencies or legislative or policy reform*
- *issues of police communication and advice, including to institutions, children and parents, the broader community and the media*
- *the adequacy and appropriateness of the NSW SOPS and the NSW JIRT Local Contact Point Protocol as procedures or protocols to guide police communication and advice*
- *the issue of blind reporting and its interaction with reporting offences discussed in section 6.3.*

4.1 Police communication and advice

(i) Need for an institutional response

Where an alleged perpetrator has recently been or is currently engaged with an institution which provides services to children, it is likely that there will be a need for the institution to respond. We agree with the Royal Commission's view that this will likely require:

- the institution disseminating relevant information to concerned third parties, including staff, parents, children and other stakeholders; and/or
- the institution conducting its own internal investigation and possibly taking disciplinary action, as well as reporting to other bodies, in accordance with internal policies, contractual arrangements and/or regulatory requirements.³⁵

The communication of information to concerned third parties will be particularly important where there are other children who may be victims or are at risk, in order to protect the best interests of the child.³⁶ However, as noted in the Consultation Paper, there are likely to be constraints on the information that can be disclosed by the police and the institution while a current police investigation is underway, as well as restrictions arising from defamation and privacy laws.³⁷

(ii) Guidance from the police and other agencies and transparent processes

Guidance from the police and other relevant agencies will be required in allowing the institution to respond effectively to a 'current' allegation of institutional child sexual abuse. As noted in the Betrayal of Trust report:

³⁵ See the Consultation Paper, pp.159-160.

³⁶ Parliament of Victoria, Family and Community Development Committee, 'Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, November 2013, p.327.

³⁷ See the Consultation Paper, p.160.

“Internal and external processes in response to an allegation of criminal child abuse may occur in parallel, which requires transparency and communication across all relevant bodies to ensure internal processes do not impede on any criminal investigation in progress.”³⁸

We support the Royal Commission’s view that procedures or protocols be developed in each jurisdiction in Australia to guide the police and institutions when responding to (current) allegations of institutional child sexual abuse.³⁹ The guidelines could cover a number of areas,⁴⁰ including:

- the assistance the institution can expect to receive from the police and other relevant agencies and the frequency of updates;
- the establishment of designated contact and liaison points;
- the information the institution can share with third parties, including the process for consultation with, and review by, the police or other relevant agencies of any communications prepared by the institution;
- where information can be disclosed, the most appropriate way to do this (e.g. having a community meeting, setting up a toll free police number or sending out letters);
- the assistance/support that can be provided to the survivor, their family, concerned parents, staff and other community members by the police and other relevant agencies; and
- whether an internal investigation by the institution can be conducted and if not, at what stage this can be commenced (where relevant), as well as the information that can be provided by the police to inform any internal risk assessment by the institution.

(iii) Adopting a trauma-informed approach and prioritising the views of the survivor

knowmore recommends that a trauma informed approach should be adopted by the police, institution and other relevant agencies when responding to (current) allegations of institutional child sexual abuse. There should be support and counselling services available for those impacted, including the survivor and their family and other children, families and staff.⁴¹ Additional sensitivity is required where the alleged perpetrator is another child.

We submit that the survivor’s interests and views should be considered carefully and taken into account in framing the appropriate response by the institution and the police. This is particularly important in relation to the level of information that is publicly disclosed by the

³⁸ Parliament of Victoria, Family and Community Development Committee, ‘Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, November 2013, p.314.

³⁹ See the Consultation Paper, pp.159-160. The Consultation Paper on Criminal Justice states that “jurisdictions, other than New South Wales do not have policies or procedures governing police response to current allegations of institutional child sexual abuse” (p.153).

⁴⁰ Note: some of these areas are drawn from the *NSW Police Force’s Standing Operating Procedures for Employment Related Child Abuse Allegations* and the *NSW JIRT Local Contact Point Protocol*.

⁴¹ Parliament of Victoria, Family and Community Development Committee, ‘Betrayal Of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, November 2013, at p.330 noted that the Victorian Inquiry found that while most organisational policies for responding to allegations of child abuse required an initial child safety assessment, very few made any reference to the provision of psychological or medical support to victims of child abuse.

police and the institution. In many cases, the survivor does not wish to be identified and is concerned about friends, family and the broader community discovering they are a victim of institutional child sexual abuse. In these cases, it is essential that the survivor's privacy is protected.

However, some survivors have told us that having reported the abuse to the police and the institution, they would have liked the institution to inform those concerned and the broader community. Some survivors have reported that they felt the institution was more concerned with preserving its reputation than creating awareness in the community. Where there are constraints on public disclosure (such as to avoid jeopardising a police investigation) appropriate support should be provided to the survivor and a sensitive approach be adopted in order to minimise a survivor feeling as if they are being silenced by the institution and/or the police.

Further, where there is a successful prosecution, the institution should consider any request from the survivor(s) to see 'symbolic' responses implemented, such as removal of the perpetrator's public accolades, plaques and honours.⁴² **knowmore** recommended such a 'symbolic' response in the context of redress outcomes, but considers that this need equally applies in this context.⁴³

4.2 Blind reporting to police

(i) Blind reporting by survivors

knowmore supports retaining the option of blind reporting to the police by survivors of child sexual abuse. As set out in our submission to Issues Paper 8, in our experience, some **knowmore** clients have told us that they do not wish to make a report to the police and provide their personal details, but would still like to inform the police about an alleged perpetrator anonymously in the event that they are still working with children.⁴⁴

While we recognise that the ability of the police and other relevant agencies to follow-up on anonymous reports may be limited, allowing anonymous reporting by survivors may increase the flow of information to the police in circumstances where the survivor would otherwise not make any report. Further, as set out in our submission to Issues Paper 8, some police services and other government agencies, will still accept, register and in some instances pass on anonymous reports and these reports can *"still alert agencies as to children in need of immediate protection, or identify a person as a risk to children in certain types of employment"*.⁴⁵

(ii) Blinding reporting by institutions and other services

We consider that the police should accept blind reports of allegations of institutional child sexual abuse from institutions, support services and other third parties arising from circumstances where survivors have disclosed abuse to such entities, but do not consent to a

⁴² **knowmore** Submission in Response to Issues Paper 6: Redress Schemes, p.28-29.

⁴³ **knowmore** Submission in Response to Issues Paper 6: Redress Schemes, p.28-29.

⁴⁴ **knowmore**, Submission to Issues Paper 8, p.8

⁴⁵ **knowmore** Submission to Issues Paper 8, p.8

police report being made in terms which identify them. The option of blind reporting should be subject to mandatory reporting laws which require a full report to be made to the police or other child protection agencies, including the proposed failure to report and protect laws discussed in section 5 below.

We recognise concerns that institutions (where the child sexual abuse occurred) should not be in the position to determine whether a survivor consents or does not consent to report to the police, given the inherent conflict of interest and power imbalance between the institution and the survivor.⁴⁶ However, as noted above, in our experience, some survivors do not wish to report to the police or have any involvement in a police investigation or prosecution process, particularly where the abuse occurred years or even decades earlier. We are concerned that these survivors will be discouraged from seeking assistance from support services or participating in institutional redress schemes where they are aware that their details will be passed onto the police without their consent. The decision to report institutional child sexual abuse to the police is a significant personal step and we consider that the survivor's wishes should be respected (subject to mandatory reporting laws).

We agree with the Royal Commission's approach that where mandatory reporting laws are not applicable, institutions should:

- make a report to the police and pass on relevant information and material to the police with the consent of the survivor;
- where survivors do not consent to a police report being made on their behalf by the institution:
 - encourage survivors to report the abuse to the relevant police agency themselves;
 - provide survivors with a guide on police reporting options; and
 - provide details of the allegations to the police without disclosing the survivor's identity (i.e. blind reporting).⁴⁷

Additionally, institutions should ensure survivors are appropriately supported through this process, such as referring survivors to external counselling or other support services to assist with police reporting.

knowmore supports institutions, support services and survivor advocacy groups developing guidelines for reporting to the police which, among other matters, clarify the process where mandatory reporting laws are not applicable.⁴⁸

⁴⁶ The Consultation Paper on Criminal Justice, p.169: Mr Shoebridge MLC, Greens member of the Legislative Council in the NSW Parliament, told the roundtable at the Royal Commission that *"[f]rom our perspective, it seems almost impossible that an institution that is alleged to have abused a victim can in any way assess whether or not they consent or don't genuinely consent to go to the police and indeed, in those circumstances, the accepting of blind reporting by the NSW Police, in my view, very deeply problematic."*

⁴⁷ The Consultation Paper, p.170.

⁴⁸ The Consultation Paper, p.171.

5. Chapter 6: Third party offences

5.1 Failure to report

We welcome submissions on whether there should be a criminal offence in relation to failure to report and, if so, whether it should apply to all serious criminal offences, child sexual abuse or institutional child sexual abuse?

(i) Failure to report offence targeting institutional child sexual abuse

knowmore supports a criminal offence which targets institutional child sexual abuse offences and requires those within institutions who have requisite knowledge of sexual abuse occurring within the institution to report to the police; including staff, employees, officer holders, board/committee members and volunteers.⁴⁹

In our experience, many **knowmore** clients reported making a complaint about institutional sexual abuse at the time it was occurring to staff at the institution, but it not being followed-up, investigated or referred to the police. Many **knowmore** clients have reported that as children their complaints of sexual abuse made to other staff at the institution were not taken seriously, were dismissed or were simply not believed. This enabled perpetrators to continue offending against the complainant and potentially other children at the institution and reinforced the powerlessness of the victims to stop the sexual abuse.

Many **knowmore** clients have expressed the view that the institution was more concerned about upholding its reputation than protecting children from abuse. Some **knowmore** clients have discovered years later that after making a complaint of sexual abuse to staff at the institution where the abuse was occurring, there was no report made to the police, but instead the perpetrator was simply moved to another section or location within the institution (such as another school or parish), which allowed the perpetrator continued access to children. Similar experiences are reported in Victoria's *Betrayal of Trust* report.⁵⁰

Given our clients' experiences, **knowmore** considers that a failure to report offence targeting institutional child sexual abuse will increase accountability of institutions to report child sexual abuse, will create a more robust reporting culture within institutions and will assist in the detection and prevention of institutional child sexual abuse.⁵¹ Further, criminal sanctions for failure to report institutional child sexual abuse reflect the seriousness of concealing child

⁴⁹ The Consultation Paper, pp.237-240

⁵⁰ Parliament of Victoria, Family and Community Development Committee, 'Betrayal Of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, November 2013, p.91, 94, 108-110. The Report provided that where victims reported sexual abuse as a child and were not believed "*many felt unable to raise their experience again until decades later, or sometimes never*" and "*the actions of perpetrators were very rarely reported as crimes*". It further provided that "*victims had hoped that reporting the criminal abuse to the organization would result in consequences for the perpetrator – in particular, seeing the perpetrator stood down from their position and reported to police. However, many victims told of experiences in which the organisation did not remove the alleged perpetrator from their position or report them to police, but instead moved the perpetrator to another position in a different location.*"

⁵¹ Parliament of Victoria, Family and Community Development Committee, 'Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, November 2013, p.332, 489.

sexual offences in institutions. As institutional child sexual abuse usually occurs in private with no direct witnesses save for the child victim, and in circumstances where the child may be too young to fully understand what is happening or to later report it, or may lack connections with anyone independent whom they could tell, reporting by staff, officials and volunteers is essential in detecting and preventing such offending.⁵²

Further, we consider that failure to report laws are required in addition to the existing mandatory welfare reporting systems. As noted in the *Betrayal of Trust* Report, the mandatory welfare reporting system prioritises the protection of ‘at-risk’ children, while “*criminal reporting focuses on catching, prosecuting and convicting offenders*”; both of which are critically important.⁵³ Further, the mandatory welfare reporting legislation in different jurisdictions in Australia generally does not cover all types of institutions which provide services to children.⁵⁴

(ii) Broader failure to report offences

We do not consider that the failure to report offence should extend to all serious criminal offences. It should not be as broad as section 316 of the *Crimes Act 1900 NSW*. The NSW Law Reform Commission reviewed s.316 of the *Crimes Act 1900 NSW* in 1999 and concluded that:

*The Commission disapproves of substituting a legal duty which is enforced by a criminal sanction for a moral one unless there are overall substantial benefits to society in doing so. No such overall benefits have been demonstrated in relation to s 316(1). The policy behind its introduction was to encourage people to report information about serious offences to the police, but the Commission is not convinced that the section has in practice fulfilled that policy function. The Commission’s view is that, in so far as the section may partially do so, its benefits are greatly outweighed by the difficulties in its application and by the abuses committed by the police in enforcing it.*⁵⁵

As noted in the Consultation Paper, a failure to report offence applying to all serious criminal offences does not take into account the complex circumstances surrounding child sexual offending and makes it difficult to specifically craft provisions to cover circumstances where criminal sanctions should not apply in relation to the non-reporting of child sexual abuse (such as where a reasonable excuse is present).⁵⁶ As highlighted in the Consultation Paper, in theory, without setting out clear legislative defences and exceptions, it could apply to “*victim themselves and to family members of the victim*”, as well as “*to other children who know of the abuse, at least once they are old enough to be criminally liable*”.⁵⁷ We share concerns highlighted in the Consultation Paper that such a broad offence may criminalize conduct that

⁵² Parliament of Victoria, Family and Community Development Committee, ‘Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, November 2013, p.478.

⁵³ Parliament of Victoria, Family and Community Development Committee, ‘Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, November 2013, p.486, 497.

⁵⁴ See Mathews, B, 2014, ‘Mandatory reporting laws for child sexual abuse in Australia: A legislative history’, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, pp.13-17.

⁵⁵ NSW Law Reform Commission, Report 93: Review of section 316 of the Crimes Act 1900 (NSW), December 1999, p.37.

⁵⁶ The Consultation Paper, p.236.

⁵⁷ The Consultation Paper, p.236.

*“society would not necessarily condemn a failure to report”.*⁵⁸ Further, we agree that a broad offence may detract from the primary purpose of a criminal offence of failure to report, being to protect children from child sexual abuse occurring in an institutional context, through encouraging the timely reporting of offences.

Consideration should be given to recommending that any failure to report offence could apply to any adult who fails to report child sexual abuse, regardless of whether it is institutional or not. This broader offence has been introduced by Victoria under section 327 of the *Crimes Act 1958 (Vic)*. It has a ‘reasonable excuse’ defence. ‘Reasonable excuse’ includes failure to report due fear of safety of any person or where a person believes that someone else has made the report. Criminal liability also does not apply where a victim who is 16 years or above requests that the information not be disclosed (unless the victim has an intellectual disability), where the information is privileged or a confidential communication, or where it has come from the public domain.

In principle, given the seriousness of child sexual abuse and the importance of safeguarding the best interests of the child, no distinction should be made between institutional and non-institutional child sexual offending and the duty to report. However, there may be some could be unintended consequences of broadening the application of the offence; for example, could it criminalize non-reporting by women experiencing family violence and other vulnerable groups (in circumstances where the fear of safety exception may not apply)?

Any such provision would only be effective in shifting reporting culture where there are significant awareness raising campaigns in the community.

5.2 Details of a targeted failure to report offence

We welcome submissions on the details of a more targeted reporting offence, including the age from which a victim’s wish that the offence not be reported should be respected, the standard of knowledge that should apply and any necessary exceptions or defences that should apply.

We submit that criminal sanctions should not apply to institutional staff or volunteers where an adult survivor of institutional child sexual abuse does not wish for their complaint to be referred to the police. We consider that while survivors should be encouraged and supported to make police reports, we recognise that this is a significant personal decision and the views of adult survivors should be respected (subject to any mandatory reporting obligations for children currently at risk).⁵⁹

As noted in section 4.2 above, in our experience, some **knowmore** clients do not wish to participate in any police investigative process, particularly where the sexual abuse occurred years or even decades earlier. As noted above, we are concerned that if criminal sanctions apply for failure to report regardless of the age or views of survivors, some survivors may be discouraged from making a complaint to the institution or participating in an institutional

⁵⁸ The Consultation Paper, p.236

⁵⁹ See Mathews, B, 2014, ‘Mandatory reporting laws for child sexual abuse in Australia: A legislative history’, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, pp.13-17.

redress scheme where they are aware that their personal details will be disclosed to the police by the institution without their specific consent.

We consider that the appropriate age of the survivor to decide whether to report to the police without criminal sanctions applying to staff or volunteers for failure to report should be 18 and above. This is consistent with the Royal Commission's definition of a child under its Letters Patent⁶⁰ and is in accordance with the Convention on the Rights of the Child.⁶¹ There is complexity in determining the appropriate age in accordance with legislative definitions of 'child' and 'young person' under child protection legislation as the age varies between jurisdictions.⁶² Similarly, the age of consent for sexual relations under criminal legislation and for various child sexual abuse offences varies across jurisdictions.⁶³ The upper-age under these legislative regimes is 'aged under 18 years'. We submit that having a consistent age of 18 and above nationally reduces complexity and makes compliance easier for institutions, particularly for those that operate nationally.

The provision should include a defence based on 'reasonable excuse', such as circumstances where the employee/official was informed that a report had already been made to the police by the institution or appropriate representative. It may be helpful to include some examples in the drafting, and not to define the circumstances which might constitute a 'reasonable excuse' exhaustively, so as to allow for all circumstances to be considered.

5.3 Whistle-blower protections

We welcome submissions as to whether a criminal offence designed to protect whistleblowers who disclose institutional child sexual abuse from detrimental action would encourage reporting.

We note the *Betrayal of Trust* report⁶⁴ (p.505) did not recommend criminal legislation enshrining the protection of whistle-blowers, on the basis that failure to report and protect laws (as framed in that report) would be sufficient.

We support legislation protecting whistle-blowers who disclose institutional child sexual abuse from detrimental action, such as dismissal from their employment or other reprisals, including harassment. In our experience, some **knowmore** clients who work at institutions have expressed reluctance to disclose child sexual abuse occurring at the institution or to provide information, due to their fear of dismissal or reprisals in their workplace. We consider that robust legislative protections for whistleblowers are important in encouraging staff at institutions to report institutional child sexual abuse occurring, and to co-operate in its

⁶⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, Letters Patent, define child "within the meaning of the Convention on the Rights of the Child of 20 November 1989".

⁶¹ The Convention on the Rights of the Child, 20 November 1989, Article 1 states "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

⁶² See Mathews, B, 2014, 'Mandatory reporting laws for child sexual abuse in Australia: A legislative history', Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, pp.13-17.

⁶³ See H Boxall and G Fuller, *Brief review of contemporary sexual offence and child sexual abuse legislation in Australia: 2015 update*, Australian Institute of Criminology, 2015, pp.3-17.

⁶⁴ At p.505.

investigation. There should be a criminal offence based on reprisal action, supported by a capacity to seek injunctive relief and compensation to prevent and/or help to redress adverse consequences arising in relation to a whistleblower's employment. There are a number of 'models' in other legislation.⁶⁵

5.4 Failure to protect

We welcome submissions on an offence for failure to protect.

knowmore supports the introduction of failure to protect offences similar to the Victorian criminal offence under section 49C of the *Crimes Act 1958* (Vic).⁶⁶ In summary, section 49C of the *Crimes Act 1958* (Vic) applies "where there is a substantial risk that a child under the age of 16 under the care, supervision or authority of a relevant organisation will become a victim of a sexual offence committed by an adult associated with that organisation."⁶⁷ Criminal liability applies where "a person in a position of authority in the organisation knows of the risk of abuse" and has "the power or responsibility to reduce or remove the risk, but negligently fail to do so."⁶⁸ This requires a "great falling short of the standard of care that a reasonable person would exercise in the circumstances".⁶⁹ The failure to protect offence applies to a wide range of institutions, including schools, churches, religious bodies, out-of-home care, government departments and agencies, sporting groups, youth organisations and charities.⁷⁰

As noted above in section 5.1, **knowmore** clients have reported systemic failures of institutions to respond appropriately to complaints of institutional child sexual abuse, including not being believed, complaints not being investigated or referred to the police and the perpetrator being moved around the organisation. Further, some **knowmore** clients have

⁶⁵ Such as the *Public Disclosures Act (1994)* (NSW) cited in the Consultation Paper, at p. 240, and also the protections afforded to witnesses in the *Royal Commissions Act (1902)* (Cth)

⁶⁶ Section 49C(2) of the *Crimes Act 1958* (VIC) states that: "A person who— (a) by reason of the position he or she occupies within a relevant organisation, has the power or responsibility to reduce or remove a substantial risk that a relevant child will become the victim of a sexual offence committed by a person of or over the age of 18 years who is associated with the relevant organisation; and (b) knows that there is a substantial risk that that person will commit a sexual offence against a relevant child— must not negligently fail to reduce or remove that risk. Section 49C(3) provides that "for the purposes of subsection (2), a person negligently fails to reduce or remove a risk if that failure involves a great falling short of the standard of care that a reasonable person would exercise in the circumstances". Section 49C(1) defines a 'relevant child' as "a child (whether identifiable or not) under the age of 16 years who is, or may come, under the care, supervision or authority of a relevant organisation". Under Section 49C(1) "a person associated with an organisation includes but is not limited to a person who is an officer, office holder, employee, manager, owner, volunteer, contractor or agent of the organisation but does not include a person solely because the person receives services from the organisation". Under section 49C(1), 'relevant organisation' is broadly defined to mean "an organisation that exercises care, supervision or authority over children, whether as part of its primary functions or otherwise" and includes (but is not limited to) schools, churches, religious bodies, out-of-home care, government departments and agencies, sporting groups, youth organisations and charities.

⁶⁷ See Department of Justice and Regulation, *Betrayal of Trust: Factsheet, Failure to Protect: a new criminal offence to protect children from sexual abuse*, 2015, p 1.

⁶⁸ See Department of Justice and Regulation, *Betrayal of Trust: Factsheet, Failure to Protect: a new criminal offence to protect children from sexual abuse*, 2015, p 1.

⁶⁹ Section 49C(3) of the *Crimes Act 1958* (VIC).

⁷⁰ Section 49C(1) of the *Crimes Act 1958* (VIC).

reported discovering years later that the institution was aware of the perpetrator's prior sexual offending against children, but employed them regardless.

knowmore supports the introduction of a failure to protect offence in addition to the failure to report offence for institutional child sexual abuse set out in section 5.1 above. We agree with the Royal Commission's view that a "*duty to protect is primarily designed to prevent child sexual abuse*" from occurring prior to it being known whether an offence has been committed, where as a duty to report offence focuses on bringing allegations to the attention of the police.⁷¹ We submit that a failure to protect law will encourage organisations to implement effective systems to prevent and respond to allegations of institutional child sexual abuse. Further, it places additional responsibility on staff with leadership roles to foster an effective organisational culture in this area.⁷²

We agree with the Royal Commission's view that the failure to protect offence should not be so onerous that it hinders or prevents institutions from continuing programs and services for children.⁷³ We submit that the failure to protect offence should be specifically targeted to apply to people in positions of authority at institutions who negligently fail to respond to substantial risks of institutional child sexual abuse [similar to section 49C of the *Crimes Act 1958* (Vic)].

5.5 Institutional criminal offences

We welcome submissions on possible institutional offences, including whether institutional offences are necessary in addition to offences for failure to protect, if so what conduct or omissions, and whose conduct or omissions, should constitute the offence(s) and whether civil liability of the kind we recommend in the Redress and civil litigation report, if implemented, would be sufficient.

knowmore recognises that an organisational culture can foster and facilitate the occurrence of institutional child sexual abuse. For example, in Case Study 23 into the Knox Grammar School, the Royal Commission found that "*during the headmastership of Dr Paterson at Knox his attitude and the culture he fostered at the school were dismissive of allegations of child sexual abuse*"⁷⁴ and that hearing raised systemic issues concerning how environments facilitate or encourage offending.⁷⁵

Some **knowmore** clients have reported that the culture of the institution where they lived/attended implicitly sanctioned the occurrence of child sexual abuse. Some of these clients consider that the relevant organisation as a whole should be held criminally responsible, in addition to perpetrators and/or any one particular employee or manager at the organisation (who may be captured by a failure to report offence). For example, some **knowmore** clients consider that the institution's silence, despite widespread awareness on

⁷¹ The Consultation Paper, p.245.

⁷² See Department of Justice and Regulation, *Betrayal of Trust: Factsheet, Failure to Protect: a new criminal offence to protect children from sexual abuse*, 2015, p 310.

⁷³ The Consultation Paper on Criminal Justice, p.246.

⁷⁴ Royal Commission Report to Case Study 23: Knox Grammar School, p.69.

⁷⁵ Royal Commission Report to Case Study 23: Knox Grammar School, p.74.

the part of its officials of child sexual abuse occurring, created an environment and organisational culture that facilitated the ongoing sexual abuse of children at that institution. Other **knowmore** clients have reported that the organisation created an environment of fear and punishment which prevented children from speaking out about abuse. As noted in the Betrayal of Trust report, for “*victims in institutional settings, the criminal child abuse was part of the culture*”.⁷⁶

As set out in our previous submissions, **knowmore** strongly supports “*all Australian jurisdictions adopting legislation imposing a clear duty of care on institutions to prevent child sexual abuse and conferring on a survivor a private cause of action [in civil law] to recover damages from an institution that breaches the duty*”.⁷⁷ **knowmore** supports the Royal Commission’s recommendations concerning the imposition on civil liability on institutions, as set out in Chapter 15 of the *Redress and Civil Litigation* report.⁷⁸

We recognise that, in principle, there is value in imposing criminal liability on institutions and not only individuals, in addition to imposing civil liability on institutions. As noted in the report on ‘Sentencing for Child Sexual Abuse in Institutional Contexts’ (‘the Sentencing Research’):

*“It is important that the criminal law adjust to enable it to respond effectively to the future harms that will inevitably occur. Although the criminal law may be sparingly used in the future, due to the difficulties of proof and the conceptual problems that inhere in organisational responsibility, the proposed offences, and sanctions, should be valuable because of the moral statement they will make about what the community considers to be right and wrong. The criminal law plays a vital symbolic role in marking the boundaries of acceptable and unacceptable behaviour, whether it be of individuals or organisations.”*⁷⁹

As noted in the Consultation Paper and the Sentencing Research, the imposition of criminal penalties on organisations carries with it significant reputational consequences for institutions and as such may encourage institutions to have appropriate protocols and procedures in place.⁸⁰ Further, criminal penalties recognise the “*collective dimensions of organisational or institutional action*” and “*collective negligence*” in failing to meet the requisite standard of care in preventing institutional child sexual abuse.⁸¹

⁷⁶ Parliament of Victoria, Family and Community Development Committee, ‘Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, November 2013, p.92.

⁷⁷ **knowmore** submission to the Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper on Redress and Civil Litigation, Recommendation 15, p. 21.

⁷⁸ See Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and civil litigation* report, 2015, Recommendations 89 to 93, p 495.

⁷⁹ A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, pp.219-220. Also see the Consultation Paper, p.251.

⁸⁰ Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p.246-247. Also see the Consultation Paper, p.250.

⁸¹ Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p.222. Also see the Consultation Paper, pp.249-250.

However, this must be balanced against the complexity in framing a criminal offence of application to institutions and identifying the appropriate criminal sanctions. As highlighted in the Sentencing Research, *“the criminal law has encountered significant difficulties in applying principles of corporate criminal responsibility in other contexts, such as occupational health and safety and environmental law, let alone in relation to [child sexual abuse].”*⁸² The complex structures of some institutions, particularly some religious organisations, underline these difficulties in the present context. We also note the issues set out in the Consultation Paper in relation to imposing criminal liability on organisations, in particular:

- in circumstances where the institutional child sexual abuse comes to light years later, the organisational culture and management may have changed significantly and the imposition of criminal liability may no longer be appropriate;
- there is complexity in determining which official’s conduct should be considered when assessing institutional responsibility; and
- the ‘organisation culture’ may be divided with some staff (that is, whistle-blowers) responding adequately, with other staff failing to act.

In our view, given the complexity of imposing criminal liability on organisations, we consider that the adoption of failure to report and protect laws above, coupled with implementation of the Royal Commission’s recommendations on civil liability, is likely to be sufficient in driving cultural change to prevent child sexual abuse and in enhancing institutional accountability. However, imposing institutional criminal liability would, as noted above, be a powerful symbolic statement and prosecutions may be appropriate in some cases, where institutional responsibility is clear (such as where there has been a prolonged and high-level organisational covering-up of child sexual abuse). Accordingly, we agree that failure to protect offences attaching liability to both the institution and relevant individuals/officers would be an appropriate reform.

⁸² Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p.219.

6. Evidence of victims and survivors

Chapter 9 of the Consultation paper commences with the Commission noting that “[M]any survivors have told us how daunting they found the criminal justice system.”⁸³ Our experience in assisting survivors has produced a similar broad sense of concern held by survivors who have participated in criminal proceedings as complainants. There are a number of issues we wish to address around some of the specific challenges and difficulties our client group has reported, and which relate to the prosecution stage of proceedings (i.e. after charges have been laid). Although raised in this part of our submission for convenience, some of these issues also relate to witness support arrangements and prosecution decisions and responses, addressed in Chapter 7 of the Consultation paper. We have also previously raised a number of matters in our submission responding to the Commission’s Issues paper No.8, which addressed prosecution responses.⁸⁴ We will not again raise those issues here, but we rely also on that earlier relevant commentary and the recommendations contained in that submission.

Many of our clients who have being involved in the criminal justice system as complainants have reported to us that they found the system to be lacking in support, particularly in being able to obtain ‘independent’ support; that is, assistance from a source that was directed to supporting the survivor and helping their interests, and was not aligned in some form with another agency (like the relevant Office of the Director of Public Prosecutions – ‘the ODPP’) or its interests.

As we have noted before, many clients have informed us of feeling that they were left with unresolved concerns around procedural issues and prosecution decisions, or that they received no or little effective support during their participation in the prosecution.

At its highest, this feeling is expressed by some clients as a sense that the trial process is inherently unfair as the victim is not independently represented. This lack of personal representation is (understandably) contrasted with the position of the accused, who is entitled as of right to representation and also, if eligible, to legal aid assistance. Some clients have expressed to us the view that the victim in a criminal case should be entitled to also have their own legal representation, which should be similarly funded by the State. In discussing why such a support would be viewed as helpful, survivors have mentioned issues such as:

- How legal representation would ‘balance the scales’ in that there would be a representative to act in their interests, in addition to the prosecutor representing the State.
- How this right exists in some other systems.⁸⁵
- Why the accused can have input into jury selection but the victim cannot.

⁸³ Consultation paper, p.346.

⁸⁴ See **knowmore**, Submission to Issues Paper 8, at pp.15 – 21.

⁸⁵ For example, some European jurisdictions (such as Norway) allow for victims of violent crimes, including sexual offences, to be legally assisted during the criminal trial. There is a useful discussion around some of the European models in the Victorian Law Reform Commission *The role of Victims in the Criminal Trial Process*, Consultation Paper, July 2015, at p.101.

- Having someone who can advocate for them in respect of decisions the prosecution may make about discontinuing charges, leading or not leading certain evidence, and so on.
- How a representative might be able to protect the victim from unfair or offensive cross-examination during the trial.
- Assisting the victim to adequately detail the impact of the crime upon them, for the purposes of sentencing, or in seeking restitution.

Obviously any general legal right of representation for the victim in a criminal trial would be a fundamental change to accommodate within our existing adversarial system, with major impacts upon trial procedure and the costs and length of proceedings.

However, we note that some of the European models provide for a more limited role for a victim's lawyer, generally through providing support and assistance, including through the provision of information to the victim about the trial process.

A common issue reported by some of our clients who have appeared in proceedings as complainants was the difficulty in being able to participate meaningfully in prosecution decisions or even discussions around procedural issues (such as raising procedural questions; for example, about whether certain evidence could be given or not).

We have raised before concerns expressed by our clients about prosecutorial decisions to discontinue or 'downgrade' charges, and the importance of effective consultation with survivors impacted by those decisions. As the Consultation paper notes, such decisions are often (understandably) the cause of significant distress for survivors. Many survivors have told us that they have experienced difficulty in understanding the process and reasons for such prosecutorial decisions; in that they were simply unable to understand, particularly in a situation that was very stressful for them, the information being provided to them by prosecution staff and the reasons for the decision. Some have spoken of feeling that they had no 'voice' to raise their concerns, or that they simply did not know what questions to ask as they could not understand the legal issues. Moreover, many clients have expressed frustration at having no effective means to review any such decision⁸⁶ or even anywhere to go to seek some independent advice about the prosecution decision, or to help them to understand it.

These concerns have been raised notwithstanding the commendable information and assistance provided to complainants by the dedicated Witness Assistance Services ('WAS'). While many clients have been very grateful for the assistance provided to them by WAS officers, some survivors have commented that much of the information available from the WAS was general, rather than being specific to the circumstances of their case and their questions. There was also concern that WAS officers are not independent of the ODPP (where the service is part of the ODPP), and would not therefore 'take the side' of the complainant, and/or that they do not have the legal skills to help the complainant respond effectively to

⁸⁶ In our submission to Issues paper 8 **knowmore** supported the establishment of transparent and effective review processes for such decisions, which also allowed for participation by the victim

raise their concerns about a prosecutor's intended course of action; e.g., in discontinuing charges.

Additionally, as the Royal Commission has noted in its Consultation paper, there are workload and resourcing pressures facing some WAS officers and services. The Commission also noted the critical importance of having culturally safe witness support services for Aboriginal and Torres Strait Islander victims of crime.

In our view many survivors would benefit from having access to a source of independent legal assistance to address particular issues that arise during the prosecution process. In addition to the issues and concerns noted above, there are other issues that arise from time to time where survivors/complainants might benefit from having access to independent legal support. These include:

- The preparation of victim impact statements, so as to ensure that appropriate information about the harm caused to the victim by the offences is put before the court (reducing the difficulties that arise in some jurisdictions surrounding the use of such statements, where they contain inadmissible material).
- Issues around access to confidential communications, such as the victim's counselling records or child protection records, where production of that material is sought in a criminal trial. Most States and Territories have legislated to provide some protection for 'confidential communications', (such as sexual assault counselling communications), where production of that material is sought by the accused.

In looking at this issue, we note particularly the submission dated 15 June 2015 from the Law Society of New South Wales responding to the Commission's Issues Paper 8.⁸⁷ The Society's submission was specifically directed towards widespread failures to comply with the sexual assault communications privilege provisions in the *Criminal Procedure Act 1986 (NSW)* in respect of subpoenas. The Law Society stated:

As a result, privileged material routinely comes before the parties and the Court without the consent of the alleged victim/protected confider.⁸⁸

Further, the Society said:

... the Committee's concern is that the alleged victim/protected confider has standing to protect their privilege or provide their consent if so minded, but their right to do so is often circumvented by the failure of the parties to comply with the sexual assault communications privilege provisions.⁸⁹

⁸⁷ Published by the Royal Commission.

⁸⁸ Law Society of New South Wales submission, Issues Paper 8, at p.1.

⁸⁹ Law Society of New South Wales submission, Issues Paper 8, at p.2.

The Society suggested a number of possible reforms to address the problem.

It would seem to us, from our experience in working with survivors, that few would be able to adequately understand and pursue their rights to seek to protect the privacy of their sexual assault counselling records without specialist legal advice and, if necessary, representation before the Court to argue the issues and their interest. In New South Wales, the Legal Aid Commission of New South Wales has established the Sexual Assault Communications Privilege Service (SACPS). It is a victims' legal service that acts to "*... help protect the privacy of counselling notes and other confidential therapeutic records in criminal proceedings.*"⁹⁰ Other than through the SACPS in New South Wales, survivors involved in criminal trials around Australia have few options (save for the unlikely step of engaging private lawyers at their own expense) to obtain free, independent and expert assistance to help them protect what are usually records of the utmost personal and private nature.

The provision of independent legal assistance to survivor witnesses in these matters would also be likely to assist the Court; through the resolution of issues between the parties; and in ensuring the Court hears from the victim, through a lawyer experienced in the application of the specific provisions.⁹¹

- There may be other specific issues that arise from time to time in trials where access to independent legal advice would assist victims appearing as witnesses, and the Court. Possible issues might include:
 - Where the evidence of a victim raises the possibility of self-incrimination in relation to criminal offences.
 - Where an issue arises as to the copying and publication of exhibits.⁹²

To conclude, from the insights we have gained from our clients around the challenges and issues they face as complainants in prosecution proceedings, we are of the view that there would be benefits for survivors of child abuse appearing in criminal trials, in providing them with access to independent legal advice and, where needed for specific issues, legal representation. We believe that provision of such assistance would be viewed favourably by survivors who would appreciate the additional support. This in turn may encourage more victims of sexual offences to participate in a criminal justice response, and to maintain their engagement.

There are a number of potential options as to how that assistance might be provided by appropriately skilled lawyers, including through:

⁹⁰ Legal Aid New South Wales Submission to Issues Paper 8, at p.1 (published by the Royal Commission).

⁹¹ This point has added significance in light of the observations of the Law Society of New South Wales about widespread non-compliance.

⁹² For example, under the provisions of Chapter 12 of the *Criminal Practice Rules 1999* (Qld).

- a new, court-based purpose specific role - as a Victims Advocacy service, providing support and legal information and advice to victims, making referrals as necessary; or
- additional staff with appropriate legal qualifications and skills, attached to an existing entity that provides other legal services, or to an entity that provides other services for victims of sexual abuse;⁹³ or
- any ongoing specialist legal service established to provide support to survivors of institutional child sexual abuse around other legal needs, such as accessing redress.

⁹³ Care would need to be taken in ensuring such a model or structure was one that was trusted by survivors. To generalise, in our experience many survivors have an acute sensitivity around issues of apprehended conflicts of interest on the part of services they approach for support.

7. Chapter 12: Sentencing

We welcome submissions on:

- *Whether there should be a presumption in favour of cumulative sentencing for child sexual abuse offences, similar to the approach of the provisions in Victoria;*
- *Whether child sexual abuse offences should be sentenced in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, as now occurs in England and Wales.*

Through its work with survivors, **knowmore** receives regular feedback from its clients regarding their views on the sentencing of those convicted of child sexual abuse offences. The general response is a view that sentences given to offenders are too lenient. Understandably, many survivors endure life-long consequences as a result of the trauma of their childhood abuse, and see the duration of sentences in that context.

We have assisted many survivors in prison who are also currently serving custodial sentences for offences other than child sex crimes. Among this group, **knowmore** particularly hears that they believe that there is a significant disparity between sentences imposed for other offences, such as drug and property offences, and what they consider as more serious crimes, being those involving child sexual abuse.

The common view of survivors is that sentences for child sexual offences should be more severe, based upon the increasing societal understanding of the ongoing impact of the abuse on the survivor.

Survivors also report feeling let down after the stress and often trauma of the trial process, when they find that the offender has received what they consider to be a lenient sentence. This is especially difficult for survivors when actual imprisonment is not imposed, particularly so when the advanced age or ill-health of the accused is a factor in a non-custodial sentence being imposed.

Survivors also report being disappointed by concurrent sentencing decisions. Survivors are living with the impact of each offence against them and feel that this reality should be reflected in the prison time served by the perpetrator. As the Commission will understand, for many reasons it is also often the case that the charges constituting the basis for the eventual trial and/or plea are not reflective of all of the incidents of abuse that the survivor(s) suffered, due to difficulties with particularising offences and obtaining evidence. This means that survivors can feel that what the perpetrator is being sentenced for does not reflect the full extent of their criminality and the survivors' experience of abuse. Concurrent sentencing can further exacerbate this feeling that the perpetrator is not being held fully accountable for his or her crimes.

We note the Victorian provisions altering the presumption in favour of concurrent sentencing to one of cumulative sentences, applies only in cases involving “serious offenders”, including “serious sexual offenders”.⁹⁴

This is a difficult area, and as it is beyond our current practicing experience we have no particular insights into how the current laws are operating in Victoria and any impact upon the length of sentences imposed for child sexual offending. A complete shift to a presumption in favour of concurrent sentencing may have unforeseen consequences; such as a reduction in the head sentences imposed for some specific offences, in the context of multiple counts, in order to assist in arriving at a total sentence that is appropriate and not crushing or subject to correction upon appeal. Additionally, given the nature of childhood sexual abuse many offenders commit hundreds of crimes, often against a number of victims over time. Multiple charges are often preferred and sentencing in such cases will be complicated by a change in the current presumption. Prosecutors may be inclined to limit the number of charges presented in indictments in recognition of the cumulative impact of the sentences that will result; an outcome that obviously would disappoint survivors, for the reasons set out above.

Accordingly, if any change to the presumption in favour of cumulative instead of concurrent sentencing is recommended by the Commission, **knowmore** would suggest some limitation of its application, consistent with the Victorian approach of limiting the application of the presumption to “serious sexual offenders.” We would also suggest that any amending legislation impacting on the presumption be drafted in a way that ensures the sentencing discretion of the court remains, so that appropriate total sentences can be arrived at in cases involving multiple counts.

knowmore supports the recommendation that child sexual abuse offenders should be sentenced in accordance with the sentencing standards (as to maximum penalty, non-parole periods and so on), existing at the time of sentencing, rather than at the time of the offending. The current approach can result in injustice for survivors (and the dissatisfaction expressed above) in historical cases, where sentences that are regarded as now being out of step with community and survivor expectations result. From the survivor’s perspective, the perpetrator has not been held to account at the time of the abuse and has continued to live their life without impact, while the survivor has been dealing with the ongoing impact of the abuse for many years.

In looking at reform options, we support the approach adopted in England and Wales.

Finally, **knowmore** works with survivors from across Australia. We have addressed issues of inconsistency arising across jurisdictions at length in our earlier submissions regarding redress, civil litigation and victims of crime statutory schemes. For similar reasons to those set out in our earlier submissions, we support a nationally consistent approach to sentencing, to provide survivors with confidence that child sexual abuse offenders are treated consistently and appropriately for their crimes, irrespective of the jurisdiction where, and the time, they offended.

⁹⁴ Part 2A of the *Sentencing Act 1991* (Vic)