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23 May 2014

Dear Mr Drum, Mr O'Brien and Mr O'Brien,

Crimes Amendment (Protection of Children) Bill 2014

We are writing as a group of non-governmental organisations including peak bodies and statewide organisations that work in the area of family violence.

Our letter concerns the Crimes Amendment (Protection of Children) Bill 2014 ('the Bill'), introduced into Parliament on 26 March 2014, as part of the Government's response to the recommendations of the Parliament of Victoria Family and Development Committee Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations (the *Betrayal of Trust* Report).

We strongly support the vast majority of the Report's recommendations to strengthen the accountability of institutions for child abuse, and accordingly we welcome Clause 3 of the Bill which criminalises a failure by a person in authority to protect a child from a sexual offence.

However, we urge you to amend Clause 4 of the Bill. Clause 4 introduces a new criminal offence:

> *Failure to disclose a sexual offence committed against a child under the age of 16*.
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> *...a person of or over the age of 18 years (whether in Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a member of the police force of Victoria as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so.*

The offence is similar to a proposal from the Victorian Government in November 2010 to introduce a 'failure to protect' law which was intended to criminalise the behaviour of non-offending family members in child abuse cases. Many of our organisations jointly responded to the Department of Justice *Discussion Paper – 'Failure to Protect Laws'* in September 2011, and also wrote to you on 24 May 2012, and on 18 December 2013 following the release of the *Betrayal of Trust* recommendations, outlining why we oppose such a measure.

We do not support the introduction of Clause 4 in its present form, because we believe that it may inadvertently cause more harm to children suffering sexual abuse, and is potentially detrimental to women experiencing family violence.

The offence may cause more harm to children

In helping children to recover from abuse, it is widely accepted best practice that services should be resourced to work to support the non-abusing parent and assist them to enhance their child's safety. However, if the mother is incarcerated for 'failure to disclose' the abuse (see discussion below), the child may instead be left in the care of the State, or even in some instances with the perpetrator of the abuse.

In 2012, the report of the Protecting Victoria's Vulnerable Children Inquiry (the Cummins Report) found that the then proposed 'failure to protect' law could undermine the growing recognition of the complex dynamics of family violence and could be inconsistent with the recent reforms to the family violence system. Importantly, the Cummins Report suggested that reforms addressing offender accountability 'may be waylaid by placing responsibility for abusive behavior on a non-abusive parent.'[1]

The Inquiry identified a range of risks and adverse consequences that could arise if such legislation was introduced. In particular, the Cummins Report expressed serious concerns

[1] Report of the Protecting Victoria's Vulnerable Children Inquiry, 360.

that the law 'might have a dampening effect on help-seeking behaviour and the reporting of abuse'.[2]

It is therefore likely that Clause 4 will actually deter the reporting of abuse to child protection authorities, and so have the unintended consequences of driving the issue of child sexual abuse further underground and placing children at greater risk.

The offence will capture mothers who are victims of family violence

In its current form, the offence is so broad that it criminalises the behaviour of any person in the community who has a belief that a sexual offence has been committed against a child. In the context of a family violence situation, a mother who is a victim of family violence may be charged with this offence, on the basis that she knew of the sexual abuse and failed to disclose the information to police as soon as practicable.

Research clearly demonstrates the co-occurrence of child abuse with family violence. In Victoria, family violence is a factor in over half of substantiated child protection cases. Of the 15 child death cases reviewed in the 2013 Annual Report of Inquiries into the Deaths of Children known to Child Protection, family violence was a factor in 12 cases (80%). Given the co-occurrence of family violence and child abuse, there is therefore a high likelihood that the offence will capture mothers who are themselves victims.

Failure to protect laws do not adequately recognise the dynamics and complexities of family violence. In particular, they fail to take account of the powerful barriers to a woman leaving an abusive relationship or reporting the abuse against her and her children, including a fear of retribution.[3] There is evidence that women face greater scrutiny and higher expectations of their parenting than men.[4] The discriminatory impact is likely to be greater for women with disabilities, Aboriginal women and women from CALD communities, as they face additional barriers to disclosing abuse.

The Bill provides a defence if a person fears on 'reasonable grounds' for the safety of any person and the failure to disclose the information to police is a 'reasonable response' in the circumstances. However, this defence will not be adequate to protect vulnerable mothers, particularly given the requirement of 'reasonableness' in relation to their fear and response. 'Reasonableness' is likely to be interpreted in a way that imposes unrealistic or unsafe expectations on such women.

Case law in other jurisdictions shows that failure to protect laws do not adequately recognise the dynamics of family violence, and are almost exclusively used against women who are themselves victims.[5] Although the following United States case studies concern failure to

[2] Ibid.
[3] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, New York, 2007).
[4] Jeanne Fugate, 'Who's Failing Whom? A Critical Look at Failure to Protect Laws' (2001) 76 *New York University Law Review* 272; Jonathan Herring, 'Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?' [2007] *Criminal Law Review* 923; Julia Tolmie, 'Criminalising Failure to Protect' (2011) *New Zealand Law Journal* December 375.
[5] Ibid.

protect laws with a broader scope than envisaged by Clause 4, we believe that similar dynamics are likely to result in Victoria if the Bill is enacted in its current form.

> CASE STUDY 1: *Campbell v State* (2000) (Wyoming)
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> Casey Campbell, the mother of a four-year-old girl, was convicted of felony child endangerment in March 2000 and sentenced to prison. She had been at work and not in a position to prevent the abuse when her partner, Floid Boyer, severely burnt her daughter causing second and third degree burns over eighteen percent of her body.
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> When Campbell returned from work, she saw that her daughter was injured, but she did not immediately seek medical attention for the child as she was afraid of her partner. Campbell testified that she had been abused by Boyer since she was 16, and that he had previously violently assaulted her with knives and guns. Campbell, on appeal, contended that her years of abuse established evidence of her belief of an imminent danger of death or great bodily harm if she refused Boyer's demands to spend the evening with him, instead of taking her daughter to the hospital. Campbell sought medical attention for the child 8 hours later. Campbell's appeal was refused and her sentence was affirmed. Boyer, however, was only convicted for a misdemeanour.

> CASE STUDY 2: *State v Williams* (1983) (New Mexico)
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> A New Mexico court convicted Jeanette Williams of child abuse for failing to protect her four-year-old daughter from her husband's abuse.
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> On appeal, Williams argued that because she was 5 months pregnant at the time, beaten by her husband and threatened by him, she could do nothing to prevent the beating of her daughter. The Appellate Court, however, affirmed the conviction and found that given the finding of repeated beatings, a reasonable inference could be drawn that the defendant's failure to remove her child from the situation, or failure to seek help at the time of the incident, was a proximate cause of the child's injuries.

While it is possible to argue that the cases above might meet the 'reasonableness' test for the defence under Clause 4 of the Bill, there are other family violence situations where the perpetrator's tactics of entrapment are more multi-faceted and subtle. It then becomes harder to explain to a court how her partner's coercive controlling tactics undermine a mother's parenting capacity, and her sense of confidence, capacity and judgment, to such an extent that even when he is not threatening her and has not used overt tactics of violence against her recently, she is still far too constrained to be able to report the abuse of her child.

By creating the willingness to prosecute non-offending parents, this provision will undermine the strong work of the Victorian government in holding family violence perpetrators accountable for the considerable harm they cause to children and women. Such work requires child protection, family services and other practitioners to make perpetrators more visible in their casework, and to emphasise community-based, civil and criminal justice system approaches that hold them accountable for their use of sexual and other forms of violence. It will create an extremely confusing message to practitioners, community services and the community, if the Victorian government fosters the willingness to prosecute family violence victims at the same time as attempting to increase its focus on perpetrators.

By creating a broad 'catch all' criminal offence that may result in charging a vulnerable victim, Clause 4 also places the onus on those victims to raise a defence in a criminal prosecution. This approach is again inconsistent with the emphasis of Victoria's family violence reforms on ensuring that the perpetrator, not the victim, bears the responsibility for the violence.

Clause 4 of the Bill contravenes Australia's National Plan of Action to Reduce Violence against Women and their Children

If Clause 4 of the Crimes Amendment (Protection of Children) Bill 2014 is not amended or removed and the Bill is passed, the Victorian Government will have directly contravened Australia's National Plan of Action to Reduce Violence against Women and their Children, to which Victoria is officially committed.

Opposition to Clause 4 of the Bill is consistent with views expressed by the research and evidence arm of the National Plan, Australia's National Research Organisation for Women's Safety (ANROWS), which was launched on 16 May. More detail is available in the attached document, 'Background re ANROWS and the Bill'.

Amendments to the offence

We believe that the better public policy approach is to create a narrow criminal offence that does not also capture vulnerable victims. The offence should be limited to a failure to disclose by a person in authority within a relevant organisation as defined in the Bill (see Clause 3). This would be consistent with Recommendation 47 of the Cummins Inquiry. Amending Clause 4 to specify that, as with Clause 3, the offence is intended to target only organisations and those in positions of authority within them, would also be consistent with the Terms of Reference of the *Betrayal of Trust* Inquiry.

Clause 4 could be redrafted as follows:

> *Failure by a person in authority to disclose a sexual offence committed against a child under the age of 16*.
>
> *...a person ~~of or over the age of 18 years (whether in Victoria or elsewhere~~) in authority in a relevant organisation who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a member of the police force of Victoria as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so.*

We seek a meeting with you at the earliest opportunity to discuss these issues further.

Yours sincerely

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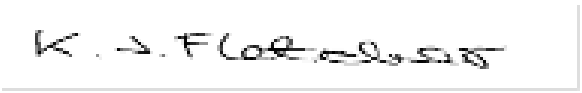

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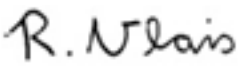

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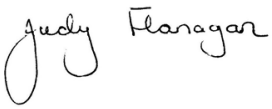

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