



Victorian Equal Opportunity
& Human Rights Commission

Response to discussion paper – ‘Failure to Protect’ laws

September 2011

Introduction

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to respond to the Department of Justice discussion paper '*Failure to protect*' laws (discussion paper).

The discussion paper sets out the Government's intention to create two separate offences for adults who fail to take action when:

- They know or believe a child who they have custody or care of, or live in the same household as, is suffering sexual abuse or abuse that may result in serious injury or death
- A child they were living in the same household as dies due to child abuse and the adult was aware of the abuse and its seriousness.

This submission considers the human rights implications of creating these two offences. This includes discussion of the Charter rights engaged, and potentially limited by the proposal.

This submission also identifies a series of unintended consequences that may flow from the enactment of failure to protect laws, where these may have a discriminatory effect and/or are contrary to existing government policy.

Finally, we make recommendations to deliver a more rights consistent approach to the policy principle that 'adults who are living with or caring for a child have a responsibility to protect that child from harm'.¹

Human rights implications of 'failure to protect' laws

The Commission has a strong interest in the development of the proposed 'failure to protect' legislation as it engages a number of rights under the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). All of which must be considered by Government when developing legislation.²

These include the right to equality before the law, right to life, right to protection of families and children, and the right to liberty and security of person.³

Consideration of these rights will help the Government assess the impact of the proposed laws on people in the community and appropriately tailor any new laws to the goals it is trying to achieve.

While aiming to support the rights of children, failure to protect laws in other jurisdictions have raised concerns from a human rights perspective that must also be taken into account.

For example, in jurisdictions where these laws have been enacted, there is evidence that the offences have predominately applied to women in practice. This disproportionate effect could potentially lead to unintended discriminatory impacts, which need to be considered in light of the right to equality in section 8 of the Charter. Section 17 of the Charter also sets out the right to protection of families and the rights of the child to protection in his or her best interests. Similarly, while the intention of the proposed laws is to protect children, the experience of these laws in

¹ Department of Justice, *Discussion Paper: Failure to Protect Laws* (2011) 1.

² Charter of Human Rights and Responsibilities Act (2006) s 38.

³ Charter of Human Rights and Responsibilities Act (2006) ss 8,9,17,21.

practice has shown that they can prove to be a barrier to women seeking help for fear of being prosecuted under failure to protect laws.

The proposed laws may therefore limit rights in a number of ways.

Further, the *Equal Opportunity Act 2010* is designed to address systemic discrimination.⁴ The Commission would be disappointed to see a policy approach that inadvertently creates a disproportionate, adverse impact upon women in the ways in which the offences might operate.

Is the proposal a reasonable limitation of Charter rights?

Section 7(2) of the Charter sets out the test for what is a reasonable limitation of a right. In summary, such a limitation must be reasonable, justifiable and proportionate, taking into account the nature of the right, the purpose of the interference, and applying the least restrictive means of limiting the right.

The Commission has concerns that the laws as proposed in the discussion paper may not achieve their purpose and may not strike the appropriate balance between protection of children and limiting rights of adults who have responsibility for children and so may not be effective in achieving the goal of child protection.

Does the proposal meet the policy aim?

The discussion paper does not provide or refer to evidence that ‘failure to protect’ offences lead to adults who are living with or caring for a child taking more responsibility for that child’s protection. Nor is there evidence provided or referred to that ‘failure to protect’ laws reduce levels of child abuse or child death.

The Commission notes with concern that in the development of this proposal that there appears to have been no review of child death and serious harm cases to establish whether failure to protect prosecutions would have been appropriate in those cases or would have had a deterrence effect.

Looking to jurisdictions where such laws have been introduced, the Commission notes that in South Australia, where a ‘failure to protect’ offence came into force in 2005, child deaths due to fatal assault and neglect have remained fairly stable, with the number of fatal assault and neglect deaths actually increasing the year after the introduction of the offence.⁵

Further, there does not appear to be an evidence base for the proposition that ‘failure to protect’ laws increase reporting of abuse by parents, or encourage earlier reporting. Indeed, they may have a “chilling effect” upon notification and lead to a reduction in the overall reporting rates.

⁴ *Equal Opportunity Act 2010* s 3.

⁵ In 2005, there were four cases of fatal assault and two cases of neglect leading to the death of child in South Australia. In 2006, there were six fatal assaults and three cases of fatal neglect, in 2007 there was one fatal assault. There were no recorded cases of fatal neglect in that year. In 2008 and 2009 there were five and six cases of fatal assault respectively. Fatal assault numbers should be treated with caution as these may include assaults where the perpetrator was another young person and not a family member. See reports of the South Australian Child Death and Serious Injury Committee. <http://www.cdsirc.sa.gov.au/cdsirc/Publications/tabid/476/Default.aspx> at 19 September 2011.

The Commission notes that in the United Kingdom the trend in the number of referrals to children's social care services has declined since the introduction of the offence.⁶

In South Australia, a failure to protect offence came into force on 7 April 2005. In the first year the offence was in place, notifications declined. This is the only year that notifications decreased in the period 2000 to 2009. Since then the number of notifications has increased, save for the year 2008/09, although arguably this increasing notification rate is a continuation of a trend that began prior to the introduction of the offence.⁷

The Commission is concerned that the introduction of 'failure to protect' offences may proceed in the absence of firm evidence from those jurisdictions that have similar legislation that the proposal will meet its stated policy aims.

We consider that legislation should not be drafted until comprehensive research is undertaken to establish that 'failure to protect' laws lead to better outcomes for children.

Is it the least restrictive means to achieve the policy aim?

As noted in the discussion paper there is an existing, similar offence, which in the Commission's view achieves the same policy aim with significantly more robust safeguards to minimise the risk of women who themselves are victims of abuse being prosecuted.

Section 493 of the *Children, Youth and Families Act 2005* establishes a 'failure to protect' offence, that applies when a person who has a duty of care in respect of child has intentionally failed to take action that results in or appears likely to result in significant harm. Before a prosecution can proceed, the Secretary of the Department of Human Services must be consulted.

The Commission notes that of 17 cases where Victoria Police have recorded incidents against this offence in the period 2000–10, none proceeded to prosecution.⁸ This suggests that instances where 'failure to protect' is an issue are very rare and so raises a question about whether the creation of a new offence is justified or proportionate and will achieve the proposed policy objective of improving outcomes for children.

Disproportionate effect and unintended consequences

Research into the experience of jurisdictions where 'failure to protect' offences operate shows that while such laws 'are written in gender-neutral terms, they consistently have a disproportionate effect upon women who themselves are victims of violence and abuse'.⁹

⁶ From 552,000 in 2005 to 547,000 in 2009. See Office for National Statistics *DCSF: Referrals, assessment and children and young people who are subject of a child protection plan, England-Year ending 31 March 2009*, 8. <http://www.education.gov.uk/rsgateway/DB/SFR/s000873/sfr22-2009.pdf> at 16 September 2011.

⁷ Australian Institute of Health and Welfare (2010) *Child Protection 2009-10* Child welfare series no. 51. Cat. no. CWS 39. Canberra: AIHW, 16.

⁸ Victoria Police Law Enforcement Assistance Program database, cited in Domestic Violence Victoria et al, *Submission to the Victorian Government in Response to the Discussion Paper on Proposed 'Failure to Protect' Laws* (2011) 6.

⁹ Prof Cathy Humphries *Protecting Victoria's Vulnerable Children Inquiry Submission* (2011) 19.

The correlation between family violence and child abuse is well understood. Family violence was a factor in 16 of the 29 cases reviewed by the Victorian Child Death Review Committee in 2010–11.¹⁰ Given the likelihood of family violence being present in cases where the proposed ‘failure to protect’ offences may apply, the Commission is concerned that the proposal risks criminalising women who are already victims of violence and abuse.

The Commission is particularly concerned that the proposal does not take into account the dynamics of households in which family violence and/or child abuse is present, and the disproportionate impact of this violence, which in itself is a manifestation of sex discrimination, upon women. While ‘failure to protect’ offences appeal to the community’s desire to see children protected, the evidence suggests that ideas inherent in such offences, such as reasonable steps to protect a child, fall away in the daily reality of living in a violent relationship.

In particular, the Commission notes the significant barriers women face in reporting family violence abuse. These include fear of retribution, escalation of violence towards the women and the child; fear that reporting will lead to the child going into care and the general feelings of fear and disempowerment that keep women and children trapped in violent relationships.

These barriers are significantly heightened for women with disability (including women with cognitive disability), Indigenous women, and those from culturally and linguistically diverse communities.

These concepts are well understood and have formed the basis of significant work by the Department of Human Services and Victoria Police to build trust, safety and support for women considering reporting. In contrast, the premise of ‘failure to protect’ laws – that people, and women in particular, should report in all circumstances, works against this body of knowledge and best practice.

Instead, the inability of ‘failure to protect’ laws to adequately respond to the complex dynamics of family violence risks creating a chilling effect upon reporting of family violence. The prospect of police involvement, self-incrimination and fear of heavy penalties will likely increase barriers to seeking help for family violence, rather than reduce them.

Increasing, not reducing the risk of harm

Barriers to leaving a violent partner are also multiple and complex. It is generally accepted that women may attempt to leave several times, and safety is best assured when a safety plan is in place. It is also a widely accepted fact that in the absence of secure, available accommodation, families escaping domestic violence will face homelessness. This acts as a significant barrier to separation.

The Commission is concerned that ‘failure to protect’ laws send a message to women that she/you will be punished if she/you do not leave a violent partner. Even though, it may be the very act of leaving that propels the partner to contemplate homicide, as evidence indicates that family violence homicide is more likely after the women leaves.¹¹

The Commission therefore has significant concerns that the proposed offences create expectations on women to leave without acknowledging that this may not provide greater safety for the women and child, and may unintentionally create

¹⁰ Victorian Child Death Review Committee *Annual report of inquiries into the deaths of children known to Child Protection* (2011) 36.

¹¹ Victorian Law Reform Commission *Review of Family Violence Laws* (2006) 32.

further danger for them. This contradicts the approach in the Victorian Government *Family Violence Risk Assessment and Risk Management Framework* – which acknowledges separation is high risk. It also offends the best interest of the child principle contained in the Children, Youth and Families Act and the Charter.

Is a family violence defence enough to mitigate discriminatory application of the law?

The Commission further notes that even when defences/exceptions are made in ‘failure to protect’ laws for women experiencing family violence, these still may not adequately respond to the inherent gender bias in the construction of these offences. For example, while the United Kingdom offence was introduced to deal with very specific circumstances where it is unclear which parent killed the child, an analysis of cases indicates that ‘women have been charged and convicted in circumstances where there was no doubt about the male perpetrator of the homicide. The women who were seen as ‘failing to protect’ were in social distress, living in fear of domestic violence from their partners and were away from the house at the time their children were attacked’.¹²

Other unintended consequences

The Commission acknowledges the complexity of the issues faced in legislating to give life to the policy principle that adults who are living with or caring for a child have a responsibility to protect that child from harm’.¹³ However, we are concerned that failure to protect laws will not only fail to achieve that policy aim, but may be counterproductive.

The Commission notes concerns raised by community service organisations and peak bodies in the child and family welfare, family violence and out-of-home care sectors that the proposed offences have the potential to unintentionally cause more harm to children, and so fails the test of being in the best interests of the child.

The Commission shares this concern, noting that:

- Such offences may provide a perverse incentive for those contemplating the murder of a child to undertake that act in the family home, or in the presence of the other partner so that the non-abusive parent is placed at risk of prosecution for failing to protect the child (revenge killings).
- The application of similar offences in other jurisdictions has led to women who were victims of family violence gaining longer sentences than the perpetrator of the abuse.¹⁴
- There is a risk of the net widening to include older siblings, grandparents and other members of extended family. Depending on how the provision was drafted, the scope of the offence may lead to family members, who themselves may be subject to violence and abuse and who face the same barriers to reporting, withdrawing from contact with the child through fear that they might later be subject to a criminal charge for failing to protect.
- There is a risk that parents who do not display what the community would consider are protective concerns are covered by the offence. For example, under

¹² Prof Cathy Humphries (2011) *Protecting Victoria’s Vulnerable Children Inquiry Submission* 19. For an analysis of US states see also Fugate, J, “Who’s Failing Whom? A critical look at failure to protect laws’ 76 (2001) *New York University Law Review* 272.

¹³ Department of Justice, *Discussion Paper: Failure to Protect Laws* (2011) 1.

¹⁴ See e.g. *Campbell v State of Wyoming*, 999.P.2d 649 (2000 WY 48).

the *Crimes Act 1958*, it is an offence for an 18 year old to engage in a sexual relationship with a 15 year old, even if both parties consider the relationship to be consensual. As noted in the discussion paper, if sexual abuse was defined as a sexual offence under the Crimes Act, an adult in the same household as the 15 year old who was aware of this sexual relationship, but did not report it, could be liable for a 'failure to protect' offence.

The Commission is also concerned that Victoria Police and the Office of Public Prosecutions may divert resources to prosecute victims of family violence. This contradicts prevailing approaches towards policing family violence.

There are also likely to be significant challenges in proving the offence. As noted in the discussion paper, 'in order to prove that an adult has failed to respond to abuse, it will first be necessary for the court to be satisfied that abuse has occurred'. This opens up the risk that the non-abusive parent could be at risk of self-incrimination if they provided evidence that the perpetrator had abused the child. This may have implications in the context of protection of rights in criminal proceedings under the Charter.¹⁵

Alternatively, there is a risk that the true perpetrator is found not guilty of killing or causing serious harm to the child, while the non-abusive parent is found guilty of failing to protect, noting that in South Australia 'failure to protect' laws apply even where it is not possible to prove who killed or caused harm to the child.

Alignment with government policy and best practice frameworks

The Commission notes that the Protecting Victoria's Vulnerable Children Inquiry is not due to report until 4 November 2011. We submit that to go forward with the development of 'failure to protect' laws before the Government has had time to consider the findings of that Inquiry would be premature. It also risks law reform that is out of policy alignment with current and future directions in best practice child protection.

The Commission notes and shares the concerns of professionals working in family violence that 'failure to protect' laws are likely to work contrary to best practice in support for non-abusive parents. We are particularly concerned that the investment in this best practice and the cultural change that has been achieved within Victoria Police, the courts and across human services may be undermined by the proposal if women withdraw from services and other supports through fear they may be caught in the net of the proposed laws.

We note in particular that the proposed offences may work against recent and comprehensive family violence reforms, including the Victoria Police *Code of Practice on the Investigation of Family Violence*. This focuses on the allocation of responsibility on the perpetrator, not the victim. This proposal risks shifting that balance.

¹⁵ *Charter of Human Rights and Responsibilities Act 2006* s 25.

Recommendations

1. That for the reasons outlined above the proposal to introduce ‘failure to protect’ offences does not proceed.
2. If the proposal does proceed prior to the Protecting Victoria’s Vulnerable Children Inquiry reporting and the Government response to that Inquiry being formulated, the following minimum safeguards should be considered:
 - That the offences of ‘failure to protect’ only apply to child death, and only where it is not possible to identify the person responsible for the death.
 - The ‘failure to protect’ offence should not apply to an older sibling of the child, who is also likely to have been the victim of violence and abuse by the perpetrator; or to grandparents and members of extended family.
 - The ‘failure to protect’ offence should have a requirement for consultation with the Secretary of the Department of Human Services before a prosecution can be initiated.
 - The prosecution should bear the onus of proving that the accused failed to protect the child from homicide (rather than the accused having to prove in a defence that they took reasonable steps).
 - The concept of ‘reasonable steps’ needs to be clarified.
 - A family violence defence should apply where the accused believes that he or she needed to defend or prevent harm to themselves or another person, or the accused was under duress due to family violence. The defence should apply even if the harm or threat of harm is not immediate.
 - Family violence should be defined broadly to include physical, sexual, and psychological abuse.¹⁶
 - Relevant evidence supporting the defence should also reflect the special family violence evidentiary provisions which s 9AH of the Crimes Act currently recognises.
 - The laws would also need to be accompanied with adequate training about the social context of family violence for those involved in the legal process.

Contact

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¹⁶ The definition of family violence under s 9AH (4)–(5) of the *Crimes Act 1958* could be adopted.