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McAuley Community
Services for Women
a ministry of the Sisters of Mercy

9 September 2011

'Failure to Protect' Laws
Department of Justice Victoria
criminal.law@justice.vic.gov.au

The Hon. Robert Clark, MP
Attorney-General
Minister for Finance
Level 26, 121 Exhibition Street
Melbourne
Victoria, 3000

Dear Attorney-General

Re: Submission 'Failure to Protect' Laws

We refer to the Discussion Paper 'Failure to Protect' Laws and are writing to endorse the joint submission by Domestic Violence Victoria, Federation of Community Legal Centres, Women's Legal Service Victoria, No To Violence, Domestic Violence Resource Centre Victoria, Women with Disabilities Victoria and Domestic Violence Victoria.

About Western Integrated Family Violence Partnership for Women and Children (WIFVP)

The Integrated Family Violence Services System (IFVSS) is part of the Victorian State Government's strategy to reduce the incidence of family violence, the leading contributor to death, disability and illness for women aged 15-44 in Victoria.

The primary aim of the Victorian family violence reform was to introduce an integrated service response across community services - including community health, family violence services, police and courts - that improve the safety of women and children and to hold violent men accountable for their actions.

Since July 2006 women and children affected by family violence in the western metropolitan sub-region have been supported by a consortium of local agencies including Women's Health West, Western Region Health Centre and MacKillop Family Services. In 2010, Molly's House and McAuley Community Services for Women joined the partnership. This integrated multi-agency approach provides a range of support services, counselling and group work programs. Better communication between agencies will ensure that women receive an appropriate, gendered response, regardless of the pathway by which they receive assistance.

Like many other specialist family violence services we have a special interest in ensuring that women and children experiencing family violence are adequately protected in all legal processes. Many women and children accessing our services experience disadvantage such as women from cultural and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander women, women with disabilities and women from rural and remote communities and it is our aim that they do not experience further disadvantage through legal processes.

Research clearly demonstrates the co-occurrence of family violence and child abuse. Where there is abuse of children it is very likely that there will also be violence against the mother¹. Of the 16 child death cases reviewed in the 2010 annual report of inquiries into the deaths of children known to Child Protection, family violence was a factor in 10 cases (62 per cent); seven of the cases involved children younger than three years old. In 65% of family violence incidents recorded by police in each of the years 1999-2000 and 2003-2004, at least one child was present².

The Victorian Government proposes to create two separate offences for adults who fail to take action when:

1. They know or believe that 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
- or
2. 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

The proposed penalties for failing to protect a child from sexual and serious abuse that does not result in death is imprisonment of up to five years and for failing to protect a child who dies imprisonment of up to 14 years.

The WIFVP agrees that rates of child abuse are unacceptably high in Victoria and that more needs to be done in order to protect vulnerable children. However, we strongly oppose the introduction of 'failure to protect' laws.

We endorse the following key concerns in the **Domestic Violence Victoria and Partner Submission**:

- **Premature:** Any decisions about introducing 'failure to protect' laws in Victoria must be made after the outcomes of the Government's 'Protecting Victoria's Vulnerable Children Inquiry' is known.
- **No justification/too broad:** The Victorian Government has not produced evidence demonstrating that 'failure to protect' offences are effective in reducing levels of child abuse or numbers of child deaths, nor evidence that introducing such offences is likely to increase reporting of child abuse.
- **Unintended consequences:** We are concerned that 'failure to protect' legislation has the potential to cause more harm to children. For example, in the case of *Campbell v State* where the mother was convicted of a felony for failing to protect her child, while the father was found guilty of a misdemeanour for inflicting third degree burns on his four year old daughter. It is difficult to understand how the removal of children already traumatised by violence from the care of the non-abusive parent can be construed as being in the child's best interest.

'Failure to protect' laws can be detrimental to the children of women experiencing family violence. There has been significant investment in recent years on strengthening the mother/child relationship and working with non-abusing parents to support these relationships thereby enhancing the safety of vulnerable children. This is exemplified by the approach of the new sexual abuse specialist units to work with the non-abusing parent to support the child, and by the strengthening relationships between child protection, Child FIRST and family violence services. There is great concern among professionals working with vulnerable children that 'failure to protect' laws will undermine these support efforts, by encouraging mothers to withdraw from services and other supports.

- **Too simplistic/misconceived:** 'Failure to protect' laws can be unfairly detrimental to women experiencing family violence. In spite of any possible attempts to take a woman's experience of family violence into account, she will be likely to be targeted by 'failure to protect' offences. There are a significant number of documented cases from overseas jurisdictions of mothers being

¹ Grealy, C., Humphreys, C., Milward, K., and Power, J. (2008) Urbis, *Practice guidelines: women and children's family violence counselling and support program*, Department of Human Services, Victoria. Family violence is a factor in 50-80% of substantiated child protection cases in Victoria

² *Victorian Family Violence Database Volume 4 Nine Year Trend Analysis* (1999-2008). This exposure compromises the development and safety of children and young people (Holt, S., et al, The impact of exposure to domestic violence on children and young people: A review of the literature, *Child Abuse and Neglect* 32 (2008) 797-810).

charged with 'failure to protect' offences when the woman was a victim of family violence and not in a position to protect her child.

The proposed legislation does not reflect the dynamics of households in which family violence is present, and the disproportionate impact of that violence on women. It creates an expectation that the only acceptable action for a woman experiencing violence is to leave the relationship in order to protect her child. However, there are many complex barriers to reporting and leaving violent relationships. Violence commonly escalates at separation; a woman may be too frightened to pack up her children and leave the abuser; and may not have any support (including adequate housing and income) to do so. Women may also have justified concerns that post-separation child contact orders will grant access to abusive fathers.

- **Discrimination:** We are concerned that 'failure to protect' laws will have a disproportionate and discriminatory impact on women who are themselves the victim of family violence. The discriminatory effect of the proposed laws is likely to be exacerbated by well established gender stereotyping and bias. This may particularly be the case for mothers with cognitive disabilities, who are already subject to surveillance of their parenting abilities, and for Aboriginal and CALD mothers, who often have good reason to be mistrustful of authorities.
- **Incorrect allocation of responsibility:** 'Failure to protect' laws will have a negative impact on recent family violence reforms, and their particular emphasis on ensuring that the perpetrator, not the victim, bears the responsibility for violence. Importantly they are inconsistent with Victoria's Police Code of Practice for the Investigation of Family Violence. Legislation needs to be directed at the offender, not the victim.

Some additional questions these proposed laws raise include:

- How will 'failure to protect' laws intersect with federal family law? We know that women now find themselves in breach of family court orders when they withhold children from fathers due to allegations of child abuse and neglect. In the future will parents be able to use 'failure to protect' laws as a defence for breaches of family law orders?
- If a parent informs the police or child protection authorities about alleged child abuse or neglect and these agencies either do not act or their actions place children at further risk, will these agencies/workers be accountable under the proposed 'failure to protect' laws?

Conclusion

The Western Integrated Family Violence Partnership for Women and Children strongly opposes the proposed legislation on the basis that it will increase women's vulnerability to family violence without protecting children from violence and abuse. We further support the submission cited above.

Please contact me if you have any queries about this letter or would like more clarification on any content.

Yours sincerely



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