



## SUBMISSION TO THE VICTORIAN GOVERNMENT IN RESPONSE TO THE DISCUSSION PAPER ON PROPOSED 'FAILURE TO PROTECT' LAWS

### 1. BACKGROUND

This joint submission is made by community agencies and peak bodies working in the family violence, child and family welfare and community legal sectors: Women's Legal Service Victoria, Federation of Community Legal Centres, No To Violence, Domestic Violence Resource Centre Victoria, Women with Disabilities Victoria and Domestic Violence Victoria (collectively, the partner organisations). The submission represents the well considered view of the partner organisations, who individually and collectively have significant experience and expertise in the area of family violence and child and family welfare. We have spoken to our respective member agencies and wider networks and understand that our views are widely shared by those who work in the community sector.

#### ***About the partner organisations supporting this submission:***

**Women's Legal Service Victoria (WLSV)** has been providing free legal advice, information, representation and legal education to women for over 30 years. WLSV is the only specialist legal service in Victoria for women experiencing relationship breakdown and violence. A significant proportion of our clients have experienced family violence during a relationship, at separation, and after a relationship has ended. We are committed to improving access to justice for women and protecting the rights of those women who are least able to protect themselves.

**Federation of Community Legal Centres Victoria (The Federation)** is the peak body for 49 Victorian Community Legal Centres (CLCs). CLCs are independent community organisations that provide free legal advice, information, assistance, representation and community legal education to more than 100,000 Victorians each year. CLC work against family violence includes the provision of duty lawyer services in Magistrates Courts for victims of family violence. The Federation also conducts strategic research, casework, policy development and social and law reform activities.

**No To Violence (NTV)**, the Male Family Violence Prevention Association, is the Victorian statewide peak body of organisations and individuals working with men to end their violence and abuse against family members. No To Violence developed from the integration in 1998 of the Victorian Network for the Prevention of Male Family Violence and the Men's Referral Service. NTV members come from a wide range of professional and community backgrounds and work in a range of settings including government, community based settings as well as private practice. Activities of members include providing male family violence men's behaviour change programs, counselling services to men and their families, as well as educational activities within the broader community directed at preventing male family violence. In working to prevent male family violence, NTV resources service providers through training and professional development services, service and educational resources, research and policy development and sector advocacy. NTV also provides a statewide male family violence telephone counselling, information and referral service – the Men's Referral Service. The Men's Referral Service operates as the central point of contact for men in Victoria who are making their first moves towards taking responsibility for their violent and abusive behaviour. The service also receives calls from women seeking assistance on behalf of their partners, male family members or friends, as well as from agencies seeking assistance for their male clients.

**Domestic Violence Resource Centre Victoria (DVRCV)** aims to prevent family violence and promote respectful relationships. DVRC works to achieve this through strategies which:

- support workforce development in the community sector around family violence;
- improve the quality of services to victims of violence;
- inform and support those affected by this violence;
- inform public policy, research and law reform; and
- raise community awareness and promote community responsibility for violence prevention.

**Women with Disabilities Victoria (WDV)** is an organisation made up of women with disabilities who support women with disabilities to achieve their rights in Victoria. Members and staff represent the diversity of women with disabilities, and supports women with disabilities to achieve their rights through community education, peer support, research and systemic advocacy. The organisation speaks for the human rights of women with disabilities on many of Victoria's key violence prevention and violence response committees.

**Domestic Violence Victoria (DV Vic)** is the peak body for over fifty family / domestic violence services in Victoria that provide support to women and children to live free from violence. With the central tenet of DV Vic being the safety and best interests of women and children, DV Vic provides leadership to change and enhance systems that prevent and respond to family / domestic violence.

## 2. INTRODUCTION AND SUMMARY OF PROPOSALS AND KEY CONCERNS

In its discussion paper on proposed 'failure to protect' laws, the Government has asked organisations to consider the construction of proposed offences relating to child abuse and child death and to provide any comments that may inform the development of the proposed offences (paragraph 1 of the discussion paper). 'Failure to protect' – or similar – regimes are in place in a number of other jurisdictions, including South Australia, Northern Territory, the UK and various states in the US. 'Failure to protect' laws typically create a positive obligation for adults who have custody or care of a child, or live in the same household as a child, to take action if they know or believe the child is being abused. The laws create a specific offence that can be used where a child has died due to abuse or has suffered significant harm, and an adult is aware of the abuse and its seriousness, and fails to take action.

**The partner organisations agree that rates of child abuse are unacceptably high in Victoria and that more needs to be done to protect vulnerable children. However, the introduction of the proposed laws is strongly opposed. The proposed laws will not protect children from violence and abuse.**

This submission addresses certain critical issues raised in the discussion paper, the key areas of concern for the partner organisations and outlines the partner organisations' proposals in response to the proposed laws. The fact that a part of the discussion paper has not been discussed should not be taken as an indication of either support or opposition to any particular issue.

Given the importance of the issues raised by the proposed laws, the partner organisations also note that they are concerned at the extremely short time period (3 weeks) which has been allowed for written submissions in response to the Government's discussion paper.

### ***Summary of proposals and key concerns:***

The partner organisations strongly oppose the creation of 'failure to protect' offences. The proposed laws should not be enacted.

- **KEY CONCERN 1: Premature**

A coordinated approach to child protection reforms is essential. Any decision about enacting the proposed 'failure to protect' laws should await the outcome of the Government's 'Protecting Victoria's Vulnerable Children Inquiry'.

- **KEY CONCERN 2: No justification / Too broad**

New 'failure to protect' laws will not provide any additional protection for children from violence and abuse. There is no evidence to suggest that 'failure to protect' laws are necessary or will lead to increased reporting of abuse. The partner organisations recommend that prior to further considering the introduction of the proposed laws the Government should undertake a review of child death and serious harm cases in Victoria in order to establish whether 'failure to protect' laws would have been appropriate in any of those circumstances. If changes are

desirable to meet the shortcomings exposed in those cases, it is likely that far narrower legislative intervention would suffice. Absent such a review, there is currently no evidence that the proposed laws are necessary.

- **KEY CONCERN 3: Unintended consequences**

Any major changes in this complex field should satisfy the criteria “first, do no harm”. ‘Failure to protect’ laws have the potential to unintentionally cause more harm to children, for instance by working contrary to best practice to support and work with protective parents, inadvertently resulting in increased ‘revenge killings’ (where a father kills the child to punish the mother and the mother is incarcerated for ‘failure to protect’), or the mother is incarcerated for ‘failure to protect’, leaving the child in the care of the perpetrator or the State.

- **KEY CONCERN 4: Too simplistic / Misconceived**

‘Failure to protect’ laws do not adequately recognise the dynamics and complexities of family violence and are detrimental to women and their children experiencing family violence. In particular, the legislation fails to take account of the powerful barriers to a woman leaving an abusive relationship or reporting that abuse.

- **KEY CONCERN 5: Discrimination**

‘Failure to protect’ laws will have a disproportionate and discriminatory impact on women who are themselves the victims of family violence. The discriminatory effect of the proposed laws is likely to be exacerbated by well-established gender stereotyping and bias. It will be further heightened for women with disabilities, Indigenous women and women from culturally and linguistically diverse (CALD) communities, who face additional barriers to reporting.

- **KEY CONCERN 6: 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 Police’s Code of Practice for the Investigation of Family Violence. Legislation needs to be directed at the offender, not the victim.

In order to protect children, the focus should instead be on greater investment in the services, systems and networks that support and work with protective parents. These must be significantly resourced and strengthened in order to ensure vulnerable women and children are properly protected when they are at risk.

If the Government determines to proceed with introducing legislation concerning a ‘failure to protect’ offence, the partner organisations expect that the Government would give significant consideration to the formulation of any offence in order to address the key concerns outlined in this submission and minimise the adverse impact of such legislation. Any such laws would need to recognise the dynamics of family violence and only apply in limited circumstances to afford sufficient protection for those in family violence situations to avoid prosecution. 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. These matters are addressed in an addendum to this submission.

**3. KEY CONCERN 1: A coordinated approach to child protection reforms is essential. Any decision about enacting the proposed ‘failure to protect’ laws should await the outcome of the Government’s ‘Protecting Victoria’s Vulnerable Children Inquiry’.**

The need for a co-ordinated approach to dealing with child protection issues in Victoria is well recognised. The scope and focus of the Government’s current ‘Protecting Victoria’s Vulnerable Children Inquiry’ (PVVC inquiry) are a recognition of the need for a coordinated approach to this complex issue. As set out on the Government’s website,<sup>1</sup> the PVVC inquiry will investigate systemic problems in Victoria’s child protection system and make recommendations to strengthen and improve the protection and support of vulnerable young Victorians. In addition, the PVVC inquiry panel will inform the Victorian Government about how to reduce child abuse and strengthen the protection of Victorian children who are at risk of, or have experienced, neglect and/or abuse. Further, it will consider the effectiveness of existing systems and processes, and enhancements in systems and services to protect Victoria’s children.

The partner organisations welcome this important inquiry but note that the PVVC inquiry panel is not due to report until 4 November 2011. The PVVC inquiry will clearly provide information of significant relevance to the Government’s decision in relation to the proposed ‘failure to protect’ laws. Accordingly, the partner organisations believe that the Government’s request for submissions on the proposed legislation is premature, given the inquiry panel is not due to report until early November 2011, and that any decision about enacting the proposed ‘failure to protect’ laws should await the outcome of the PVVC inquiry.

**Proposal:**

**At a minimum, any decision on enacting the proposed ‘failure to protect’ laws should await the outcome of the Government’s “Protecting Victoria’s Vulnerable Children Inquiry” to facilitate a coordinated response to child protection reforms.**

**4. KEY CONCERN 2: New ‘failure to protect’ laws will not provide any additional protection for children from violence and abuse. There is no evidence to suggest that ‘failure to protect’ laws are necessary or will lead to increased reporting of abuse.**

There is no evidence which demonstrates the need for the proposed ‘failure to protect’ laws.

Neither the discussion paper, nor other public statements by the Victorian Government in relation to the proposed laws, provide any examples or evidence of where ‘failure to protect’ legislation might help to protect vulnerable children or have been appropriate in any recent cases of child

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<sup>1</sup> [www.childprotectioninquiry.vic.gov.au](http://www.childprotectioninquiry.vic.gov.au).

death or serious harm in Victoria. The partner organisations note that the introduction of a ‘failure to protect’ regime has never been recommended by the Victorian Child Death Review Committee.<sup>2</sup>

Moreover, as identified in the discussion paper, Victoria has an existing ‘failure to protect’ offence under s 493 of the *Children, Youth and Families Act 2005* (CYFA). This offence applies where a person who has a duty of care in respect of a child has intentionally failed to take action that has resulted or appears likely to result in significant harm. The provision requires consultation with the Secretary of the Department of Human Services (DHS) before a decision is made to prosecute.<sup>3</sup> When it was introduced, the requirement to consult was described as “*an inbuilt safeguard, and encouragement to the development of family support services.*”<sup>4</sup> We believe that this is a sound prerequisite so that the focus is ultimately on the protection of children.

In the period from July 2000 to June 2010, according to Victoria Police’s Law Enforcement Assistance Program database, 17 ‘offences’ or incidents were ‘recorded’ against this ‘fail to act’ provision (between 0-4 incidents each year), although these incidents did not result in prosecutions. As at 1 July 2010 neither the Magistrate’s Court nor the Children’s Court of Victoria had dealt with offences of child abuse under s 493 CYFA.<sup>5</sup> Rather, the courts have acknowledged that the circumstances giving rise to any possible charge are more likely to be dealt with by referral to the child protection agency rather than prosecution, with the emphasis being on the future safety of the child.<sup>6</sup> The limited recording of incidents under the Victorian provision highlight the lack of any evidence supporting the need for ‘failure to protect’ laws.

In addition to the Victorian legislation, the partner organisations have reviewed ‘failure to protect’ laws in a number of jurisdictions in considering their response to the discussion paper. If these laws were having their desired effect, one would expect there to be increased reporting of abuse. Yet in South Australia and the UK, two jurisdictions with these laws in place, there is limited or no evidence to suggest that ‘failure to protect’ laws led to increased reporting of abuse.

In the UK, a ‘failure to protect’ offence came into force on 21 March 2005. Statistics published by the Office for National Statistics indicate that, in England, the trend in the number of referrals to children’s social care services has declined since the introduction of the offence.<sup>7</sup>

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<sup>2</sup> [www.ocsc.vic.gov.au](http://www.ocsc.vic.gov.au).

<sup>3</sup> This requirement to consult was introduced in 1978 to a precursor to this offence (section 81 of the *Social Welfare Act 1970* (Vic)) following extensive community consultation. The level of community consultation undertaken on this bill was described at the time as unprecedented in the field of social welfare: Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 1978, 5913 (Thomas William Roper).

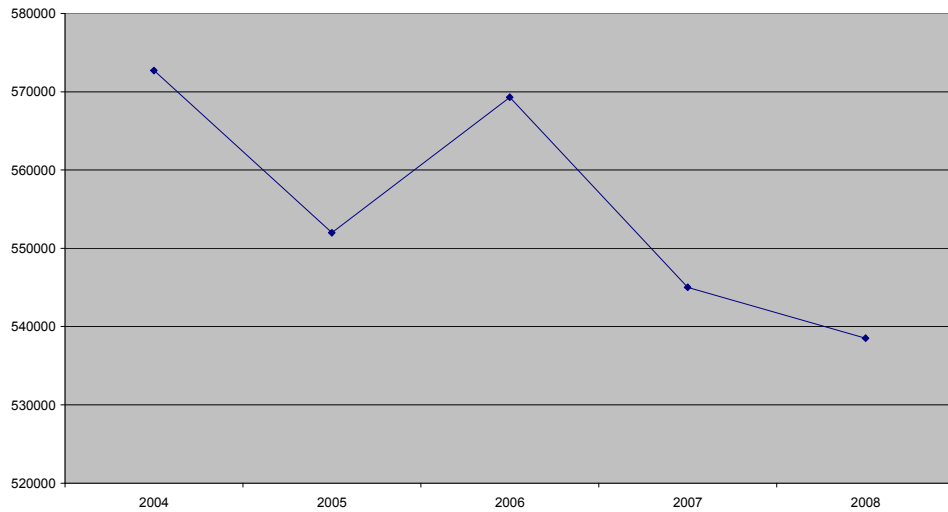
<sup>4</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 1978, 5911 (Brian James Dixon, Minister for Social Welfare).

<sup>5</sup> ALRC and NSW Law Reform Commission, *Family Violence – A National Legal Response: Final Report*, October 2010, 941.

<sup>6</sup> *Ibid*, 941.

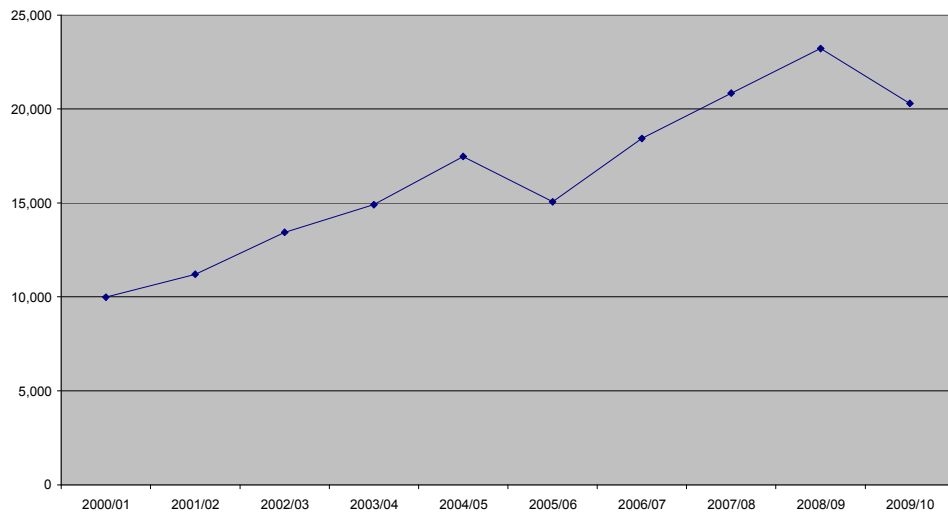
<sup>7</sup> “DCSF: Referrals, assessment and children and young people who are the subject of a child protection plan, England - Year ending 31 March 2009” obtained from [www.statistics.gov.uk](http://www.statistics.gov.uk).

Referrals of children to children's social care services (England)



In South Australia, a similar offence came into force on 7 April 2005. Although the number of notifications have increased in South Australia, this is the continuation of a trend that began prior to the introduction of the offence.<sup>8</sup> Indeed, the first year the offence was in place saw a drop in levels of notifications.

Number of notifications (South Australia)



In the absence of any evidence that 'failure to protect' laws lead to increased reporting of abuse or better outcomes for children, the partner organisations strongly oppose the introduction of the proposed laws. At a minimum, if the Government plans to proceed with introducing the proposed laws, the partner organisations believe that evidence of the need for such laws should be publicly demonstrated.

<sup>8</sup> Australian Institute of Health and Welfare, "Child protection Australia 2009–10", accessed at [www.aihw.gov.au](http://www.aihw.gov.au).

To the extent that it is shown that there are any loopholes in the existing law, it is highly likely that those can be met by far narrower legislation which would not be discriminatory and potentially counter productive.

**Proposals:**

**The proposed laws should not be enacted.**

**Prior to further considering the introduction of the proposed laws, the Government should undertake a review of cases of child deaths and serious harm to a child in order to establish whether 'failure to protect' laws would have been appropriate in any of those cases.**

**5. KEY CONCERN 3: 'Failure to protect' laws have the potential to unintentionally cause more harm to children.**

The partner organisations have serious concerns that 'failure to protect' laws have the potential to unintentionally, but in fact, cause more harm to children in a number of respects.

First, there has been continual acknowledgment in recent years that 'best practice' in child protection requires strengthening the mother-child relationship and that working with non-abusive parents to support these relationships enhances the safety of vulnerable children.<sup>9</sup> Experts in the study of family violence believe the positive relationship between the child and the non-abusive parent improves the child's well-being.<sup>10</sup> This relationship allows the child to share a bond with someone who recognises and understands the child's pain and is "*a source of security and thus is essential to recovery.*"<sup>11</sup> The proposed laws are inconsistent with this 'best practice'. In order to protect children, the Government ought to focus on greater investment in the services, systems and networks that support and work with protective parents. An appropriate focus would be to encourage therapeutic counselling for the family, and not to discourage parents from seeking help.

Second, if a mother is convicted and incarcerated for failing to protect a child there is a real likelihood that the child is then left in the care of the State, or absurdly, the perpetrator (for example see *Campbell v State* cited below (page 2) where the mother was convicted of a felony for failing to protect while the father was only guilty of a misdemeanor 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 interests in any way.

<sup>9</sup> See, for example, A Elliot and C Carnes, "Reactions of non-offending parents to the sexual abuse of their child: A review of the literature", 6 *Child Maltreatment* (2001), 4314-4331.

<sup>10</sup> BM Ewen, "Failure to Protect Laws: Protecting Children or Punishing Mothers?", 3 *Journal of Forensic Nursing* 2 (2007), 85, citing Weithorn (2001).

<sup>11</sup> *Ibid*, 85 citing Bancroft (2004).

Third, there is a real danger that ‘failure to protect’ laws may inadvertently result in increased ‘revenge killings’ where a father kills a child to punish the mother as seen in recent high-profile Victorian cases (eg. Robert Farquharson, Arthur Freeman). Not only will a ‘revenge killer’ be able to rob a mother of her child but with a ‘failure to protect’ offence in place he may also be able to expose her to imprisonment for not stopping him.

Given these concerns, the partner organisations strongly oppose the introduction of the proposed ‘failure to protect’ laws.

**Proposals:**

**The proposed laws should not be enacted.**

**In order to protect children, the focus should instead be on greater investment in the services, systems and networks that support and work with protective parents. These must be significantly resourced and strengthened in order to ensure vulnerable women and children are properly protected when they are at risk.**

**6. KEY CONCERN 4: ‘Failure to protect’ laws do not adequately recognise the dynamics and complexities of family violence and are detrimental to women and their children experiencing family violence.**

The partner organisations submit that the absence of evidence that ‘failure to protect’ laws increase reporting of child abuse, and hence, provide any additional protection for children, is fundamentally linked to the dynamics of family violence. Paragraphs 72 and 73 of the discussion paper raise the issue of family violence in the context of ‘failure to protect’ laws. The focus of these paragraphs is whether the proposed legislation should take instances of family violence into account. The partner organisations strongly believe that an informed understanding of the dynamics of family violence necessitates the conclusion that the proposed laws impose unrealistic expectations on victims of family violence.

**6.1. Co-occurrence of child abuse with family violence**

Research clearly demonstrates the co-occurrence of child abuse with family violence and the impact of violence on the developmental needs and safety of children and young people.<sup>12</sup> In Victoria, family violence is a factor in over half of substantiated child protection cases.<sup>13</sup> 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%). In more than 35% of “family violence

<sup>12</sup> S Holt 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).

<sup>13</sup> See [www.health.vic.gov.au/childrenatrisk/parents.htm](http://www.health.vic.gov.au/childrenatrisk/parents.htm).

incidents” recorded by police in each of the years 1999/00 to 2007/08, at least one child was present.<sup>14</sup>

Other Australian statistics also clearly point to the co-occurrence of child abuse with family violence. In its report, ‘Australian Statistics on Domestic Violence’, the Australian Domestic and Family Violence Clearinghouse commented that *“it is estimated that in 30% to 60% of families where domestic violence is a factor, child abuse is also occurring.”*<sup>15</sup> In NSW, the Child Death Review Team (2001) found that in 18 out of the 19 cases reviewed where the death occurred as a result of physical abuse and neglect, there was a background of domestic violence (2000-2001).<sup>16</sup>

Accordingly, it is highly likely there will be a history of family violence in the vast majority of cases where charges under ‘failure to protect’ laws may be contemplated by authorities. Specifically, where children are abused it is very likely that there will also be violence against the mother.<sup>17</sup> As the Victorian *Family Violence Protection Act 2008* states in its preamble, *“while anyone can be a victim or perpetrator of family violence, family violence is predominantly committed by men against women, children and other vulnerable persons”*.

The partner organisations have grave concerns that the proposed laws mean that a woman suffering family violence is more likely to be in a position where they, as the non-abusive parent, can be accused of failing to protect their children.

## **6.2. Proposed ‘reasonable steps’ demonstrate a miscomprehension of the dynamics of family violence**

Paragraph 60 of the discussion paper notes that a key element of ‘failure to protect’ offences is that they require adults to take reasonable steps to protect a child. Paragraph 62 suggests that there are a number of different steps an adult could take in response to a risk that a child would be killed, injured or sexually abused. These include intervening to prevent the abuse, removing the child from the abusive environment and reporting the abuse to the relevant authorities.

In situations where the non-abusive parent is also a victim of family violence – which is highly likely to be the case in the majority of situations given the co-occurrence of child abuse with family violence – these supposed ‘reasonable’ steps demonstrate a significant misunderstanding of the nature of family violence and impose unrealistic expectations on women who are experiencing family violence. Family violence undermines the mother’s parenting ability, reduces her confidence, her capacity and her judgment. For a mother experiencing family violence, the partner organisations have serious concerns about what would be seen as a ‘failure to protect’ in those circumstances: If she has not been able to separate from the perpetrator, is this ‘failure to protect’? If she has not reported the abuse, is this ‘failure to protect’?

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<sup>14</sup> Department of Justice Victoria, *Victorian Family Violence Database Volume 4 Nine year trend analysis (1999-2008)*. The figure ranges, to almost 50% for the years 2003/04 and 2004/05.

<sup>15</sup> “Australian Domestic and Family Violence Clearing House Topic Paper”, *Australian Statistics on Domestic Violence* (2003), 7.

<sup>16</sup> *Ibid*, 8.

<sup>17</sup> C Grealy et al, *Practice guidelines: women and children’s family violence counselling and support program*, Department of Human Services, Victoria (2008).

### 6.2.1. Barriers to leaving

The proposed laws create an expectation that a woman should leave a violent relationship in order to protect her children. However, the barriers to leaving are both complex and very real. Escaping the perpetrator's control can be extremely difficult. For many victims leaving a situation of family violence is often a staggered approach and victims may attempt to leave multiple times before they are successful.<sup>18</sup>

Paradoxically, victims often feel safer staying in the relationship than leaving. These intuitions are confirmed by statistics: the most extreme form of family violence, homicide, occurs more often when a victim has already left the abusive relationship.<sup>19</sup> The Victorian Government's 'Family Violence Risk Assessment and Risk Management Framework' acknowledges that separation is a high risk period for victims of family violence.<sup>20</sup> A study by Humphreys and Thiara observed that domestic violence and child abuse escalate at the point of separation and beyond.<sup>21</sup> A UK study of cases reported to child protection from incidents of domestic violence showed that the majority (54% of 251 cases) of reports occurred where the couple had already separated.<sup>22</sup> Leaving prematurely and without a plan or support increases the risk of stalking, injury and homicide and therefore further endangers both the non-abusive parent and the child.<sup>23</sup>

Apart from fearing retribution, further barriers to leaving include a victim's access to finances. Lack of affordable and available housing and refuge places means many women have nowhere else to go. Significant disruption to work, education and children's schooling further exacerbates the difficulties of leaving violent relationships and opportunities to establish lives post violence.<sup>24</sup> Further, many victims are unaware of their legal options.<sup>25</sup> Any adverse experiences with police and the Courts can significantly hinder this process.<sup>26</sup>

The partner organisations have grave concerns that 'failure to protect' laws place expectations on women to separate where there is family violence or other issues of child abuse without acknowledging that this may be a highly dangerous move and not provide greater safety for either children or women.

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<sup>18</sup> Victorian Law Reform Commission, *Review of Family Violence Laws* (2006), 34.

<sup>19</sup> *Ibid*, 32.

<sup>20</sup> Department for Victorian Communities, *Family violence risk assessment and risk management framework* (2007), 55.

<sup>21</sup> C Humphreys and RK Thiara "Neither justice nor protection: Women's Experiences of Post-separation Violence", 25 *Journal of Social Welfare and Family Law* 4 (2003), 195–214.

<sup>22</sup> N Stanley, et al "Children's experiences of domestic violence: developing an integrated response from police and child protection services", 26 *Journal of Interpersonal Violence* (2011), 2372–2382.

<sup>23</sup> BM Ewen, above n 10, citing Kopels and Sheridan (2002).

<sup>24</sup> VLRC report above n 18, 34.

<sup>25</sup> *Ibid*, 34.

<sup>26</sup> *Ibid*, 65.

### 6.2.2. Barriers to reporting

The partner organisations are also concerned that the proposed laws also create a belief that it is reasonable to expect the non-abusive parent to report child abuse. In circumstances of family violence there are many real barriers to reporting abuse. These include a fear of retribution, not only towards themselves but also towards their children; a fear that violence will escalate and that, by reporting they may risk the lives of their children. In interviews victims consistently state that they fear for the safety of their children.<sup>27</sup> The victim may also be so disempowered by the experience of family violence that they feel helpless and powerless to act. The reluctance to contact authorities arises because perpetrators of family violence create environments of power and control over their victims through systematic disempowerment.<sup>28</sup> Anecdotally, women also report their fear that they will lose custody of their children if they attempt to report an offending partner. Most importantly, reporting the abuse often forces a woman to leave the relationship prematurely which poses all the barriers discussed above.

Barriers to reporting are particularly significant in the case of mothers with cognitive disabilities, who are already subject to surveillance of their parenting abilities. Reporting abuse puts the word of the reporter against the word of the abuser. Research indicates that women with cognitive disabilities are not likely to be believed when pitted against the word of an offender who presents as 'rational' and 'reasonable'.<sup>29</sup> The barriers to reporting are similarly high for Aboriginal and culturally and linguistically diverse (CALD) mothers, who often have good reason to be mistrustful of authorities and can have quite limited understandings of Australian law.

Women are also often coerced and convinced by their (former) partner that violence experienced by children is the woman's fault, and are blamed for it. Women are often so confused about their experiences of violence from a (former) partner that they are sometimes unsure about who is ultimately responsible for the violence towards children. A common example recited by men is that if their female partner was 'a better parent' or 'better at maintaining the household' then the man wouldn't have to resort to the use of violence.

The prospect of police involvement, self incrimination and fear of heavy penalties for one or more of the household is likely to create a further barrier to reporting abuse rather than encouraging reporting. In addition, given family violence and child abuse tend to occur repeatedly over long stretches of time, family members may fear that they will be criticised or prosecuted for reporting abuse too late, and hence not report at all. This will undo extensive work that has taken place in Victoria to encourage parents to seek help for children who are being abused.

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<sup>27</sup> See excerpts of interviews with victims, *ibid*, 17, 22.

<sup>28</sup> *Ibid*, 7.

<sup>29</sup> A Gray, S Forell and S Clarke, "Cognitive impairment, legal need and access to justice", *Justice Issues* 10 (10 March 2009), Law and Justice Foundation of New South Wales.

### **6.3. The proposed laws may result in convictions for victims of family violence**

The partner organisations are concerned that the proposed laws will see victims of family violence convicted of offences. Case law in other jurisdictions in which ‘failure to protect’ laws have been enacted reflects that the laws do not adequately recognise the dynamics of family violence. This can result in mothers being convicted of an offence even where they were not in a position to protect a child, or are not even present when the abuse takes place. This is highlighted in the following cases:

#### **CASE STUDY 1: *Campbell v State* (2000)(Wyoming)<sup>30</sup>**

In this case, 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.

When Campbell returned from work, she saw that her daughter was injured, however 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 misdemeanor.

#### **CASE STUDY 2: *State v Williams* (1983) (New Mexico)**

In *State v. Williams*,<sup>31</sup> a New Mexico court convicted Jeanette Williams of child abuse for failing to protect her four-year-old daughter from her husband’s abuse.

On appeal, Williams argued that, because she was 5 months pregnant at the time, beaten herself by her husband and threatened by him, she could do nothing to prevent the beating.

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.

#### **CASE STUDY 3: *State v Mott* (1997) (Arizona)**

In this case, Kay Mott, who experienced domestic violence, was charged with murder and child abuse for the death of her child from injuries inflicted by her boyfriend.

On appeal by the State of Arizona, the Arizona Supreme Court held that expert witness testimony related to ‘battered woman’s syndrome’ offered by Ms Mott in the first instance was unable to be admitted. The expert witness testimony concluded that Ms Mott was a battered woman and that being a battered woman was relevant to her ability to protect her children. According to the doctor, and as set out in the Arizona Supreme Court judgment, a battered woman forms a “traumatic bond” to her batterer. She does not feel that she can escape her environment; she is hopeless and depressed. Furthermore, the battered woman cannot sense danger or protect others from danger. She is inclined to believe what the batterer tells her and will lie to protect him.

<sup>30</sup> 999 P.2d 649 (2000 WY 48).

<sup>31</sup> 670 P.2d 122 (NM Ct App 1983).

The expert testimony was rejected by the Court on the basis that the Arizona legislature did not accept the use of psychological testimony to challenge the *mens rea* element of a crime.

Ms Mott was sentenced to 35 years imprisonment without possibility of parole.

**CASE STUDY 4: *Salma Begum* 2005 (UK)<sup>32</sup>**

Salma had been married to her husband, Sitab Ullah, for around 2 years when he became addicted to heroin and crack cocaine. His personality changed and he became violent towards Salma and delusional.

Ullah also became violent towards the couple's young baby, Samira, who had been born 2 months premature on 19 July 2004, but had been discharged from hospital 2 weeks later. He became convinced that the baby was possessed by spirits and began to physically assault her, at first by flicking the soles of her feet to 'hurt the thing inside her' and complaining that the baby was being fed too much and becoming greedy because 'he thought the thing inside her wanted to be fed all the time'.

The assaults culminated when Ullah shook the baby so hard that she sustained a fatal brain injury and died on 16 October 2004. Ullah was found guilty of murder and Salma Begum the mother who had been subject to violence herself, pleaded guilty to child cruelty and neglect.

Given 'failure to protect' laws can be detrimental to women and their children experiencing family violence, the partner organisations strongly oppose the introduction of the proposed laws.

**Proposals:**

**The proposed laws should not be enacted.**

**In order to protect children, the focus should instead be on greater investment in the services, systems and networks that support and work with protective parents. These must be significantly resourced and strengthened in order to ensure vulnerable women and children are properly protected when they are at risk.**

**7. KEY CONCERN 5: 'Failure to protect' laws will have a disproportionate and discriminatory impact on women who are themselves the victims of family violence. The discriminatory effect of the proposed laws will be further exacerbated for women with disabilities, Indigenous women and women from CALD communities, who face additional barriers to reporting.**

***7.1. Failure to protect laws are almost exclusively used against women***

As the discussion above indicates, analysis and consideration of 'failure to protect' regimes in other jurisdictions shows that the laws are almost exclusively used against women who are themselves the victims of family violence. Charges against men are rare. Fugate refers to a statement by a US

<sup>32</sup> See BBC News Online, "*Baby killed for being 'possessed'*" 21 December 2005 accessed at [news.bbc.co.uk/2/hi/uk\\_news/england/london/4547544.stm](http://news.bbc.co.uk/2/hi/uk_news/england/london/4547544.stm).

advocate which neatly summarises this issue: *“In the 16 years I’ve worked in the courts, I have never seen a father charged with failure to protect when the mom is the abuser. Yet in virtually every case where dad is the abuser, we charge Mom with failure to protect.”*<sup>33</sup>

Fugate also notes that *“While it is true that more women have custody of their children and thus are more likely to have the duty to protect their children, this fact alone does not explain the discrepancy adequately. The overwhelming prevalence of female defendants can be explained best by the higher expectations that women face in the realm of parenting and child law.”*<sup>34</sup>

The above comments demonstrate that the proposed ‘failure to protect’ law will have a disproportionate and discriminatory impact on women, particularly those experiencing family violence, and does not provide opportunities for men to take responsibility for their violent and abusive behaviour, or for them to be supported through a process of behavioural change. It is true that more often, women have custody of their children rather than men. The Australian Bureau of Statistics, with regard to living arrangements in separated families, stated that *“in April 1997, there were 978,000 Australian children who were living with one natural parent and who had a natural parent living elsewhere. The vast majority (88%) lived with their natural mother in either one parent families (68%) or in step or blended families (20%).”*<sup>35</sup> Nevertheless, the discriminatory impact on women is unjustified and wrongful. In addition to the reality that non-abusing parent is likely to also be the victim of violence – given the co-occurrence of family violence with child abuse – stereotyping and gender bias contribute to and exacerbate this discriminatory outcome:

- Women face greater scrutiny of their parenting efforts than men due to stereotyping. There is a well-documented history of the gender bias of laws and the court system where violence against women is involved. A 1989 report on gender bias commissioned by the Massachusetts Supreme Judicial Court,<sup>36</sup> found that when fathers contest custody, mothers are held to a different and higher standard than fathers. The report notes that: *“Even when the conduct of both parties is considered, it is often evaluated according to different standards. Women are often measured against the standard of ideal motherhood, while fathers are measured against a different and lower standard”*<sup>37</sup>. The report also refers to the testimony of Sheera Strick of Greater Boston Legal Services in which it was stated: *“The courts, as in the rest of society, expect far more from women as caretakers than men. Any shortcomings the woman has, whether directly relating to her parenting or not, are closely scrutinised. Whereas, if a father does anything by way of caring for his children, this is an indication of his devotion and commitment.”* This bias can have a much greater impact on women subject to domestic violence. According to family service officers: *“The court treats a woman much more severely than a father if she leaves her family and then*

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<sup>33</sup> GL Lecklitner et al, “Promoting safety for abused children and battered mothers: Miami Dade County’s Model Dependency Court Intervention Programme”, 4 *Child Maltreatment* 175 (1999), 176, quoted in JA Fugate, “Who’s failing whom? A critical look at failure to protect laws”, 76 *New York University Law Review* 272 (2001), 274.

<sup>34</sup> Ibid, 274.

<sup>35</sup> Australian Bureau of Statistics, “Living arrangements: Caring for children after parents separate”, 4102.0 Australian Social Trends (1999).

<sup>36</sup> “Gender Bias Study of the Court System in Massachusetts”, 24 *New England Law Review* (spring 1990), 745.

<sup>37</sup> Ibid, 60.

returns. She will have a big fight on her hands in order to get any visitation rights. On the other hand, if the father leaves and returns, the judge will ask him what visitation rights does he want".<sup>38</sup>

- Gender bias and stereotyping also appear to be prevalent in 'failure to protect' cases in other jurisdictions. For example, in the case of *Campbell*, referred to above, it appears that the prosecution suggested that Campbell herself should have been seriously injured before she allowed her child to sustain harm. It was stated in the prosecution's closing submissions, "*She got slapped, but where are her broken bones? Where are her burns?*"<sup>39</sup> This approach was also reflected in the case of *Tenn. Dep't of Human Services v Tate* (1995) in which it was stated that: "*the court finds that even animals protect their young... Now, [the defendant] may have well been afraid of her husband. There were times when he was gone and even if she was afraid if she had the natural maternal instinct that any mother should have, that maternal instinct should have overcome her fear if she is to be a fit mother and she failed to do that.*"<sup>40</sup>

## **7.2. Greater discrimination for women with disabilities, Indigenous women and women from CALD communities.**

The discriminatory effect of the proposed laws is likely to be further exacerbated for women with disabilities, Indigenous women and women from CALD communities, who face additional barriers to reporting.

The 'Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities' reported that "*the statistics paint a frightening picture of what could only be termed an 'epidemic' of family violence and child abuse in Aboriginal Communities*".<sup>41</sup> Despite the supported assumption that sexual violence in Indigenous communities occurs at rates that far exceed those for non-Indigenous Australians,<sup>42</sup> very few victims report the issue to police or seek assistance. Some of the reasons why Indigenous women continue not to report sexual assault include intimidation by authority figures and white people in general; closeness of communities leading to fear of reprisals and shame; the relationship of the survivor to the perpetrator; unfamiliarity with the legal process; and a fear that the perpetrator will be sent to prison.<sup>43</sup>

If abuse is reported, in addition to the many barriers women often faced in terms of giving their evidence in court, it has been commented that Aboriginal women would further suffer the discriminatory practices of a criminal justice system that was racist; often ignorant of Indigenous

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<sup>38</sup> Ibid, 62.

<sup>39</sup> JA Fugate, "Who's failing whom?", above n 33.

<sup>40</sup> Tenn Ct App (31 March 1995).

<sup>41</sup> Gordon et al, "Putting the Picture Together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities", Department of Premier and Cabinet, Western Australia (2002), as quoted in M Keel, *Family violence and sexual assault in Indigenous Communities' Australian Centre for the Study of Sexual Assault*, Briefing No 4, September 2004.

<sup>42</sup> D Lievore, *Non Reporting and Hidden Recording of Sexual Assault: An International Review*, Australian Institute of Criminology, Canberra, as quoted by M Keel, *ibid*, 2.

<sup>43</sup> M Keel, *ibid*, 7.

culture; and disproportionately questioned their credibility, their alcohol and drug use, and their sexual behaviour.<sup>44</sup>

Similar issues affect women with disabilities due a lack of independence, learned helplessness, isolation and lack of access to information. This is especially the case where the victim’s abuser is also the carer.<sup>45</sup> A study of parents with a disability in New South Wales child protection matters has shown that a disproportionate number of parents with a disability — particularly those with an intellectual and psychiatric disability — were appearing in child protection proceedings. It found that 7.1 per cent of all care proceedings in the NSW Children’s Court involved a parent with an intellectual disability. In the majority of these cases the child was put into the custody of another adult or made a ward of the state.<sup>46</sup>

**Proposals:**

**The proposed laws should not be enacted.**

**In order to protect children, the focus should instead be on greater investment in the services, systems and networks that support and work with protective parents. These must be significantly resourced and strengthened in order to ensure vulnerable women and children are properly protected when they are at risk.**

**8. KEY CONCERN 6: ‘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. In particular, they are inconsistent with Victoria Police’s Family Violence Code. Legislation needs to be directed at the offender, not the victim.**

Recent policy advancements including the creation of Victoria Police’s ‘Code of Practice for the Investigation of Family Violence’<sup>47</sup> (Victoria Police’s Family Violence Code), the enactment of the *Family Violence Protection Act 2008* (Vic) (FVPA) and use of intervention orders, as well as the ‘Women’s Safety Strategy: A Policy Framework’ have been important in ensuring that the perpetrator, not the victim, bears the responsibility for violence. ‘Failure to protect’ laws are fundamentally flawed as they shift blame to the victim (for failing to leave) rather than the perpetrator.<sup>48</sup> Rather than supporting a woman experiencing family violence, ‘failure to protect’ laws criminalise the conduct of non-abusive parents. Legislation needs to be directed at the offender, not the victim.

<sup>44</sup> Department for Women in New South Wales, “Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault”, NSW Government (1996).

<sup>45</sup> “Domestic violence and women with disabilities”, Better Health Channel, accessed at [www.betterhealth.vic.gov.au](http://www.betterhealth.vic.gov.au).

<sup>46</sup> A Gray et al, *Cognitive impairment*, above n 29, 4.

<sup>47</sup> Victoria Police, *Code of Practice for the Investigation of Family Violence*, 2nd edition (10 December 2010).

<sup>48</sup> BM Ewen, above n 10, citing Magen (1999).

An example of the negative impact that ‘failure to protect’ laws will have on recent family violence reforms relates to the way in which police will be expected to respond to family violence and child protection incidents. The focus of ‘failure to protect’ laws on the non-abusive parent is inconsistent with the approach adopted in Victoria Police’s Family Violence Code and undermine the code’s attempt to create a culture of understanding of family violence within the police force. Victoria Police’s Family Violence Code recognises the dynamics of family violence, including the barriers to leaving, that leaving is often a staggered process and the need to support children by supporting the non-abusive parent through:

- a requirement to act on *any* incident of family violence reported to them regardless of who made the report and how it was made.<sup>49</sup> This requirement recognises that leaving a situation of family violence may require a victim to make multiple attempts;
- collecting forensic evidence, rather than relying on victim statements so they may proceed with convictions even if the victim withdraws her complaint;<sup>50</sup>
- acknowledging that the first contact a person has with police can influence their experiences and impressions of the justice system and their future decisions;<sup>51</sup>
- adopting a ‘pro-arrest’ policy for instigators of family violence;<sup>52</sup> and
- stating that consent is not a defence to breaching an intervention order and acknowledging that the victim cannot be charged for aiding and abetting the breach of an intervention order.<sup>53</sup>

Asking police to prosecute a non-abusive parent for failing to report or leave significantly undermines the Code’s attempt to foster a culture of understanding within the police force and appropriate reaction to domestic violence by police officers. It is deeply concerning that the proposed legislation threatens to undermine recent family violence reforms.

**Proposal:**

**The proposed laws should not be enacted.**

**In order to protect children, the focus should instead be on greater investment in the services, systems and networks that support and work with protective parents. These must be significantly resourced and strengthened in order to ensure vulnerable women and children are properly protected when they are at risk.**

<sup>49</sup> Victoria Police, *Code of Practice*, above n 47, 8.

<sup>50</sup> *Ibid*, 25.

<sup>51</sup> *Ibid*, 9.

<sup>52</sup> *Ibid*, 23.

<sup>53</sup> *Ibid*, 28, referring to *Family Violence Protection Act 2008 (Vic)*, s 125.

## 9. CONCLUSION

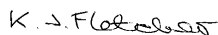
**Given the concerns outlined above, the partner organisations strongly oppose the creation of a ‘failure to protect’ offence. We have spoken to our respective member agencies and wider networks and understand that our views are widely shared by those who work in the community sector.**

The partner organisations repeat the recommendation above that prior to further considering the introduction of these laws, the Victorian Government should undertake a review of cases of child deaths and serious harm to a child in order to establish whether ‘failure to protect’ laws would have been appropriate in any of those cases. Absent such a review, there is currently no evidence that the proposed laws are necessary. Moreover, given the key concerns raised in this submission, the partner organisations submit that there are compelling reasons why the proposed laws should not be enacted.

However, if the Government determines to proceed with introducing legislation concerning a ‘failure to protect’ offence, the partner organisations expect that the Government would give significant consideration to the formulation of any offence in order to address the key concerns outlined in this submission and minimise the adverse impact of such legislation. Our preliminary views on these issues are outlined in an addendum to this submission.

## 10. CONTACT

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## 11. ADDENDUM TO SUBMISSION OF THE PARTNER ORGANISATIONS IN THE EVENT THE GOVERNMENT DECIDES TO PROCEED WITH THE INTRODUCTION OF 'FAILURE TO PROTECT' LAWS

**As outlined in this submission, the partner organisations strongly oppose the creation of a 'failure to protect' offence.**

If the Government determines to proceed with introducing legislation concerning a 'failure to protect' offence, the partner organisations expect that the Government would give significant consideration to the formulation of any offence in order to address the key concerns outlined in this submission and minimise the adverse impact of such legislation.

Our preliminary views on these issues are set out in this addendum. **Any such laws would need to recognise the dynamics of family violence and only apply in limited circumstances to afford sufficient protection for those in family violence situations to avoid prosecution.** Those limited circumstances are as follows:

- The 'failure to protect' offence should only apply to circumstances of child death;
- The 'failure to protect' offence should only apply where it is not possible to identify any 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;
- 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;
- The 'failure to protect' offence should have in-built defences, including that the accused was a victim of family violence; and
- 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 laws would also need to be accompanied with adequate training about the social context of family violence for those involved in the legal process.

Each of these is discussed in further detail below.

### **11.1. Failure to protect' laws should only apply to circumstances of child death**

If these laws are progressed, they should be limited to circumstances where a child has died.

It would be inappropriate for such an offence to apply to circumstances of sexual abuse. There is strong evidence that in most cases the non-abusing parent is unaware of the occurrence of abuse until it is disclosed by the child.<sup>54</sup> While the abuse may look obvious from the outside, it is often not discernible within the family unit, as perpetrator's purposefully groom their families to hide their abuse.<sup>55</sup> There is a strong risk that these laws will discourage children from disclosing abuse. Once it becomes known that the non-abusing parent could face prosecution for 'failure to protect', the child will be under intense pressure to retract statements. Further, as mentioned above, there is a real possibility of the non-abusive parent being removed from the family, leaving the child in the care of the State, or in the care of the perpetrator (if not convicted for the main offence). An offence of 'failure to protect' in relation to sexual abuse would undo significant work over recent years to support the non-abusing parent.

It is also inappropriate for these laws to apply to circumstances of 'serious injury'. As these laws place a positive obligation to act, they also expect a lay person to be able to determine the legal concept of what constitutes 'serious' injury. Further, the expectation that a person will know whether or not another person's conduct will result in 'serious injury' is highly onerous on the non-abusive parent.

#### **11.2. The offence of 'failure to protect' should only apply where it is not possible to identify any person responsible for the death**

The partner organisations submit that the scope of the proposed legislation should be limited only to circumstances where it is not possible to identify any person as being responsible for a child's death. The discussion paper clearly states that this is the issue the Government is attempting to address with this legislation. Limiting the scope in this way significantly reduces the potential for the unintended consequences outlined in section 5 of this submission.

#### **11.3. 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**

The partner organisations are concerned that older siblings of a deceased child may be exposed to a 'failure to protect' charge, if the class of persons to whom the proposed legislation applies is drafted broadly. An older sibling is likely to also be the victim of violence and abuse by the perpetrator. It is inappropriate that they might be exposed to a charge under the legislation. Any offence should make clear that the legislation does not apply to older siblings.

#### **11.4. 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 defence that they took reasonable steps)**

The partner organisations strongly submit that the onus would need to be on the prosecution to prove that the accused failed to protect the child from homicide (rather than the accused having to

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<sup>54</sup> C Humphreys, "Child Sexual Assault Disclosure: Mothers in Crisis", PHD thesis (1991).

<sup>55</sup> Ibid.

prove in defence that they took reasonable steps). This safeguard acknowledges the reality of family violence and that it is common for victims of family violence (and therefore potential defendants) to be unaware of their legal options and have difficulties accessing legal resources.<sup>56</sup>

### **11.5. The concept of ‘reasonable steps’ needs to be clarified**

The partner organisations have serious concerns about the actions a mother would be required to take before it could be said that she has protected her child. As outlined in section 6 above, the suggested ‘reasonable steps’ in paragraphs 60 – 62 of the discussion paper are irreconcilable with an in-depth understanding of the dynamics of family violence and the barriers to leaving and reporting. In circumstances of family violence it is not reasonable to simplistically expect the non-abusive parent to report the abuse or leave a violent relationship. Further, outside of the suggested ‘reasonable steps’ noted in the discussion paper, the concept of reasonable steps raises more questions than it answers. For example, if a mother has allowed the child to spend time with the father in compliance with Family Court Orders, despite her concerns that the child is at risk, would this be considered a failure to protect? Similarly, if a mother has reported abuse and DHS has not responded, has she ‘failed to protect’ the child? Appropriate clarity is needed within the legislation.

### **11.6. The ‘failure to protect’ offence would need to have in-built defences, including that the accused was a victim of family violence.**

There should be various defences available to the charge, including an express legislative family violence defence.

‘Failure to protect’ laws in other jurisdictions contain as an element of the offence a consideration of the defendant’s circumstances. Importantly, in South Australia the circumstances are considered subjectively rather than objectively.<sup>57</sup> The United Kingdom requires the prosecution to prove that *“the defendant failed to take such steps as he could reasonably have been expected to take to protect the victim from the risk”*. A full understanding of the defendant’s circumstances, including fear of retaliation, will define the reasonable steps in that scenario. The Northern Territory equivalent also includes an express defence of ‘reasonable excuse’, which is defined as including a reasonable belief of a threat to safety if a report is made.<sup>58</sup>

The partner organisations believe that any ‘failure to protect’ legislation in Victoria would need to go further. We believe that expressly providing a defence of victimisation from family violence would be necessary due to a well-documented history of gender bias of laws where violence against women is implicated, and the subsequent continued excusing of men’s violence. This trend continues, despite legislative good intentions. By way of comparison, reviews of Victorian defensive

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<sup>56</sup> VLRC report above n 18, 34.

<sup>57</sup> See section 14 *Criminal Law Consolidation Act 1935* (SA) under which a defendant can put the prosecution to proof on all elements of the offence, such as: whether the defendant had assumed responsibility for the victim (eg. siblings, family friends); whether the defendant took steps he or she could reasonably be expected to have taken in the circumstances; whether the defendant’s conduct was so serious that a criminal penalty is warranted.

<sup>58</sup> Section 124A *Domestic and Family Violence Act 2007* (NT).

homicide laws have identified the need to tackle gender bias within criminal law and respond to concerns about inadequacies in the legal system's treatment of domestic homicides that occur in the context of family violence.<sup>59</sup> As with defensive homicide, we are concerned that any 'failure to protect' laws do not add to the injustices for women experiencing family violence. We, therefore, advocate that a strong 'safety net' would need to be introduced alongside any legislation which includes an express legislative family violence defence.

An express legislative family violence defence would need to include factors along the following lines:

- 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. The definition of family violence under s 9AH (4)-(5) of the *Crimes Act 1958* (Vic) could be adopted.
- Relevant evidence supporting the defence should also reflect the special family violence evidentiary provisions which s 9AH of the *Crimes Act 1958* (Vic) currently recognises in the context of homicide, namely:
  - the history of the relationship between the accused and the family member who is alleged to have used family violence against them or another family member;
  - the psychological effect of violence on people who are or have been in a relationship affected by family violence;
  - social or economic factors that impact on people who are or have been in a relationship affected by family violence;
  - the cumulative effect of the violence on the accused or another family member;
  - social, cultural or economic factors that impact on the accused or another family member affected by the family violence; and
  - the general nature and dynamics of relationships affected by family violence, including the possible consequences of the separation of the accused from the family violence perpetrator.<sup>60</sup>

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<sup>59</sup> See Department of Justice Victoria, "Review of the offence of defensive homicide: Discussion paper", August 2010, 21; Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004).

<sup>60</sup> *Crimes Act 1958* (Vic) s 9AH. Inserted by *Crimes (Homicide) Act 2005* (Vic) which came into force on 23 November 2005.

### **11.7. The ‘failure to protect’ laws would need to include a requirement for consultation with the Secretary of the Department of Human Services before a prosecution can be initiated**

Section 493 of the CYFA contains a necessary safeguard which requires police to consult with the Secretary of DHS prior to bringing proceedings. The partner organisations submit that this safeguard would need to be similarly applied to the proposed legislation if it is introduced. This safeguard would ensure that each case would be considered by someone with experience and understanding of the dynamics of family violence and the focus of any legislation would remain on preventing harm to children, rather than being purely punitive in nature.

### **11.8. Any introduction of ‘failure to protect’ laws would need to be accompanied by adequate training of those involved in the legal process**

This express legislative safety net for victims of family violence would need to be supported by associated ongoing and comprehensive training of judges, the OPP, legal professionals and police, using information about the social context of family violence via such sources as the ‘Family Violence Benchbook’<sup>61</sup> and the experience of advocates for women victims/survivors. This is necessary in order to provide the basis for developing a shared understanding across the continuum of responses in the justice system to family violence, including child homicide cases where family violence against the mother is involved. Training is also needed to ensure judicial expertise on the gendered realities of family violence and avoid judicial misunderstandings of the dynamics of family violence which has occurred in other jurisdictions, as adequately demonstrated in the case studies discussed above.

Protocols around handling family violence issues within the criminal courts would also need to be developed. There is a related need for more cooperation between law enforcement, the legal sector and family violence agencies, in recognition of the need for consistency in dealing with the continuum of family violence in various aspects of the civil and criminal justice process.

If ‘failure to protect’ legislation is introduced in the absence of such infrastructure, the justice system will fail to protect women and children by failing to recognise the complex impacts of family violence, legitimising abusers’ perspectives of violence and blaming the victim. This process “*often leads to the further victimisation of those who look to the justice system for protection, and has been referred to as ‘the cultural facilitation of violence’*”.<sup>62</sup> It is directly contrary the Government’s stated desire to reduce violence against vulnerable members of Victorian communities.

#### **Proposals:**

**The proposed laws should not be enacted.**

<sup>61</sup> Judicial College of Victoria (2010), accessed at [www.justice.vic.gov.au/emanuals/FamilyViolenceBBWeb/default.htm](http://www.justice.vic.gov.au/emanuals/FamilyViolenceBBWeb/default.htm).

<sup>62</sup> R Busch, “Don’t Throw Bouquets at Me...(Judges) Will Say We’re In Love: An analysis of New Zealand Judges’ Attitudes Towards Domestic Violence”, in J Stubbs (ed.), *Women, Male Violence and the Law*, (1994) 104–146, 105.

**If the proposed laws are enacted, the laws would need to recognise the dynamics of family violence and only apply in limited circumstances to afford sufficient protection for those in family violence situations to avoid prosecution.**

**The laws would need to be accompanied with adequate training about the social context of family violence for those involved in the legal process.**