



**Human Rights
Law Centre Ltd**
ABN 31 117 719 267

Level 17, 461 Bourke Street
Melbourne VIC 3000
Australia

P: + 61 3 8636 4450
F: + 61 3 8636 4455
admin@hrlc.org.au
www.hrlc.org.au

The Hon. Robert Clark, MP
24 Rutland Road
Box Hill VIC 3128

By email: robert.clark@parliament.vic.gov.au

CC:

Mary Wooldridge MP, Minister for Mental Health, Community Services, Disability Services and Reform
mary.wooldridge@parliament.vic.gov.au

Daniel Andrews
daniel.andrews@parliament.vic.gov.au

Martin Pakula MP, Shadow Attorney-General
martin.pakula@parliament.vic.gov.au

Danielle Green MP, Shadow Minister for Family Violence
danielle.green@parliament.vic.gov.au

28 April 2014

Dear Attorney

Human rights implications of the *Crimes Amendment (Protection of Children) Bill 2014*

This letter concerns the *Crimes Amendment (Protection of Children) Bill 2014* (the Bill), introduced by the Government in response to the Family and Community Development Committee's *Betrayal of Trust* report.

Child abuse is a critical issue that must be addressed as a matter of urgency and priority and the Human Rights Law Centre (HRLC) welcomes the majority of the recommendations in the *Betrayal of Trust* report. The HRLC also welcomes clause three of the Bill which criminalises a failure by a person in authority to protect a child from a sexual offence. However, the Human Rights Law Centre is concerned that clause four of the Bill - which creates a new 'failure to disclose' offence where a person does not disclose a sexual offence committed against a child - is not appropriately adapted to protect children and has the potential to punish women who are themselves victims of violence.

The Bill provides a defence if a person fears on reasonable grounds for the safety of any person and the failure to disclose the information to police is a reasonable response in the circumstances. The 'reasonableness' requirement in this defence is likely to render it inadequate to provide protection for women who are the victims of family violence.

The HRLC considers that clause four of the Bill constitutes an unjustifiable limitation on human rights contained in Victoria's *Charter of Human Rights and Responsibilities Act 2006* ('Charter'). The relevant human rights are identified below, followed by a consideration of whether the limitations on these rights are 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom' as required by section 7(2) of the Charter.

Right to liberty and security of the person (section 21); right to life (section 9); freedom torture and cruel, inhuman and degrading treatment (section 10)

'Failure to disclose' offences such as the offence contained in clause four of the Bill are generally applied to women who are themselves the victims of domestic violence.¹ These laws fail to take account of the special circumstances of women who are subject to domestic violence and ignore the risks that women face when they take action against perpetrators.²

'Failure to disclose' laws limit Charter rights that protect physical and psychological integrity by, for example:

- deterring women from reporting abuse, seeking medical care or pursuing criminal or civil remedies to stop the abuse for fear that they will place themselves at risk of criminal prosecution if they have not reported the abuse in the past;
- requiring women to act in situations where they fear for their own safety or that of their children in a way that may further jeopardise their safety or that of their children; and/or
- enabling perpetrators of violence to threaten to report women to welfare authorities if they try to leave the relationship.

These dangers are all compounded by the lack of emergency and long term housing, economic support and job security for women escaping violence.

Non-discrimination (section 8)

While clause four of the Bill is expressed in gender neutral terms, in other jurisdictions similar laws are almost exclusively applied to women.³ They may therefore constitute indirect discrimination against women contrary to the rights set out in section 8 of the Charter.

In addition, family violence is itself a form of discrimination against women.⁴ The right to equality in section 8 of the Charter requires the Victorian Government to address this discriminatory practice and

¹ Family violence was a factor in 62% of cases reviewed in the Victorian Child Death Review Committee's *Annual report of inquiries into the deaths of children known to Child Protection* (2010); see also Jeanne A Fugate, 'Who's Failing Whom? A Critical Look at Failure to Protect Laws', *New York University Law Review*, Vol. 76, p.274.

² The special circumstances of women who are subject to domestic violence are already recognised in Victoria in the *Family Violence Protection Act 2008* and several areas of criminal and common law.

³ See, for example, Michelle S. Jacobs, *Criminal Law: Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 *J. Crim. L. & Criminology* 579, 593 n.68 (1998).

⁴ Committee on the Elimination of Discrimination against Women, *General Recommendation 19, Violence against women* (Eleventh session, 1992), U.N. Doc. A/47/38 (1993) ("CEDAW General Recommendation 19")[1].

exercise 'due diligence' in preventing violations and protecting against them.⁵ As discussed in the section above, clause four of the Bill does the exact opposite by increasing and exacerbating the risks faced by women experiencing or at risk of violence.

The higher rates of prosecutions and convictions against women in 'failure to disclose' cases may be partially attributable to the prevalence of discriminatory gender stereotypes.⁶ Specifically, stereotypes about women's 'maternal role' place unfair and unrealistic expectations on women. For example, in a judgement in a failure to protect case, a US Court commented:⁷

even if she [the Defendant] was afraid if she had the natural maternal instinct that any mother should have, that maternal instinct should have overcome her fear.

Harmful stereotyping is also a form of discrimination against women and is therefore a further limitation on the right to equality under the Charter.⁸

Right to Protection of Families and Children (section 17)

Section 17(2) of the Charter establishes the right of the child to protection in his or her best interests. Clause four of the Bill may threaten the safety and security of children, limiting children's rights. As set out above, we are concerned that women in extremely vulnerable situations will not immediately report because of fear of violence to themselves or their children if they do. If they do not promptly report, clause four may then provide a disincentive for women to seek assistance in the future when they are better able to do so for fear that they will be prosecuted.

Permissible limitations on rights (section 7)

Under section 7(2) of the Charter a human right:

may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

- a. the nature of the right; and
- b. the importance of the purpose of the limitation; and
- c. the nature and extent of the limitation; and
- d. the relationship between the limitation and its purpose; and
- e. any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The Government has presented the 'failure to disclose' law as an initiative designed to protect children from violence.⁹ The importance and purpose of the limitation (section 7(2)(b)) is therefore extremely significant. However, the Government is also required to demonstrate that the law is appropriately

⁵ CEDAW General Recommendation 19 [9].

⁶ For a discussion of stereotyping and human rights see Cook and Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (2010).

⁷ *Tenn. Dep't of Human Servs. v. Tate*, No. 01-A-01-9409-CV-00444, 1995 WL 138858 (Tenn. Ct. App. Mar. 31, 1995).

⁸ *Convention on the Elimination of All Forms of Discrimination Against Women*,

⁹ Ted Baillieu, MP, *Coalition's Tough New Laws to Protect Children from Violence*, 23 November 2010.

designed to achieve this purpose and that there is no less restrictive means of doing so. The Victorian Supreme Court has held that:¹⁰

[t]he onus of 'demonstrably justifying' the limitation in accordance with s 7 resides with the party seeking to uphold the limitation. In light of what must be justified, the standard of proof is high. It requires a degree of probability which is commensurate with the occasion.

The HRLC is not aware of any evidence that the offence contained in clause 4 would increase protection of vulnerable children. In fact, there is evidence to the contrary.¹¹ In this context, we consider that clause four of the Bill constitutes an unreasonable limitation on human rights and fails to comply with the requirements of the Victorian Charter.

Recommendations

The Human Rights Law Centre endorses the recommendations contained in the letter from Victorian family violence organisations dated 2 April 2014 (attachment 1), namely that the offence in clause four of the Bill be narrowed so that it is limited to a failure to disclose by a person in authority within a relevant organisation as defined in clause three of the Bill.

Yours sincerely



Rachel Ball
Human Rights Law Centre

About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

Contact

Rachel Ball
Director – Policy and Campaigns
Human Rights Law Centre
P: (03) 8636 4433
E: rachel.ball@hrlc.org.au

¹⁰ *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [147].

¹¹ Jeanne A. Fulgate, 'Who's Failing Whom? A Critical Look at Failure to Protect Laws', *New York University Law Review*, Vol. 76, p.272; See also, Jacob, A. and Fanning, D., *Report on Child Protection Services in Tasmania* (2006) p.59.