
WHO'S FAILING WHO?

NEW FAILURE TO PROTECT LAWS IN VICTORIA AND THE IMPACT ON INDIGENOUS MOTHERS AND THEIR CHILDREN

by Kyllie Cripps

INTRODUCTION

In May 2014, the Crimes Amendment (Protection of Children) Bill 2014 was introduced to the Victorian Parliament. This Bill amends four related Acts¹ to create two new criminal offences in relation to the sexual abuse of children. Both offences relate to the failure of adults to report and to protect children from sexual abuse. It turns a 'failure to protect' policy that potentially removes children from mothers who are the victims of family violence, into a law that will also turn a victim of violence into a criminal. The new laws have caused much controversy with many commentators concerned over the impact on victims of family violence, and how they may be criminalised for failing to protect their children in arguably very difficult and confronting circumstances.²

Recent child protection data for the first time provides an insight into the co-occurrence of different types of abuse. It demonstrates that when sexual abuse is noted as the primary form of abuse, in 21.3 per cent of cases, emotional abuse is also present.³ In many jurisdictions child protection policy dictates that the witnessing of family violence be coded as emotional abuse.⁴ This begs the question: how much of the sexual abuse taking place is in the context of homes in which family violence is present? There is limited research available to answer this specific question. Some suggest that as much as 40 per cent of those experiencing sexual abuse were also exposed to family violence.⁵ Data specific to the experiences of Indigenous women and children in this context is hard to come by, but given the high rates of reported family violence and child sexual abuse in these communities, the ramifications of the new laws in Victoria are likely to impact them significantly.⁶ This paper seeks to shed light on these circumstances and the potential consequences by drawing on examples of how 'failure to protect' as a policy operating in child protection is already disproportionately and negatively affecting Indigenous families. It will also examine the process for introducing failure to protect laws in Victoria, posing the question: are these laws likely to reduce the harms associated with sexual abuse in Indigenous communities? The significance of this information to the Royal Commission into Institutional Responses to Child Sexual Abuse will also briefly be discussed.

DISCLOSURE OF ABUSE: FAILURE TO PROTECT AS A POLICY PRIOR TO ANY LAW REFORM

Indigenous women and children are dependent on their family and kinship networks. Disclosure of family violence and in particular, child sexual abuse, to authorities is often viewed within these networks as a betrayal.⁷ This is because the consequences of reporting involve a range of outsiders flooding in to families and communities who have a history of judging Indigenous people harshly. This has included child protection workers exerting a policy and practice on mothers, who are victims of family violence, by removing their children from their care on the basis that they failed to protect their children from witnessing abuse. A major basis for this claim, particularly if this is not the first time the violence has taken place, is that she had prior knowledge of the tendencies of the perpetrator and therefore had a responsibility to take appropriate actions to minimise the risk of harm to herself and the children.⁸

Movements to criminalise 'failure to protect' adds a new layer to how far the state is willing to discriminate against the vulnerable in our community.

It should be noted that the responsibility is often on the mother to take action. The perpetrator, who may well be the father of the children, often becomes invisible in this context.⁹ Fathers often disappear from view, refusing to participate in directives from child protection, particularly if they have been ordered by the courts to stay away from their partner and/or children. Several Australian studies have found that men are often not interviewed after a child protection report, even when the concern is related to family violence.¹⁰ One study noted that a pattern of scrutinising women and failing to include men was so pronounced that it was suggestive of a gender bias in the cases studied.¹¹ This is significant, as it demonstrates an intention to hold women/mothers to a higher

level of accountability for the care and protection of children then it does for men. Child protection workers expect that the mother will be compliant with actions that will increase the safety of herself and her children. These may include: abiding by conditions of any family violence order made by the court; relocating to a shelter and leaving behind familial and community resources and networks including male children over the age of 10; parenting and/or anger management classes; as well as counselling programs. Depending on the circumstances, the conditions for maintaining care and control of one's children post family violence for the mother, and even more so in the context of the co-occurrence of sexual abuse, will be considerable. Resistance by the mother in complying with directives from the department are viewed as a refusal to properly care for and protect her children.¹² In such circumstances children are placed in out-of-home care. The rate at which Indigenous children are placed in out-of-home care is increasing every year. The current rate is 57.1 per 1000 children, which is 10.6 times the rate of non-Indigenous children.¹³ There is no data available to disaggregate how many of these cases are specific to a government policy of holding mothers responsible for failing to protect their children from exposure to family violence.

LEGAL LANDSCAPE

Given the above policy context, movements to criminalise 'failure to protect' adds a new layer to how far the state is willing to discriminate against the vulnerable in our community. Since 2011, the Victorian Government has been exploring a variety of options to legislate in the area of 'failure to protect', seeking to compel adults to take active steps in responding to child abuse as they become aware of it. This has included creating offences that can be used where a child has died or been seriously maimed as a result of child abuse; and it is not possible to convict a perpetrator because it is unclear which adult was responsible.¹⁴ These laws, it was argued, would increase the standards and responses to vulnerable children by obligating adults living and/or caring for them to protect them from harm.¹⁵ As the case is now, the proposed reforms in 2011 caused much concern amongst service providers.¹⁶ It was argued that the proposed changes were too broad; would not provide additional protection to children; and the reporting and help seeking behaviours of non-offending parents would decrease out of fear of the criminal consequences.¹⁷ Children would ultimately bear the burden of reporting by being separated from their mothers and placed in either state out-of-home care.

THE CUMMINS INQUIRY

The Cummins Inquiry in 2012 explored the necessity for new 'failure to protect' laws. They acknowledged that recent family violence reforms in Victoria, and in many other states, were focused on offender accountability; and that these reforms may be diverted

by placing responsibility for abusive behaviour on a non-offending parent (more often than not the mother). The Inquiry stressed that for any change to take place it was necessary that existing legal provisions be reviewed, for example, section 493 of the *Children, Youth and Families Act 2005* ('CYF Act'), which provides that it is an offence for a person who has a duty of care in respect of a child to intentionally fail to take action that does, or is likely to, result in harm to a child. Victoria Police advised the Inquiry that, in a 10 year period, there were only 15 recorded alleged offences in relation to this section. The reason being that this section requires proof of 'intention' to be established; and in situations of child abuse and family violence, incidences often occur on the spur of the moment, with no or little intention to cause harm. The Inquiry recommended that the section be reviewed and consideration be given as to whether the section was sufficient to meet the policy objectives that the proposed new offence was being designed to address.¹⁸ They also specifically noted that if new 'failure to protect' laws were enacted, they should provide that the 'prosecution is required to prove, as an element of the offence and beyond reasonable doubt, that the accused was not the subject of, or exposed to, relevant family violence'.¹⁹

The Cummins Inquiry also examined mandatory reporting and the professions currently gazetted to report under the *CYF Act*. They recognised that there was a delicate balance to be achieved between increasing the number of people reporting and the system's capability of investigating and responding to those reports.²⁰ It was on this basis that they made two recommendations, firstly that the Victorian Government should progressively gazette those professions listed in Section 182 (1) F-K that were yet to be mandated, starting with qualified child care workers.²¹ Secondly, it recommended that the *Crimes Act 1958* (Vic) ('*Crimes Act*') be amended to create a separate reporting duty where there is reasonable suspicion a child or young person under the age of 18 is being or has been physically or sexually abused by an individual within a religious or spiritual organisation.²² This duty would extend to a Minister and persons associated with the religious organisation, the only exemption being in the context of confession.²³

INQUIRY INTO THE HANDLING OF CHILD ABUSE BY RELIGIOUS AND OTHER NON-GOVERNMENT ORGANISATIONS

A further Parliamentary Inquiry was held shortly after the release of the findings of the Cummins Inquiry. Its purpose was to provide additional evidential weighting to the need for legislative reform specific to the handling of reports of child abuse and sexual abuse by religious and other organisations. The findings of this Inquiry delivered in November 2013, noted how very difficult it is for a child to make a complaint to adults about child sexual abuse—to be

believed and to have their complaints acted on appropriately. They recommended that section 326 of the *Crimes Act* be amended to ensure that a person who fails to report a serious offence involving the abuse of a child will be guilty of an offence; and that new offences be created to hold organisations accountable in instances where persons in authority are aware of and consciously disregard substantial and unjustifiable risks where 'their acts or omissions place a child in a situation that might endanger the child's life, health, welfare, morals, or emotional wellbeing.'²⁴

Far from providing a safety net, mothers will likely be held accountable for the actions of offenders against their children.

CRIMES AMENDMENT (PROTECTION OF CHILDREN) BILL 2014

It is interesting to note that the Crimes Amendment (Protection of Children) Bill 2014, tabled in the Victorian Parliament in May, failed to incorporate the specific recommendation of the Cummins Inquiry, that the prosecution bear the onus of proof that the accused was not the subject of family violence. The Bill instead provides that an acceptable excuse for failing to disclose relevant information to police in the circumstances includes a person's fear on reasonable grounds for the safety of any person should they disclose.²⁵ It will be at the discretion and interpretation of judicial officers reviewing specific cases whether family violence constitutes reasonable grounds, as the legislation does not specifically provide for it.

The new law then is as follows: Firstly people in authority in organisations who fail to reduce or remove a substantial risk that a child will become a victim of a sexual offence may be liable for a maximum penalty of five years imprisonment. The second offence is the failure to disclose a sexual offence against a child. It applies to all adults who have information that leads them to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 by an adult. Failure to disclose the information to Victoria Police as soon as it is practicable to do so may subject them to a maximum penalty of three years imprisonment.²⁶

INDIGENOUS CHILD CARE ORGANISATIONS

In jurisdictions around the country, including in Victoria, there exist Indigenous childcare organisations responsible for protecting and promoting the rights of Indigenous children and young people.

They provide a range of programs and services to support children in care, to reinforce Aboriginal culture and kinship networks, and to encourage best parenting practices so that children can be raised in safe and nurturing homes. These organisations have long been engaged with the families entangled in the policy net of 'failure to protect' and work with them to quickly resolve the issues that child protection has identified. Many working in this context often feel that they "walk a tight rope" between what is considered right and just from an Indigenous child, familial, and/or community perspective; versus working in an often uncompromising child protection system. Their loyalties at times can be conflicted making their work incredibly hard to manage.²⁷ Prior to the new 'failure to protect' laws coming into effect, these organisations could work with some degree of autonomy as provided by the CYF Act; and by departmental policy directives in the context of reports of abuse. The new laws however, increase the threshold of reporting on all employees. As such they will need to examine, as the Royal Commission into Institutional Responses to Child Sexual Abuse is presently, how their policies, procedures and practices for the management of reports of sexual abuse will need to change. For example; staff will need to be trained to ensure their compliance, as to not comply may result in a gaol sentence; and community education will also need to take place to provide an understanding of how the roles and responsibilities of workers have changed, in an effort to minimise any negative feelings that may arise as a consequence of increased reports to police and child protection. This is a difficult position for an organisation to contemplate.

CONCLUSION

Although the ultimate goal of social policy and law reform is to improve the welfare of citizens, best intentions can often have unintended consequences.²⁸ The new 'failure to protect' laws being introduced in Victoria will have a significant impact for mothers and children who are the victims of both child sexual abuse and family violence. Far from providing a safety net, mothers will likely be held accountable for the actions of offenders against their children. The seriousness of the offence and the criminal penalty of imprisonment will leave children vulnerable to separation from their caregivers and placement in a child protection system that has, in recent times, been seriously critiqued for its failure to protect children from sexual abuse.²⁹ This is at a time when children need the care and support of their non-offending family and the certainty of their love, support and protection. To take such support and protection away is to increase their trauma, potentially producing feelings of self-blame for disclosing the abuse.

Indigenous communities and their organisations are inevitably going to feel the harshness of these new laws in unique and profound ways because of our historical and contemporary

experiences with violence. How the state monitors and mitigates against this will be the challenge. It may be that the work of Royal Commission will provide the state with insights to help facilitate this process.

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- 1 *Crimes Act 1958* (Vic); *Working with Children Act 2005* (Vic); *Children, Youth and Families Act 2005* (Vic); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).
- 2 CASA Forum, Letter to Mr Geoff Shaw MP Re Crimes Amendment (Protection of Children) Bill 2014 (1 May 2014) <<http://www.casa.org.au/assets/Documents/Joint-letter-Geoff-Shaw-MP-Protection-of-Children-Bill-2014-010514.pdf>>.
- 3 Australian Institute of Health and Welfare, *Child protection Australia: 2012–13* (AIHW, 2014) 21.
- 4 Victorian Department of Human Services, *Abuse and harm - legal and practice definitions Advice No 1008* <<http://www.dhs.vic.gov.au/cpmanual/practice-context/child-protection-program-overview/?a=657493>>.
- 5 Gillinder Bedi and Chris Goddard, 'Intimate partner violence: What are the impacts on children?' (2007) 42 (1) *Australian Psychologist*.
- 6 A distinction is made here about the reported cases of family violence and child sexual abuse as it is widely understood that the non-disclosure of violence is as high as 90 per cent for Indigenous women and arguably higher for child sexual abuse cases; see Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities' (2011) *Trends and Issues in Crime and Criminal Justice* 405.
- 7 Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities' (2011) *Trends and Issues in Crime and Criminal Justice* 405.
- 8 Beth Mandel, 'The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholson V. Williams' (2005) 73 *University of Cincinnati Law Review* 1142.
- 9 Cathy Humphreys and Nicky Stanley, *Domestic violence and child protection: Directions for good practice* (Jessica Kingsley Publishers, 2006); Susan Strega et al, 'Connecting father absence and mother blame in child welfare policies and practices' (2008) 30 (7) *Children and Youth Services Review* 705.
- 10 Margarita Frederico, Annette Jackson, and Jenny Dwyer, 'Child protection and cross-sector practice: an analysis of child death reviews to inform practice when multiple risk factors are present', (2014) 23 (2) *Child Abuse Review* 104; Susan Heward-Belle, *All care and all responsibility: a study of the responses of child protection workers to domestic violence in families*, (Master of Social Work, University of Sydney, 1996).
- 11 Ibid.
- 12 Above 6.
- 13 Above 2, 51.
- 14 Victorian Government, Discussion Paper 'Failure to Protect' Laws 2011.
- 15 Ibid.
- 16 See Federation of Community Legal Centres, Submission to the Victorian Government in response to the discussion paper on proposed 'Failure To Protect' Laws (September 2011) <<http://www.fclc.org.au/lrs.php>> ; Victorian Equal Opportunity & Human Rights

Commission, Response to discussion paper – 'Failure to Protect' laws (September 2011) <<http://www.humanrightscommission.vic.gov.au/index.php/submissions/item/196-submission-on-failure-to-protect-laws-sep-2011>>.

- 17 Victorian Equal Opportunity & Human Rights Commission Above 19, 12.
- 18 Phillip Cummins, Dorothy Scott and Bill Scales, *Report of the Protecting Victoria's Vulnerable Children Inquiry 'Cummins Inquiry'*, Volume 1 (Victorian Government, 2012) xviii.
- 19 Ibid.
- 20 Ibid.
- 21 Cummins, Scott and Scales, above 22, 349.
- 22 Ibid, 355.
- 23 Ibid.
- 24 Parliament of Victoria, Family and Community Development Committee, *Betrayal Of Trust Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, Volume 2* (Parliament of Victoria, 2013) 477.
- 25 Crimes Amendment (Protection of Children) Bill 2014 (Vic) ss 327 (3) (a).
- 26 Ibid.
- 27 Teresa Libesman, *Decolonising Indigenous Child Welfare-Comparative Perspectives* (Oxford University Press, 2014).
- 28 Brian Wharf and Brad McKenzie, *Connecting Policy to Practice in the Human Services* (Oxford University Press, 1998); Kendra Nixon and Kyllie Cripps, 'Child Protection Policy and Indigenous Intimate Partner Violence' in Susan Strega et al, *Failure to Protect: Moving Beyond Gendered Responses* (Fernwood Publishing, 2013) 166.
- 29 ABC, 'Siblings' sexual abuse highlights flaws in 'negligent' Victorian state care', *ABC News*, 3 July 2014; ABC, 'Leaked documents show hundreds of sexual assault allegations in Victorian children's homes', *ABC News*, 4 July 2014.

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