

8 September 2011

Ms Annie Woodger
Criminal Law Policy
Department of Justice
121 Exhibition Street
Melbourne VIC 3000

By email: criminal.law@justice.vic.gov.au

Dear Ms Woodger

Human rights implications of 'failure to protect' laws

The Human Rights Law Centre welcomes the opportunity to comment on the Victorian Government's proposed 'failure to protect' laws. These laws would create offences for adults who fail to take action where:

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

This submission considers the human rights implications of 'failure to protect' laws and sets out that such laws constitute unjustifiable limitations on human rights contained in the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*. The Charter requires all public authorities to consider and act in accordance with human rights in developing laws or policies or providing services.

The human rights relevant to 'failure to protect' laws 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.

Child abuse is a critical issue that must be addressed as a matter of urgency and priority. However, the HRLC considers that the proposed laws are not appropriately adapted to achieve this aim and instead are likely to punish women who are themselves victims of violence.

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

- deterring women who fear criminal prosecution from reporting abuse, seeking medical care or pursuing criminal or civil remedies to stop the abuse;
- 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 'failure to protect' laws are expressed in gender neutral terms, in jurisdictions where they currently operate, they are almost exclusively applied to women.³ They may therefore constitute a form of 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 exercise 'due diligence' in preventing violations and protecting against them.⁵ As discussed in the section above, 'failure to protect' laws do 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 protect' cases may be partially attributable to the prevalence of discriminatory gender stereotypes.⁶ Specifically, stereotypes

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].

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).

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. 'Failure to protect' laws may threaten the safety and security of children they also limit children's rights. For example, the best interests of the child are compromised where women are deterred from seeking assistance and support for fear that they will be prosecuted under 'failure to protect' laws.

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 Coalition has presented the 'failure to protect' laws 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 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.

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.

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

The Human Rights Law Centre is not aware of any evidence that such laws do increase protection of vulnerable children. In fact, there is substantial evidence to the contrary.¹¹ In this context, we consider that the 'failure to protect' laws constitute unreasonable limitations on human rights and fail to comply with the requirements of the Victorian Charter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rachel Ball', with a stylized, cursive script.

Rachel Ball
Director – Policy and Campaigns

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.