MEMBERS OF LEGISLATIVE ASSEMBLY:

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

The Honourable Louise Asher MP
Deputy Leader of the Liberal Party; Minister for Innovation; Minister for Tourism and Major Events; Minister for Employment and Trade
louise.asher@parliament.vic.gov.au

The Honourable Christine Fyffe MP
Speaker of the Victorian Legislative Assembly
christine.fyffe@parliament.vic.gov.au

The Honourable Heidi Victoria MP
Minister for the Arts; Minister for Women's Affairs; Minister for Consumer Affairs
heidi.victoria@parliament.vic.gov.au

Hon Jeanette Powell MP
jeanette.powell@parliament.vic.gov.au

Ms Donna Bauer MP
donna.bauer@parliament.vic.gov.au

Ms Cindy McLeish MP
cindy.mcleish@parliament.vic.gov.au

Ms Lorraine Wreford MP
lorraine.wreford@parliament.vic.gov.au

Ms Dee Ryall MP
dee.ryall@parliament.vic.gov.au

Ms Elizabeth Miller MP
elizabeth.miller@parliament.vic.gov.au

MEMBERS OF LEGISLATIVE COUNCIL:

The Honourable Wendy Lovell MLC
Deputy Leader of the Government in the Legislative Council; Minister for Housing; Minister for Children and Early Childhood Development; Manager of Government Business (Legislative Council)
wendy.lovell@parliament.vic.gov.au

Mrs Andrea Coote MLC
Parliamentary Secretary for Families and Community Services
andrea.coote@parliament.vic.gov.au

Ms Georgie Crozier MLC
Parliamentary Secretary for Health
georgie.crozier@parliament.vic.gov.au

Mrs Inga Peulich MLC
Cabinet Secretary
inga.peulich@parliament.vic.gov.au

Mrs Jan Kronberg MLC
jan.kronberg@parliament.vic.gov.au

Mrs Amanda Millar MLC
amanda.millar@parliament.vic.gov.au

Dear Members of Parliament,

Crimes Amendment (Protection of Children) Bill 2014

We are writing to you as women and as members of the Liberal National Party Government in Victoria, urging you to consider supporting an amendment to the Crimes Amendment (Protection of Children) Bill 2014 ("the Bill") that was introduced into Parliament on 26th March 2014.

Our concerns about the Bill as it stands are outlined in detail in this letter, and have been raised with the Attorney General, Robert Clark. We are now appealing to you as women Members of Parliament to consider our concerns and raise them within your party and the Victorian Parliament. We understand that the Bill will be debated in either the next session of Parliament sitting in early May, or the following sitting at the end of May.

You will all be aware of the unprecedented amount of public interest and media coverage of family violence over the past few weeks, after several tragic family violence homicides in Victoria. This includes the very public killing of Luke Batty by his father Greg Anderson in Tyabb in February; the killing of Fiona Warzywoda who was allegedly stabbed to death by her long term de-facto partner after attending Sunshine Magistrates Court to seek an Intervention Order; and the tragic deaths of sisters Indianna and Savannah who were allegedly killed by their father in Watsonia over Easter. These homicides have all brought an enormous amount of coverage and debate of the issue of family violence.

As the Honourable Mary Wooldridge MP noted in her speech at the launch of the partnership between the National Foundation to Prevent Violence against Women and their Children and Vic Health on 10th April this year, we really need to start to talk about **male** violence against women and children. What is still not well understood in the wider community is the strongly gendered nature of family violence; the far reaching impacts on women and children who live with that violence; and the barriers to and (often well-founded) fears of women to leaving or to reporting the violence.

Our group of non-government organisations includes peak bodies and statewide organisations that work in the area of family violence. We have worked together and with governments for many years to build a better and more integrated system to protect women and children.

We have serious concerns about the Bill as it stands, and believe it will cause more harm than good to women and children experiencing family violence.

The Bill was introduced into Parliament on 26 March 2014, as part of the Government's response to the recommendations of the Parliament of Victoria Family and Development Committee Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations (the *Betrayal of Trust* Report).

We strongly support the vast majority of the Report's recommendations to strengthen the accountability of institutions for child abuse, and accordingly we welcome Clause 3 of the Bill which criminalises a failure by a person in authority to protect a child from a sexual offence.

However, we urge your government to either amend Clause 4 of the Bill, or to decide against adoption of that clause. Clause 4 introduces a new criminal offence:

> *Failure to disclose a sexual offence committed against a child under the age of 16*.
>
> *...a person of or over the age of 18 years (whether in Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a member of the police force of Victoria as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so.*

The offence is similar to a proposal from the Victorian Government in November 2010 to introduce a 'failure to protect' law which was intended to criminalise the behaviour of non-offending family members in child abuse cases. Many of our organisations jointly responded to the Department of Justice *Discussion Paper – 'Failure to Protect Laws'* in September 2011, and also wrote to the Attorney General on 24 May 2012, and on 18 December 2013 following the release of the *Betrayal of Trust* recommendations, outlining why we opposed such a measure.

We do not support the introduction of Clause 4 in its present form, because we believe that it may inadvertently cause more harm to children suffering sexual abuse, and is potentially detrimental to women experiencing family violence.

The offence may cause more harm to children

In helping children to recover from abuse, it is widely accepted best practice that services should be resourced to work to support the non-abusing parent and assist them to enhance their child's safety. However, if the mother is incarcerated for 'failure to disclose' the abuse (see discussion below), the child may instead be left in the care of the State, or even in some instances with the perpetrator of the abuse.

In 2012, the report of the Protecting Victoria's Vulnerable Children Inquiry (the Cummins Report) found that the then proposed 'failure to protect' law could undermine the growing recognition of the complex dynamics of family violence and could be inconsistent with the recent reforms to the family violence system. Importantly, the Cummins Report suggested that reforms addressing offender accountability 'may be waylaid by placing responsibility for abusive behavior on a non-abusive parent.'[1]

The Inquiry identified a range of risks and adverse consequences that could arise if such legislation was introduced. In particular, the Cummins Report expressed serious concerns that the law 'might have a dampening effect on help-seeking behaviour and the reporting of abuse'.[2]

It is therefore likely that Clause 4 will actually deter the reporting of abuse to child protection authorities, and so have the unintended consequences of driving the issue of child sexual abuse further underground and placing children at greater risk.

The offence will capture mothers who are victims of family violence

In its current form, the offence is so broad that it criminalises the behaviour of any person in the community who has a belief that a sexual offence has been committed against a child. In the context of a family violence situation, a mother who is a victim of family violence may be charged with this offence, on the basis that she knew of the sexual abuse and failed to disclose the information to police as soon as practicable.

Research clearly demonstrates the co-occurrence of child abuse with family violence. In Victoria, family violence is a factor in over half of substantiated child protection cases. Of the 15 child death cases reviewed in the 2013 Annual Report of Inquiries into the Deaths of Children known to Child Protection, family violence was a factor in 12 cases (80%). Given the co-occurrence of family violence and child abuse, there is therefore a high likelihood that the offence will capture mothers who are themselves victims.

Failure to protect laws do not adequately recognise the dynamics and complexities of family violence. In particular, they fail to take account of the powerful barriers to a woman leaving an abusive relationship or reporting the abuse against her and her children, including a fear of retribution.[3] There is evidence that women face greater scrutiny and higher expectations

[1] Report of the Protecting Victoria's Vulnerable Children Inquiry, 360.
[2] Ibid.
[3] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, New York, 2007).

of their parenting than men.[4] The discriminatory impact is likely to be greater for women with disabilities, Aboriginal women and women from CALD communities, as they face additional barriers to disclosing abuse.

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. However, this defence will not be adequate to protect vulnerable mothers, particularly given the requirement of 'reasonableness' in relation to their fear and response. 'Reasonableness' is likely to be interpreted in a way that imposes unrealistic or unsafe expectations on such women.

Case law in other jurisdictions shows that failure to protect laws do not adequately recognise the dynamics of family violence, and are almost exclusively used against women who are themselves victims.[5] Although the following United States case studies concern failure to protect laws with a broader scope than envisaged by Clause 4, we believe that similar dynamics are likely to result in Victoria if the Bill is enacted in its current form.

> CASE STUDY 1: *Campbell v State* (2000) (Wyoming)
>
> 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, but 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 misdemeanour.
>
> CASE STUDY 2: *State v Williams* (1983) (New Mexico)
>
> 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 by her husband and threatened by him, she could do nothing to prevent the beating of her daughter. 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.

While it is possible to argue that the cases above might meet the 'reasonableness' test for the defence under Clause 4 of the Bill, there are other family violence situations where the perpetrator's tactics of entrapment are more multi-faceted and subtle. It then becomes harder to explain to a court how her partner's coercive controlling tactics undermine a mother's parenting capacity, and her sense of confidence, capacity and judgment, to such

[4] Jeanne Fugate, 'Who's Failing Whom? A Critical Look at Failure to Protect Laws' (2001) 76 *New York University Law Review* 272; Jonathan Herring, 'Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?' [2007] *Criminal Law Review* 923; Julia Tolmie, 'Criminalising Failure to Protect' (2011) *New Zealand Law Journal* December 375.

[5] Ibid.

an extent that even when he is not threatening her and has not used overt tactics of violence against her recently, she is still far too constrained to be able to report the abuse of her child.

By creating the willingness to prosecute non-offending parents, this provision will undermine the strong work of the Victorian government in holding family violence perpetrators accountable for the considerable harm they cause to children and women. Such work requires child protection, family services and other practitioners to make perpetrators more visible in their casework, and to emphasise community-based, civil and criminal justice system approaches that hold them accountable for their use of sexual and other forms of violence. It will create an extremely confusing message to practitioners, community services and the community, if the Victorian government fosters the willingness to prosecute family violence victims at the same time as attempting to increase its focus on perpetrators.

By creating a broad 'catch all' criminal offence that may result in charging a vulnerable victim, Clause 4 also places the onus on those victims to raise a defence in a criminal prosecution. This approach is again inconsistent with the emphasis of Victoria's family violence reforms on ensuring that the perpetrator, not the victim, bears the responsibility for the violence.

Amendments to the offence

We believe that the better public policy approach is to create a narrow criminal offence that does not also capture vulnerable victims. The offence should be limited to a failure to disclose by a person in authority within a relevant organisation as defined in the Bill (see Clause 3). This would be consistent with Recommendation 47 of the Cummins Inquiry. Amending Clause 4 to specify that, as with Clause 3, the offence is intended to target only organisations and those in positions of authority within them, would also be consistent with the Terms of Reference of the *Betrayal of Trust* Inquiry.

Clause 4 could be redrafted as follows:

> *Failure <u>by a person in authority</u> to disclose a sexual offence committed against a child under the age of 16*.
>
> *...a person ~~of or over the age of 18 years (whether in Victoria or elsewhere~~) <u>in authority in a relevant organisation</u> who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a member of the police force of Victoria as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so.*

Alternatively if you conclude that you cannot support an amendment to Clause 4 along the above lines, we urge you simply not to support the incorporation of that clause in legislation. We believe that there needs to be extensive public consultation concerning Clause 4, and that due to the focus of the Betrayal of Trust Inquiry on *institutional* accountability for child abuse, this has not yet been undertaken. Accordingly, Clause 4 requires public consideration before any redrafting and parliamentary debate occurs.

We believe that as women Members of Parliament you play an important role in promoting a dialogue within your party about family violence. Amending or opposing Clause 4 will go some way towards recognising that family violence victims should be protected by the law rather than prosecuted under it.

We would be happy to discuss any of the details of this Bill with you personally. Please contact Dr Chris Atmore on 9652 1506 with your questions or to arrange a meeting.

Yours sincerely

Dr Chris Atmore
Senior Policy Adviser
Federation of Community Legal Centres (Vic)
policy@fclc.org.au
03 9652 1506

Libby Eltringham
Community Legal Worker
Domestic Violence Resource Centre Victoria
leltringham@dvrcv.org.au
03 9486 9866

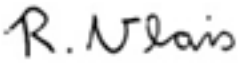
Fiona McCormack
Chief Executive Officer
Domestic Violence Victoria (DV Vic)
fionamccormack@dvvic.org.au
03 9921 0828

Antoinette Braybrook
Chief Executive officer
Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLS Victoria)
abraybrook@fvpls.org
03 9244 3333

Annette Gillespie
Chief Executive Officer
Women's Domestic Violence Crisis Service
annette.g@wdvcs.org.au
03 9928 9611

Maya Avdibegovic
Chief Executive Officer
inTouch Multicultural Centre against Family Violence
ceo@intouch.asn.au
03 9413 6517

Joanna Fletcher
Chief Executive Officer
Women's Legal Service Victoria & Family Law Legal Service
joanna@womenslegal.org.au
03 9642 0877



Rodney Vlais
Acting Chief Executive Officer
No To Violence and Men's Referral Service
rodney@ntv.org.au
03 9428 3536

Keran Howe
Executive Director
Women with Disabilities Victoria
Keran.howe@wdv.org.au
03 9664 9340

Mary Crooks AO
Executive Director
Victorian Women's Trust
mary@vwt.org.au
03 9642 0422

Judy Flanagan
Convenor
CASA Forum
Judy.flanagan@easternhealth.org.au
03 9870 7310