



September 5, 2011.

Submission: Failure to Protect Legislation

Child & Family Services Ballarat (CAFS) is a significant provider of services associated with child protection (being out of home care, ie foster care, residential care, adoption & permanent care and kinship care and integrated family services, including Child & Family Intake & Referral Service Team—Child FIRST) and with family violence (men's behaviour change and the family violence court counselling program). CAFS welcomes the invitation to comment on the proposed Failure to Protect legislation.

We oppose the proposed 'failure to protect' legislation because it is based on a complete misconception of the general pattern of abuse in families. Statistics on abuse and our own experience as social workers both show that in families which suffer from child abuse the entire family is highly likely to be living in fear of the abusive family member, which makes it both misguided and cruel to criminalise the failure of other victims to sufficiently protect the abused child.

Based on reports from those jurisdictions which have enacted similar legislation, the people most likely charged under these laws will be women with abusive partners who victimise them and their children concurrently. Women in this situation already have two incredibly strong motivations to speak out - protecting themselves and their children - and it is a measure of the amount of pressure an abusive partner can have that despite this child abuse frequently goes unreported. It is foolish to think that criminalising their enforced silence could ever provide a stronger incentive than these to contact police or social workers: indeed, the most likely effect will be to make carers even more afraid of approaching them due to the possible consequences.

In the vast majority of cases an abusive parent will also have complete control over the family finances and will use this to maintain power over other family members, meaning that a frightened partner or elder child will have no authority or ability to take the abused child out of the reach of the abusive parent or contacting police without becoming homeless in doing so, making it indefensible to subject them to any criminal sanctions, let alone of this severity. The legislation's primary effect will thus be to punish the victims of abuse while providing no increased protection to children at all.

These punishments are likely to fall with the greatest harshness on the most marginalised groups of society, for it is they who have the most difficulty in making use of police and social worker's protection. Consider these four scenarios, each of which is all too common:

- a woman from a new immigrant or refugee family in an abusive relationship, unable to speak English well and unused to taking any initiative of her own outside the home,
- a woman with a mental illness in an abusive relationship, fearful of authority figures and having great difficulty communicating with others,
- a woman with an alcohol or drug addiction in an abusive relationship, so busy struggling with her own difficulties that she has little hope and energy left to court more trouble by approaching social services,
- a woman from a remote Indigenous community in an abusive relationship, who finds it extremely difficult to step outside the tight-knit community she's grown up in and appeal to outside authorities who seem very alien to her.

Each of these scenarios depicts a person who faces the greatest possible obstacles to



successfully obtaining outside help for an abused child or to taking them out of their partners care by their own efforts, and who is thus among the most likely to be found guilty under the proposed legislation. Considering these obstacles, it is abundantly clear that what is needed is not criminalisation of the victim's behaviour, but instead a greater effort to facilitate the process of speaking out against domestic abuse, through increased cultural sensitivity training and community outreach programs targeting marginalised groups in the community.

We are also concerned at the potential breadth of the legislation, as illustrated by item 26 of the discussion paper. Each of the six cases listed there depicts a person who has little or no authority concerning the child's welfare and whose knowledge of what happens to the child under an abusive parents care may be very limited and will be very difficult to establish conclusively in court, yet might well be targeted under the legislation. This is sufficient grounds to rule out the 'member of a household' approach, but the 'duty of care' approach is not free of flaws either: the strength of the concept of duty of care in negligence law is its flexibility, and thus it could potentially apply to extremely diverse situations where no real moral culpability is present.

Finally, we are concerned that despite the large decrease in the standard of proof for these offences from established child abuse offences, there has been only a small reduction in the maximum sentence applicable. While judges exercise discretion over sentencing, both they and police prosecutors take their cues from the legislative maximums set, which in this case are very severe. It is extremely worrying that the legislation is framed specifically to bypass these established offences where proof beyond a reasonable doubt for them is lacking. In the highly unlikely event that a person is convicted of child abuse and their partner knew about it but stood idly by not through fear of retribution but through lack of concern for the child's welfare, then they are likely to be convicted of aiding and abetting the offence for their silence under the present law in any case. The spectre raised in the discussion paper by item 4, of police unable to prove an offence being able to indiscriminately charge carers with child abuse without any evidence they participated in it, is frankly frightening. The principle of proof beyond reasonable doubt is the cornerstone of our entire criminal justice system, and it cannot be safely bypassed. Instead of criminalising people for being afraid of an abusive partner, the better solution lies in putting our resources into overcoming communication difficulties, by supporting new initiatives to assist victims of abusive relationships and families in speaking out in court without fear of reprisal from the abusive family member.

Yours sincerely,

Kevin Zibell,
Chief Executive Officer.