

Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VICTORIA) INC, IN CONSULTATION WITH MEMBER CENTRES

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Royal Commission into Institutional Responses to Child Sexual Abuse Criminal Justice Consultation Paper



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About the Federation of Community Legal Centres (Victoria) Inc

The Federation is the peak body for 49 community legal centres across Victoria. A full list of our members is available at <http://www.communitylaw.org.au>.

The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Introduction

This submission follows the participation by the Federation of Community Legal Centres ('the Federation') in the Royal Commission's Criminal Justice Roundtable: Reporting Offences (20 April 2016). The submission only addresses the 'Third-party offences' and 'Judicial directions and informing juries' sections of the Criminal Justice Consultation Paper.

Third-party offences

Failure to report

The Federation believes there should be a criminal offence in relation to failure to report, and that its scope should be reasonably narrow: it should target institutional child sexual abuse offences and require those within institutions with a reasonable suspicion to report to police. We support this narrow approach for the following reasons.

A broader offence would be counter-productive

As the Consultation Paper notes, the recent introduction of a broader offence in Victoria has had a vexed history, with over 30 community service and peak organisations working against violence against women, including Victoria's key family violence bodies, the peak entity for Centres Against Sexual Assault, and the Federation, publicly opposing the reform. The present Victorian Government, together with the Greens Members of the Legislative Council, shared our concerns when in Opposition (see eg Martin Pakula MP, *Hansard* 6 May 2014, pp 1364-9).

The arguments against a broader offence in all Australian jurisdictions are essentially the same. First, an offence that potentially targets all adults with the requisite capacity (as the Victorian offence does) could inadvertently cause more harm to children suffering sexual abuse. 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 report the abuse, 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 report' 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 such an offence would 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.

In our view, other (non-abusive) persons in the family and community of the abused child need more positive support, so that they can be assisted to safely disclose to well-resourced and trained police, confident that the child will then receive justice and help.

Second, such an offence is potentially detrimental to women experiencing family violence. In our view, the present availability in Victoria of a 'reasonable excuse' defence for such women, and even the implementation of Recommendation 30 of the Royal Commission into Family Violence, that the Director

¹ Cummins Report, 360.

² Ibid.

of Public Prosecutions be required to approve a prosecution in cases where the alleged offender is a victim of family violence, would not necessarily prevent injustice in all circumstances. Some of this argument was canvassed in the Criminal Justice Roundtable discussion, and was underpinned by feminist and legal analyses of the ways in which the concept of 'reasonable' may not work in favour of women defendants,³ and how judicial, prosecutorial and defence practices remain deeply gendered and not always well informed by an understanding of the dynamics of family violence.

In many family violence situations, the perpetrator's tactics are multi-faceted and subtle. It then becomes harder to explain to a court how a female defendant's partner's coercive controlling tactics undermine her parenting capacity, and her sense of confidence, capacity and judgment, to such 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. This therefore means that even a defence of 'reasonable excuse' together with prosecutorial discretion may not sufficiently recognise the impact of family violence on women's capacity to safely disclose sexual abuse of their children.

Further, there is evidence that women face greater scrutiny and higher expectations 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 more detailed submission appended separately provides examples of how similar laws in other countries have been used almost exclusively against women who are themselves victims.

On the basis of the above arguments, the Federation further believes that introducing a broader 'fail to report' offence would undermine key aspects of the National Plan to Reduce Violence against Women and their Children.

We also note that if the Royal Commission does recommend a broader offence of failure to report, then consistent with the Irish approach (Consultation Paper, pp 233-4), it makes no sense - and would indeed be inequitable - if priests hearing confession were to continue to be exempt from a requirement to report.

Appropriate obligation for institutions

As the Consultation Paper discusses, a significant benefit of only targeting institutions is that this allows a lower standard of knowledge or belief than would be reasonable if the offence applied to the community at large, and hence the institutional obligation to report is a broad one. We believe this is an appropriate standard for institutions, given the evidence continuing to be heard by the Royal Commission, some of which is documented in the Consultation Paper. However, if the threshold is to be the lower one of 'reasonable suspicion', it seems appropriate for the person accused within the institution to have some requisite degree of authority. The comparable civil reforms currently being addressed by the Royal Commission might further assist a test here.

Whistleblower protection

The Federation supports the introduction of protection for whistleblowers, and endorses the submission of knowmore, our leading community legal centre advocate for survivors of institutional child sexual abuse.

³ See eg D Kirkwood, M McKenzie and D Tyson, *Justice or Judgement? The impact of Victorian homicide law reforms on responses to women who kill intimate partners* (DVRCV 2013).

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.

Failure to protect

The Federation supports consistent nationwide ‘failure to protect’ offences, for reasons outlined in the submission of knowmore. As detailed by knowmore, these offences should be specifically targeted to apply to people in positions of authority at institutions who negligently fail to respond to substantial risks of institutional child sexual abuse (similar to section 49C of the *Crimes Act 1958* (Vic)).

Judicial directions and informing juries

Over the past decade, the Federation has extensively engaged with the Victorian law reform process concerning both sexual offences and jury directions, and has taken a leading role in producing joint submissions from an alliance of sexual assault and family violence peak and service organisations.

We appreciate the need to reduce, simplify, and sometimes completely remove (where outdated and prejudicial) jury directions in child sexual offence trials, for the reasons outlined in the Consultation Paper. However, our experience with the Victorian sexual offences reforms suggests that it is possible to ‘go too far’ in codifying jury directions, particularly when it is always an easier task for Parliament to amend legislation than for Government to also provide the resources needed to accompany such changes with an appropriately high level of judicial and counsel training, and jury support.

In Victoria, for example, we believe that following a tranche of reforms, sexual offences legislation is now vastly improved, particularly in clarity and logic. However, Government commitment to removal of complicated jury directions that had led to labyrinthine appeals has in our view resulted in ‘over-pruning’ of jury directions in sexual assault trials. This has negative implications for both adult and child victims.

As the Consultation Paper notes (pp 469-71) and the available literature also suggests, jurors in sexual assault trials often have strong stereotypical expectations about how a ‘real’ victim would behave.⁵ Jurors are members of the community with all the prejudices and biases evident in that broader context. While previous research has identified a small shift in community views about what constitutes ‘real rape’ and ‘real rape’ victims, a research-informed understanding of sexual violence and its perpetration is far from what could be considered to be ‘common sense’. In this context, clear and explicit guidance should be provided to juries, legal officers and police to ensure that, as far as possible, victim-blaming attitudes and rape myths are not influencing investigation, prosecution and decision-making processes in the criminal justice system.

For this reason, when jury directions reform was introduced into Victorian Parliament in 2015, at a time when sexual offences reforms were still in progress, the Federation supported its overall intent, which was, in part, to further simplify the law relating to both jury directions and sexual offences. At the same time, however, we opposed the proposed removal of certain mandatory jury directions in sexual offence trials. Our particular concerns here pertained to the removal of mandatory jury directions concerning consent and the accused’s reasonable belief. While neither of these directions is centrally relevant in child sexual offences, we allude to them here because the underpinning principles are the same.

We argued that removing these particular mandatory directions, even while substantially improving the clarity and fairness of the law regarding consent and the accused’s belief, could work against the purpose of other recent sexual offences reforms by increasing unjust outcomes for some victims and

⁵ N Taylor, Juror attitudes and biases in sexual assault cases (2007) <http://www.aic.gov.au/publications/tandi2/tandi344.pdf>; A Cossins and J Delahunty, ‘Misconceptions of Expert Evidence in Child Sexual Assault Trials: Enhancing Justice and Jurors’ Common Sense’ (2013) *Journal of Judicial Administration* 22 171-190; L Ellison and V Munro, ‘Better the Devil You Know? “Real Rape” Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations’ (2013) 17 *International Journal of Evidence & Proof* 299-322.

resulting in traumatic and expensive appeals that would otherwise be unnecessary – and which jury directions reform was intended to reduce. We cited in support the recommendations of the 2004 Victorian Law Reform Commission’s Sexual Offences Review and the spirit of the 2009 Victorian Law Reform Commission’s Jury Directions Review with respect to sexual offences.

The Federation believes that successfully clarifying sexual offences legislation and balancing rights of accused and alleged victim, in the manner that has now been attempted in Victoria, still requires judges to mandatorily direct jurors on relevant aspects of that legislation. For example, as the Consultation Paper (p 480) implies in relation to a potential judicial direction containing educative information about the impact of child sexual assault, for this direction to automatically occur amidst a legacy of removal of jury directions that may unfairly advantage the accused, some new and mandatory jury directions may be needed.

However, our submission to this effect ran counter to the context of a stated commitment to prune jury directions. The *Jury Directions Act 2015* (Vic), read together with the sexual offences provisions of the *Crimes Act 1958* (Vic), now either places the onus on prosecution or defence to not only request the direction but also to specify which direction is required;⁶ or in some instances, requires the trial judge to give a direction even though it has not been requested, but via a two-step process in which the judge decides whether there are substantial and compelling reasons for doing so, after inviting submissions from prosecution and defence.⁷

Just as we cannot assume that members of a jury necessarily understand the nature and dynamics of sexual assault against either adults or children, we cannot assume that all counsel have a sufficiently sophisticated understanding of the issues and that they will request relevant and timely directions in each case.⁸ Ongoing education of defence counsel, prosecutors and police about the social context of sexual assault, and associated specialisation, is needed.

As the Consultation Paper (pp 452-3) notes in its discussion of the development of the common law of child sexual assault, judges too do not always have a sophisticated understanding of the dynamics and impacts of child sexual assault.⁹ All judicial officers presiding in sexual assault cases, including appellate judges, must receive substantial induction and professional development training about the social context of sexual assault and its impact on victims/survivors, including on how sexual assault may affect complainants in giving their evidence. Again, specialisation is to be encouraged.

In addition, we strongly support the recommendations of the Victorian Law Reform Commission *Jury Directions Final Report* (2009) concerning the provision of assistance to juries via an Outline of Charges and a Jury Guide (Recommendations 41-43). There is also much to be learned from overseas jurisdictions about how to encourage and support jury decision-making in sexual assault trials, such as pre-trial education about the social realities of sexual offences, and decision flow-charts.

These essential non-legislative reforms must be funded and implemented in tandem with:

- greater use of expert witnesses and specialist decision-makers in sexual offence cases; and
- ongoing, appropriately funded community education campaigns, primary prevention initiatives and community-based legal services and sexual assault victim/survivor advocacy organisations.

⁶ *Jury Directions Act 2015* (Vic) ss 46-47.

⁷ *Jury Directions Act 2015* (Vic) s 16.

⁸ See eg, although primarily in relation to family violence, D Kirkwood, M McKenzie and D Tyson, *Justice or Judgement? The impact of Victorian homicide law reforms on responses to women who kill intimate partners* (DVRCV 2013).

⁹ And see above n8.

Appendix

See separate attachment.