

ANROWS

AUSTRALIA'S NATIONAL RESEARCH
ORGANISATION FOR WOMEN'S SAFETY
to Reduce Violence against Women & their Children

Legal Affairs and Community Safety Committee

Attn: Committee Secretary

Parliament House, George Street,

Brisbane QLD 4000

By email: lacsc@parliament.qld.gov.au

Criminal Code (Child Sexual Offences Reform) & Other Legislation Amendment Bill 2019 (QLD)

Dear Chair

Australia's National Research Organisation for Women's Safety (ANROWS) would like to thank the Legal Affairs and Community Safety Committee for the opportunity to assist the Committee with their examination of the *Criminal Code (Child Sexual Offences Reform) & Other Legislation Amendment Bill 2019*.

ANROWS is an independent, not-for-profit organisation established as an initiative under Australia's National Plan to Reduce Violence against Women and their Children 2010-2022. ANROWS is jointly funded by the Commonwealth and all state and territory governments of Australia. ANROWS was set up with the purpose of establishing a national level approach to systematically address violence against women and their children.

Our mission is to deliver relevant and translatable research evidence which drives policy and practice leading to a reduction in the incidence and impacts of violence against women and their children. Every aspect of our work is motivated by the right of women and their children to live free from violence in safe communities. We recognise, respect and respond to diversity among women and their children, and are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

This submission applies relevant ANROWS research evidence to the failure to report offence contained in the Bill, that we propose might not function as intended. We would be very pleased to assist the Legal Affairs and Community Safety Committee further, as required.

Yours sincerely

Dr Heather Nancarrow
Chief Executive Officer

20 December 2019

Failure to Report Offence

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) Criminal Justice Report recommended that each state and territory government introduce legislation to create a criminal offence of failure to report, targeted at child sexual abuse in an institutional context in recommendations 32-36 (Commonwealth of Australia, 2017). The Criminal Code (Child Sexual Offences Reform) & Other Legislation Amendment Bill 2019 expands upon that task to create a new offence of failure to report belief of child sexual offence (s229BC), requiring all Queensland adults to report child sexual abuse to police. In surrounding Australian Associated Press media articles, Attorney-General Yvette D'Ath explained the rationale behind this failure to report offence is to send "a strong message to the entire community that child sexual abuse is not something that can be ignored by any adult" (AAP, 2019).

ANROWS commends the intention, and the child-centric principle behind expanding the institutionally focused 'failure to protect' offence (s229BB) into this additional failure to report (s229BC) offence that applies to all persons, however in practice we are concerned with how this might affect mothers experiencing domestic and family violence (DFV). While ANROWS recognises that a failure to report offence has already been applied in other Australian states and territories, albeit with differing penalties and conditions, we see a substantial difference between the two offences in this section of the Child Sexual Offences Reform Bill. While s229BB is directed at professionals, who have likely had some training in mandatory reporting, s229BC is directed at the general public who do not.

As the Australian Institute of Family Studies points out, numerous studies, including some conducted in Australia, have found even professionals who are required to report child abuse and neglect indicate they have not been trained appropriately to equip them for this role (Abrahams, Casey, & Daro 1992; Christian, 2008; Hawkins & McCallum, 2001; Kenny, 2001, 2004; Mathews, 2011; Reiniger, Robison, & McHugh, 1995; Starling, Heisler, Paulson, & Youmans, 2009; Walsh, Bridgstock, Farrell, Rassafiani, & Schweitzer, 2008 cited in Mathews & Walsh, 2014). The evidence also cautions that "without effective reporter training, severe penalties might influence hypersensitive or "defensive" reporting of minor incidents not intended to be covered by the law" (Mathews & Walsh, 2014).

With the inclusion of this offence, and the resulting expanded awareness of, and willingness to, report child abuse, as well as the expanded definitions of child abuse and mandatory reporting requirements, there is a risk that without additional resources, child protection departments will become overwhelmed. This will make it difficult for child protection workers to identify serious cases of child abuse requiring immediate action (Humphreys 2008, 2007; Powell & Murray 2008 cited in Richards, 2011). The effect of this could be moderated through an extensive educational campaign that assists all Queenslanders, including culturally and linguistically diverse Queenslanders, to understand how to identify child sexual abuse, and the suite of ways they can discharge their legal duty to report these

suspensions to police. There is also the possibility that the roll-out of this campaign could act as a deterrent for some potential offenders.

RECOMMENDATION 1: If the failure to report offence put forward in this Bill comes into law, it must be accompanied by an extensive (and ongoing) educational campaign so all Queenslanders, including culturally and linguistically diverse Queenslanders, know how to effectively discharge their legal duty in this area.

Domestic and family violence often co-occurs with child sexual abuse

Applying the failure to report offence to women experiencing DFV highlights specific barriers to some Queenslanders effectively discharging their legal duty. The reason we raise DFV is the high rates of co-occurrence of Australian children experiencing physical abuse and being exposed to domestic violence, and experiencing sexual abuse and being exposed to domestic violence, which has been estimated at 55 percent and 40 percent respectively (Bedi & Goddard 2007 cited in Richards, 2011). This co-occurrence means that the cohort of Queenslanders likely to be compelled by this legislation to act in instances of suspected child sexual abuse will likely include a high proportion of women experiencing DFV.

Women experiencing DFV can have individual histories that make it hard to identify child sexual abuse

Individual factors that might inhibit women experiencing DFV from identifying child abuse might include their own history of child sexual abuse (Cox, 2015) that makes identification fraught and traumatic. The 2016 Personal Safety Survey found around one in three women who experienced abuse before the age of 15 also experienced partner violence as an adult (ABS, 2017). Women who experienced childhood abuse were nearly three times more likely to experience partner violence than those who had not been abused as children (ABS, 2017). Unresolved trauma combined with cultural change and dislocation for Indigenous women experiencing DFV may present a serious barrier to recognising and reporting child sexual abuse, and can intersect with contributing factors, like the harmful use of alcohol to aid denial (Stanley et al., 2003). Individual factors, like the co-occurrence of child abuse and DFV, will need to be considered carefully by courts as providing reasonable excuses to failure to report.

Being in an ongoing relationship with the offender adds complexity and risk to reporting

ANROWS research confirms that whilst many Indigenous women wish for an end to the violence they encounter in their relationships, many do not wish to end their relationship with the perpetrator (Blagg et al., 2015). Reporting crimes committed by your spouse is already a vexed issue, with current social attitudes and legislation stemming all the way back to old common law understandings of the

law of ‘husband and wife’ based upon the legal principle of marital unity (Blackstone, 1795 cited in Tarrant, Tolmie & Giudice, 2019). There are traces of this in contemporary legislation, like *Evidence Act 1995 (Cth)* that sets out the compellability of spousal evidence, including not requiring evidence if the court finds there is a likelihood that harm would or might be caused to the person, or the relationship (*s18(6)(a)*).

This social attitude against reporting current spouses is also evidenced in the DFV context, where women show particular reluctance to report violence by current partners. For example, an estimated 82% of women who experienced current partner violence never contacted the police, while only 65% of women who experienced previous partner violence did not contact the police (ABS, 2017). This points to women being better able to identify intimate partner sexual violence (IPSV) from a previous, rather than current partner, who they may feel confused, loyal or forgiving about (Mitchell, 2011). Women were more likely to talk to someone else about a violent incident than they were to tell police (Mitchell, 2011). It is likely that this cohort of women will experience similar barriers reporting their current partner to police on the grounds of suspected child abuse, which is already backed up in Australian research (Wallis, 1992 cited in Willis, 2011).

Women experiencing DFV are already pressured to assume responsibility for the perpetrator’s violence

Most child sexual abuse offences are aimed at perpetrators of abuse, and impose negative duties which require a person to refrain from doing an act. The failure to report offence is aimed at third parties, that is, persons other than the perpetrator of the abuse, and makes it the third party’s positive obligation to take action by making a police report (Mathews & Walsh, 2014). This is a departure from contemporary ANROWS research into DFV that highlights the importance of ‘pivoting to the perpetrator’ to maintain the onus of responsibility for abuse on the perpetrator of violence (Mandel, 2014 cited in Healey et al., 2018).

Women experiencing DFV are already under considerable social (and legal) pressure to effectively protect their children from the perpetrator of violence, all whilst simultaneously experiencing violence themselves. These pressures are clearly evidenced in the high profile experience of Ms Rosie Batty AO, who, through the course of the inquest into her son’s death, was prompted to say:

Did I ever think Luke would get smacked over the head with a cricket bat and stabbed to death? Of course I didn’t. So don’t ask me any more about what I did, and the risk I thought there was, because there was an ongoing, never-ending consideration of Luke’s safety. He got killed on a day when I thought it was fine. If I had called the police, can anyone tell me that Luke and I would have been safe (Davey, 2014)?

This highlights the lived experience of DFV as an ongoing climate of risk where abuse tactics are used to punish victim resistance and effectively limit the victim/survivor’s space for independent action (Tarrant, Tolmie & Giudice, 2019).

Women experiencing DFV have a host of emotional, psychological, financial and social issues to negotiate (Flood & Fergus, 2008). Many women are acutely aware of the impact of the violence on children or young people in their care, and indeed, threats made against their children, or actual violence against them, is a common reason why many women report trying to leave a violent relationship (Australian Bureau of Statistics, 1996 cited in Flood & Fergus, 2008). For Aboriginal women interviewed for ANROWS research on the experience of rural and regional women, concern for the wellbeing of the children has often been the catalyst to reach out for help from family members or to ring the police (Wendt et al., 2017). However “some of the women explained they were guarded about what they told practitioners about their children for fear the practitioner might contact child protection” (Wendt et al., 2017, p. 18).

Raising child abuse in the context of separation from a violent partner could increase risk

Many women decide not to refuse contact time with fathers who perpetrate DFV for fear of being perceived as an ‘unfriendly parent’ and being penalised in a way that would lead to children residing with the father and risk exposing them to further violence (Laing, 2003; McIntosh et al., 2016). Recent Australian research into family law cases shows that parental alienation, which has been widely discredited in a clinical sense, continues to be raised by fathers as a “defence” to child sexual abuse allegations (Death, Ferguson & Burgess, 2019). The raising of these issues is gendered, with “mothers primarily being constructed as manipulative, mentally unwell, suffering from delusions, and ultimately harming their children with the intent of punishing the other parent” (Death, Ferguson & Burgess, 2019, p. 2). Other Australian research has found that our family law system does not respond as well as it should to child sexual abuse, and sometimes accepts perpetrator generated narratives of mental illness to explain allegations, rather than investigate them (McInnes, 2013).

Mental health in Family Court matters is also gendered, with it being given as the “reason limiting child contact with mothers in 30% of such cases, but only in 2% of cases limiting fathers”, which does not align with general mental health prevalence (McInnes, 2014 cited in Death, Ferguson & Burgess, 2019, p. 7). Unsurprisingly then, both women, and some of the professionals they had contact with, are fearful to raise allegations of child abuse in the family court system lest they be seen as an “alienating” parent (Kaspiew et al., 2017). This fear would likely extend to police, and act as a barrier to women reporting child abuse to them, as there would be a presumption that information would be shared with the family law system and result in custody being awarded to the abuse perpetrator.

Research shows that women experiencing DFV encounter multiple barriers when establishing safety in their lives (Blagg et al., 2015; Burke et al., 2014; Vaughan et al., 2015; Wendt et al., 2015). There is likely also a temporal factor to reporting child sexual abuse for women experiencing DFV, because the period following separation is dangerous. According to the Australian Domestic and Family Violence Death Review Network, actual or intended separation was a characteristic in over half (55.4%) of intimate partner homicides that followed a history of DFV when the homicide offender was male (ADFVDRN, 2018). Almost half (47.7%) of the males who killed a former female partner killed that

partner within three months of the relationship ending (ADFVDRN, 2018). Almost a quarter (24%) of the men who killed their current or former female partners were named as respondents in Domestic Violence Orders protecting the female homicide victim at the time of the death (ADFVDRN, 2018). Family law proceedings had been formally commenced and were on foot at the time of the homicide in 11.4% of the cases where a male homicide offender killed a former female intimate partner (ADFVDRN, 2018).

Leaving a violent partner does not necessarily mean an end to violence. Two out of five women experienced violence while temporarily separated from their violent male former cohabiting partner, and six out of ten women who experienced violence while temporarily separated, reported an increase in violence during the separation (Cox, 2016). One quarter of women who are no longer in a relationship with their violent partner reported that the violence increased after their final separation (Cox, 2016). It is ANROWS's view that women experiencing DFV need to balance their own, and their child's safety, when deciding when, and how, to raise child sexual abuse. Punitive measures that include the threat of a custodial sentence have the potential to make an already risky DFV situation less safe for both mother and child.

Taking this back to the proposed failure to report offence, we recognise some attempt has been made in the proposed Bill to address situations like DFV, without specifically using DFV as a limiting case. In s229BC(2) it sets out the idea that there are 'reasonable excuses' for not discharging this legal duty to report, without explaining what reasonable excuses are. In s228BC(4)(d) it provides that if a person has a belief (which must itself be reasonable) that the disclosure would harm themselves or another person, excluding the abuse perpetrator, they have a reasonable excuse.

The reasonable excuse provision requires the voices of women experiencing DFV to be trusted

ANROWS leads the [National Community Attitudes to Violence Against Women Survey](#) (NCAS), which is one of the two key national surveys administered under the *National Plan to Reduce Violence Against Women and their Children 2010-2022* (Council of Australian Governments, 2011). NCAS is the world's longest-running survey of community attitudes towards violence against women. Mistrusting women's voices is a prevalent, violence-supportive attitude stemming from gender inequality.

In 2017, NCAS showed that men were more likely to endorse that women make up or exaggerate claims of domestic violence to improve their case in custody battles (51% of men compared to 37% of women) (Parton, 2019). Research indicates that the prevalence of false allegations of child sexual abuse is approximately the same when compared to the prevalence of false allegations in other Family Court matters (Brown et al., 1998 cited in Death, Ferguson & Burgess, 2019). The social endorsement of attitudes that reflect mistrust of women's reports of violence, and support for the idea that women use reports of violence for advantage over men, can be a barrier to women reporting crime within the context of experiencing DFV. NCAS also shows that less than half (49%) of Australians recognise that

levels of fear from domestic violence are worse for women, as reported by the Australian Bureau of Statistics' Personal Safety Survey (ABS, 2017). There has been no statistically significant change in the proportion of the population that is aware of this fact since 2013, and at that time, the proportion of Australians who were aware of this fact had declined 6 percentage points compared to the proportion in 2009, when 55 percent of respondents recognised that levels of fear are worse for women (ANROWS, 2018).

In the context of DFV, using fear and coercive control, the perpetrator can employ tactics developed over time by trial and error that are uniquely tailored for the individual victim/survivor (Tarrant, Tolmie & Giudice, 2019). Some of these behaviours can be subtle, and can appear non-violent to an observer: "It reached the point where it was enough for him to give her a "look" and she became extremely scared and would do as he wanted (*Tr*, p. 1096)" (Tarrant, Tolmie & Giudice, 2019). To meet the conditions of a reasonable excuse for women charged with failure to report, courts would need to understand fear generated by coercion as part of "a pattern of harmful behaviour" (Tarrant, Tolmie & Giudice, 2019). This requires the use of a social entrapment model, similar to the one used with Victorian reforms (*Crimes Act 1958 (Vic) ss. 322J, 322K*) that is aimed at ensuring women's use of force in response to intimate partner violence is assessed within its social context and the particular circumstances of each defendant (Tarrant, Tolmie & Giudice, 2019).

RECOMMENDATION 2: Should the failure to report provision succeed, courts will need guidance when DFV is involved in child sexual abuse matters, to help identify fear stemming from non-imminent threats and coercive control; and in the use of a social entrapment framework to assess women's reasonable excuses for 'failing to report'.

Women from diverse backgrounds experiencing DFV have additional barriers to reporting crime

Women from diverse backgrounds are disproportionately affected by violence. ANROWS research has demonstrated that women face multiple barriers to escaping violence, and these barriers can be greater for women from marginalised communities (Blagg et al., 2015; Vaughan et al., 2016). The differential nature and effects of this violence are often compounded by various, often intersecting, forms of marginalisation. These effects are particularly notable for Aboriginal and Torres Strait Islander women; lesbian, transgender, intersex or queer women; culturally and linguistically diverse women; women with disability, and women in rural and regional locations.

When assessing the merit of the failure to report offence, each of these groups warrants specific consideration:

- Aboriginal children experiencing family violence are more likely to be removed from their families (Our Watch, 2014 cited in Victorian Government, 2018) which can intersect with intergenerational trauma stemming from the forced removal of Aboriginal children, and be a barrier to disclosing DFV for Aboriginal women (Australian Institute of Criminology, 2011 cited in Victorian Government, 2018). Reporting child sexual abuse would likely impact the

same trauma, as well as exacerbating the anxiety experienced by many Indigenous people when they are compelled to interact with police and other government agencies (Phillips & Vandebroek, 2014).

Research has shown that Aboriginal and Torres Strait Islander people face barriers to disclosing over and above those in the broader community, which, beyond obvious ones like racism, can also include issues like fears about maintaining confidentiality in a close-knit community (FVPLS Victoria 2010b cited in Willis, 2011), and shame (FVPLS Victoria 2010b; Taylor & Putt 2007; Willis 2010 cited in Willis, 2011). Some victims/survivors also may feel that they need to protect the perpetrator from imprisonment or a possible death in custody (Willis, 2011) which means this failure to report offence potentially places these women between two irreconcilable choices.

For Aboriginal women, reporting child sexual offences occurs within a context of what the Australian Law Reform Commission describes as “over-policing of public order and criminal infringement offences, ‘proactive’ policing in relation to bail and residential checks, and under-policing of family violence when Aboriginal and Torres Strait Islander people, particularly women, are the victim (ALRC, 2018). This means, for Aboriginal women with outstanding warrants, fines or other reasons that make them ‘legally compromised’, reporting child sexual offences to the police (that is, bringing themselves to the attention of the police) constitutes an impossible choice against their own interests and their children’s interests, with the potential to result in incarceration either way.

- Many immigrant and refugee women are reliant on perpetrators of violence for financial security, visa status and access to health care services (Vaughan et al., 2016). Along with the language barriers, fears about experiencing racism, and different cultural attitudes toward trusting authorities (Willis, 2011), there are significant, intersecting barriers to reporting child sexual abuse.
- Women with disability can find gender-based discrimination and discrimination based upon ableism intersect and increase their risk of violence (Cox, 2016), particularly when they are substantially dependent upon their caregivers (Barger et al., 2009 in Cox, 2015). Along with access issues associated with reporting, dependency upon caregivers may also be a barrier to women with disability being able to report child sexual abuse.
- Lesbian, bisexual, queer, intersex and gender non binary people can find gendered inequality intersects with marginalisation based upon sexuality or perceived deviance from conservative sex and gender norms (Cox, 2015). This marginalisation can make interacting with police fraught, and reporting child sexual abuse may have particular intersections with perceived sexual deviance and fear around being blamed for the abuse, creating an additional barrier.
- Women living in rural and remote areas can find tight-knit, conservative communities potentially perpetrate a culture that accepts intimate partner sexual violence (Parkinson & Zara, 2014 in Cox, 2015). Combined with isolation and a lack of services that increases the practical challenges of leaving violent situations (DeKeseredy & Schwartz, 2008 in Cox, 2015), women living in remote and rural areas might be hampered by having to report child abuse to

someone known to them or the perpetrator.

Each of these groups may face different challenges toward discharging their legal duties with respect to the failure to report offence, and what is a reasonable excuse for one woman, may not be reasonable for another woman experiencing DFV with different marginalisation. It is important to ensure that all Queenslanders have fair access to justice with respect to this new offence.

Social entrapment provides a multi-dimensional framework for realistically analysing the facts of any particular case involving DFV, by drawing upon the significant body of literature documenting the particular manner in which entrapment is experienced by, and compounded for, women facing multiple forms of disadvantage (Tarrant, Tolmie & Giudice, 2019). In situations where DFV is involved in a failure to report case, the court needs a clear process that renders visible the aggressor's pattern of abuse behaviour to understand how it constrains the primary victim's resistance and ability to escape the abuse, while simultaneously considering the wider operations of power in play in her life (Tolmie et al., 2018). This will involve determining the coercive and controlling behaviours employed by the aggressor and how they specifically limited the victim's ability to be self-determining (and therefore discharge their legal duty to report child sexual abuse). The court would also need to consider how informal networks and agencies responded to any of the victim's help-seeking behaviour. Finally the court would need to look at how structural inequities (poverty, historical trauma, colonisation, disability, racism, sexuality and gender, geographic isolation) exacerbated both of the previous dimensions (Tolmie et al., 2018). It is only with this analysis that the merit of a reasonable excuse to a failure to report offence could be fairly assessed for women experiencing DFV.

RECOMMENDATION 3: A social entrapment model needs to be mandated in this legislation in order to understand what constitutes a reasonable excuse to failure to report offences for diverse groups of women affected by DFV that make this legal duty difficult to discharge.

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