

14 September 2018

Hon Daniel Andrews MP

Premier of Victoria  
1 Treasury Place  
Melbourne VIC 3000



CC: Attorney General Martin Pakula, Special Minister of State Gavin Jennings, Minister for Health Jill Hennessy, Minister for Women and Prevention of Family Violence Natalie Hutchins

Dear Premier,

**Urgent: Don't undermine your legacy to protect victim-survivors of family violence – make sure everyone feels safe to call for help when they need it.**

**Stop the mandatory sentencing provisions in the *Justice Legislation Miscellaneous Bill*.**

We are writing to advise you of the consequences of continuing to pursue the mandatory sentencing provisions in the *Justice Legislation Miscellaneous Bill*, which is being listed for debate in Legislative Council next week.

As you are aware the Federation of Community Legal Centres in partnership with multiple community organisations have advised you to reject the proposed laws (letter 5 June 2018). We have urged the Attorney General's office to make amendments to ameliorate the worst aspects of the proposed Bill.

We continue to ask for your support to reject dictated sentencing and work with us to build safer working environment for emergency workers, all health, community and social workers, and the community as a whole.

We feel obliged warn you again about the devastating consequences of the legislation will have on our community.

Premier, as a defender of victims-survivors of family violence and as the leader of a government which endeavours to support people with mental illness and cognitive impairments – these laws undermine the work you have done and aspire to do if re-elected. You still have time to prevent the unintended consequences of the Bill.

The consequences of this legislation are real and permanent. **It is only a matter of time until a person dies who did not call for help when their partner was abusing them or their adult child was in a psychotic state.**

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No one wants to see an old woman with dementia, a person who has cognitive impairment such as autism, or a victim-survivor of family violence being sentenced to a minimum 6 months in jail. But this is what will happen if these laws are passed unamended.

No one wants to see an activist caught up in a scuffle at a protest rally or picket line go to jail for a minimum of 6 months. Under your laws Premier, they will.

No one wants to see community and social workers left dealing with mentally unwell person on their own as they fear calling 000 will put their clients in jail.

### **Mandatory sentencing laws are designed to create unjust outcomes**

The Australian Law Reform Commission says 'Evidence suggests that mandatory sentencing increases incarceration, is costly, and is not effective as a crime deterrent.'<sup>1</sup> There is no evidence to say mandatory sentencing reduces crime, but it has been shown to increase it due to entrenching people in cycle of incarceration.<sup>2</sup>

In summary, mandatory sentencing leads to unjust outcomes. It was your Attorney General who said in opposition:

"the only time that a mandatory minimum sentence has any work to do or has any effect is when it is forcing a judge to impose a sentence that the judge does not believe is justified in all the circumstances of the offence."<sup>3</sup>

We urgently ask you again to reject these laws.

At a minimum the Bill must be urgently amended to ensure it is consistent with the Andrews Government's commitment to tackling family violence and implementing the recommendations of the Royal Commission into Family Violence.

### **Undermining the Andrews Government legacy on family violence prevention**

Currently the Andrews Government has a proud record of addressing the complex issue of family violence. Your commitment to implement all the recommendations of the Royal Commission into Family Violence could be one of the Government's greatest legacies.

Recent media reports show the full horror of family violence with women in the prime of their lives being killed by former husbands and partners. Journalist Miki Perkins acknowledged:

"the major legislative and policy changes recommended in Victoria's Royal Commission into Family Violence will take time. We're starting from way back. And cultural change is a slippery beast."

Our concern is that mandatory sentencing will have an unintended impact on the work the Andrews Government is doing to address family violence. The Bill will increase exposure to prison for perpetrators, reaffirm a culture of gender violence and reoffending. But perhaps more significantly, it reimposes a culture of silence among victims.

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<sup>1</sup> Australian Law Reform Commission, *Pathway to Justice – An inquiry into the incarceration rates of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) 30

<sup>2</sup> See Law Institute of Victoria <https://www.liv.asn.au/getattachment/22c3c2c9-45a5-45c4-96e6-f0affdfe2ff8/Mandatory-Minimum-Sentencing.aspx>

<sup>3</sup> Legislative Council Victoria, Hansard, 19 February 2013, 283 (Shadow Attorney General, Martin Pakula)

The sentencing laws are aimed at attacks on emergency service workers; however they will directly impact the family violence response in two ways:

1. Women will be reluctant to call for help when their partner is violent fearing the partner will lash out at police and be sentenced to jail. For victims of family violence the barriers for calling for help are already substantial, creating another barrier will put women's lives at risk.
2. During volatile family violence incidents the victims themselves get arrested. Research that community legal centres are currently undertaking shows misidentification of perpetrators may be as high as one in eight. If a victim injures the police in a mistaken arrest, the victim will receive a custodial sentence. There is nothing in the drafting of the legislation to prevent this perverse outcome.

Recently we heard the story of Stephanie who is a victim-survivor of family violence and was arrested by police when her partner claimed she was the perpetrator. She was removed from her home and her baby daughter left with her abuser. This is not an isolated experience. 57 per cent of women named as perpetrators were actually the victims.<sup>4</sup>

We know victims of family violence currently get charged for causing injury to police and emergency workers. It is not ok that these women in distress would have a minimum 6 months jail sentenced imposed, with no judicial discretion.

As a response to family violence the Royal Commission reiterates concerns that 'tougher' approaches to sentencing of violent offending which limits judicial discretion are ineffective and harmful. The Commission stated that prison sentences, while:

'superficially or symbolically attractive, do not actually advance the safety of victims and the community, or the accountability of the perpetrators.'<sup>5</sup>

Victim-survivors of family violence want to be heard and for the violence to stop.<sup>6</sup> Experiences of mandatory sentencing in the US showed that the experience had the 'perverse effect of diminishing those who it is seeking to protect and vindicate'.<sup>7</sup>

Evidence before the Royal Commission found that prisons have a tendency to make male violence worse.<sup>8</sup> Reoffending is higher when sentence of prison is imposed.<sup>9</sup> The focused response of perpetrator accountability should be on understanding the needs and experiences of victims, and prioritising women and children's safety through effective risk management.<sup>10</sup>

Parents who experience family violence and abuse from older children, or adolescents who use violence towards siblings, are even less likely to report abuse to police for fear

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<sup>4</sup> Emma Younger, '[When police misjudge domestic violence, victims are slapped with intervention order applications](#)' (ABC news, 15 August 2018)

<sup>5</sup> Royal Commission into Family Violence, 224

<sup>6</sup> Royal Commission into Family Violence, 252

<sup>7</sup> Royal Commission into Family Violence, 128

<sup>8</sup> Royal Commission into Family Violence, 253

<sup>9</sup> Royal Commission into Family Violence, 253

<sup>10</sup> Royal Commission into Family Violence, 293

of breaking up the family.<sup>11</sup> Who will they call now when their family is in danger? We need fewer deterrents for seeking help not more.

A consistent finding of the Royal Commission was that sentencing needs to consider the complex circumstances of the victim, the family and the offender. The focus must be on the needs of the women and children and their safety, not on what might appear a 'tough on crime' approach to violence:

'The endless variety of circumstances that may arise makes it difficult to predict how one feature of a case will interact with all the others. Stipulating that courts must, owing to one particular variable and regardless of all other variables, treat a case in a particular way tends to undermine the court's ability to impose an appropriately tailored sentence. There will be circumstances where exposing a person to a higher sentence solely because of a circumstance of family violence will not be appropriate. There might, for example, be a situation where the offender had previously been subjected to violence by the person who was the victim of the offence; there might also be acute psychiatric or psychological factors which should be dealt with to prevent that person from re-offending, and which are better dealt with through a community correction order than a prison sentence.'<sup>12</sup>

The mandatory sentencing laws for emergency workers must be considered in relation to their interaction with the family violence response the Andrews Government is implementing. The undermining of core tenets of the sentencing principles and imposing dictated custodial sentences when perpetrators and victims interact with police will undermine the carefully contemplated efforts to meaningfully tackle the scourge of family violence.

### **Mental health and cognitive impairment**

Parents of adult children with autism and serious depression have contacted community legal centres concerned about what they will do next time their child has a crisis. A person with autism can become disturbed when placed in a situation that is confronting and confusing for them, such as a police officer yelling orders. Advice provided to parents of autistic children is they should call 000 during crisis. Now they ask us: what are they to do? They do not want to take on the criminal justice system.

We know of one father who is devastated after his adult daughter called him during a depressive episode. He took her to hospital against her will. Out of character she pulled a pocket knife on him and herself. When she refused to put it down the hospital staff called the police. She was charged with assaulting an emergency worker. On being admitted to hospital she received treatment and has an ongoing treatment plan and medication. She is now deeply regretful of the harm she caused. Her father felt personally responsible that his daughter now faces criminal charges and is unsure if he would call for help in the future. Under this Bill she would face not only criminal charges, but a jail sentence.

Community workers are concerned what might happen given the role of police and CAT teams in welfare checks on people with mental illness. We know these checks can sometimes go badly. A shocking case of police beating a person with disability in his front yard was captured on CCTV, suggest more checks and balances are needed, not less.<sup>13</sup>

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<sup>11</sup> Royal Commission into Family Violence, 140

<sup>12</sup> Royal Commission into Family Violence, 231

<sup>13</sup> Nick McKenzie, '[Beaten, abused, humiliated and filmed by Victoria police](#)' (The Age, 2 April 2018)

The Bill provides for an exception for people who experience mental illness or have impaired cognitive function. The intention of the Government appears to be that the daughter with depression, people with autism, and people with mental illnesses who offend as a result of their illness, are not caught up in the mandatory sentencing regime. Unfortunately, as we have advised the Attorney General and other members of the government we have contacted in relation to this Bill, the mandatory treatment and monitoring order exception as currently drafted in the Bill is unworkable.

The Bill requires the impaired mental functioning be 'causally linked' to the offending. Experts are reluctant to make findings of causality – that is why a test that the impaired mental function be either 'linked' or 'connected' to the offending would be more appropriate.

Additionally, the Bill requires an expert report in relation to the offending. Expert reports take 6-8 weeks for assessments during that time the person will likely be in remand and separated from family and mental health treatments. For mentally unwell people and cognitive impaired people to be put in remand while waiting for expert reports would be an injustice of the kind this provision is seeking to prevent.

Significantly, the sole exception to a custodial sentence is this provision. There is no recognition of the trauma, notably trauma of family violence. Women who have experienced family violence and whose behaviour is linked to this trauma will have a prison sentence imposed. Already most people in women's prisons have been exposed to family violence as a child and as an adult.<sup>14</sup> We do not need to add to this statistic.

Victoria's prison system as a whole is over represented by people with a mental illness – 40 per cent have mental illness and 54 per cent have a history of self-harm.<sup>15</sup> One study found that of adults in their 20s and 30s, around one third of those with psychiatric illness had been arrested during a 10-year period, the first arrest often occurred before their first contact with mental health services.<sup>16</sup> We do not need laws that add to these shocking statistics.

### **Urgent amendments to address the unintended consequences of the Bill**

Given the significant impact of the Bill the victim of family violence, and on people experiencing mental illness and cognitive impairment and their families, we call for the Bill to be rejected.

Should the Andrews Government seek to continue with the Bill we call for the following urgent amendments to be made.

#### **1. Remove the offence from a category 1 offence**

Defining causing injury – which may be a scratch, bruise or temporary psychological harm – as category 1 offence like murder and rape, is not proportionate. The difficulty with this drafting decision is that the judge does not have all the sentencing options before her or him. The only option is a prison sentence.

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<sup>14</sup> Victoria State Government, 'Strengthening Connections: Women's policy for the Victorian corrections system' (2017), 8

<sup>15</sup> Bernadette McSherry and Andrew Carroll, 'Hospitals or prisons? Treating offenders with severe mental health conditions' (Report, Melbourne Social Equity Institute, University of Melbourne, 21 October 2015); Victoria, 'Victorian Ombudsman Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria' Parl Paper No 94 (2015).

<sup>16</sup> Australian Instituted of Health and Welfare, 'The health of Australian prisoners 2015', cat. No. PHE 207 (27 November 2015)

Offences other than category 1 offences allow for community corrections orders to be issued in conjunction with a prison sentence. Causing injury is a hot-headed offence and the people who commit this offence often have complex needs and can benefit from supervision and treatment in the community.

The Federation would remain concerned that the Special Reason provisions provide a narrowing of exceptions to the mandatory sentencing provisions with keeping causing injury as non-category 1 offence. In particular, the special reasons removes the exceptions of psychosocial immaturity and a young person's prospects of rehabilitation, it explicitly excludes drug and alcohol use as an excuse, and narrows compelling reasons. This tighten definition of special reasons amount to a tough on attacks approach to sentencing.

## **2. Change the level of injury caused to serious injury**

An alternative approach would be to recognise that an attack on emergency worker requires a serious injury. The proposed threshold of injury is not proportionate. If a person causes an injury when fleeing a PSO or if a victim-survivor lashes out when being arrested by mistake, these injuries are unlikely to be significant injury. Fixing the definition would mean that the dictated prison sentence is limited to attacks on emergency workers, not incidental injuries. Many of the unintended consequences that might result from family violence, mental illness or even civil disobedience action, could be ameliorated by this move.

Again, the Federation would continue to be concerned that even any injury on emergency worker would have a imposed minimum 6 months prison sentence with the narrowed special reasons as only exception. However, the worst unintended consequences may be addressed by this measure.

## **3. Making the mandatory treatment and monitoring order effective**

There is one exception proposed in the Bill to prison sentence being imposed and that is the mandatory treatment and monitoring order. Our advice is that the drafting of this provision will make it difficult for those with a mental impairment to rely on the clause.

The following amendments are necessary to protect families whose loved ones suffer from mental illness or cognitive impairment, and victims of family violence:

- a) Remove the requirement that the offending be 'causally' linked, and require the illness be either 'linked' or 'connected' to the offence.
- b) Delete requirement for expert reports in relation to offending. This is a practical step: there is such a backlog in expert reports that it takes 6-8 weeks, and under current bail laws mentally unwell people will likely be held in remand waiting for reports. The provision might be able to be substituted for a requirement for an expert report in relation to impaired mental functioning.
- c) Add to the definition of impairment mental function – trauma. This will allow recognition the impact of family violence.

## **Police accountability**

Another consequence of this Bill is the impact on police accountability. People who have a position of authority and power in our society need more accountability not less.

When two teenagers on their way home at night are beaten and their phone recording the beating smashed,<sup>17</sup> or a mother of two who was bashed by police when asking they leave her sick husband,<sup>18</sup> police have charged those making complaints against the police with the 'hamburger with the lot'<sup>19</sup> – that is resisting arrest and assaulting police.

Threatening a person who makes a complaint against the police with a charge of injuring a police that dictates a minimum 6 months prison sentence gives another tool to police who do the wrong thing. This law will further silence people who try to speak out against police misconduct and undermining the rule of law in our state.

If you are continuing down this path you must have safeguards in place to protect people who make police complaints and have a proper independent investigation of police complaints that is in line with international human rights benchmarks and community expectations.

### **Consultation**

Finally, we reiterate the call we made in joint correspondence with Jesuit Social Services, for a representative from the community sector to be on the Emergency Worker Harm Reference Group. We understand that critical work on the roll out of this change to the law is underway without community engagement and without engagement with the Aboriginal and Torres Strait Islander communities.

The community sector represents key constituencies and directly provides support and services for people in crisis, including those experiencing family violence, mental illness, homelessness, and substance abuse issues. Aboriginal legal services and family violence services provide critical advice to address the over-policing and over-representation of Aboriginal and Torres Strait Islander peoples in prison and should be consulted.

Only through collaboration with emergency workers and community workers can we address the issue of occupational violence that impacts all us community workers.

### **Conclusion**

We reiterate the urgency to stop this legislation that will put those who rely on the help and support of emergency workers at risk.

Yours sincerely,



Belinda Lo

**CEO Federation of Community Legal Centres**

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<sup>17</sup> The Age, '[Police charged with assaulting teen boys who filmed alleged attack](#)', 13 January 2016.

<sup>18</sup> The Age, '[Beaten, abused, humiliated and filmed by Victoria Police](#)', 2 April 2018

<sup>19</sup> The Age, '[Beaten, abused, humiliated and filmed by Victoria Police](#)', 2 April 2018