

**THE LAW REFORM COMMISSION OF HONG KONG**

**SUB-COMMITTEE ON  
CAUSING OR ALLOWING THE DEATH OF A CHILD  
OR VULNERABLE ADULT**

**CONSULTATION PAPER**

**CAUSING OR ALLOWING THE DEATH OR SERIOUS  
HARM OF A CHILD OR VULNERABLE ADULT**

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**May 2019**



*This Consultation Paper has been prepared by the Causing or Allowing the Death of a Child or Vulnerable Adult Sub-committee of the Law Reform Commission. It does not represent the final views of either the Sub-committee or the Law Reform Commission, and is circulated for comment and discussion only.*

*The Sub-committee would be grateful for comments on this Consultation Paper by 16 August 2019. All correspondence should be addressed to:*

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*It may be helpful for the Commission and the Sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.*

*It is the Commission's usual practice to acknowledge by name in the final report anyone who responds to a consultation paper. If you do not wish such an acknowledgment, please say so in your response.*



*DEDICATION*

*We, the Chairman and Members of the Sub-  
committee, dedicate this paper to  
our distinguished former Chairman,  
the late Mr Alexander King, SC,  
who passed away on 12 February 2015 after a brave  
battle with illness.*



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# Preface

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## Terms of reference

1. In September 2006, the Secretary for Justice and the Chief Justice directed the Law Reform Commission:

*“To review the law, both substantive and procedural, relating to the criminal liability of parents or carers of children and vulnerable adults when the child or vulnerable adult dies or is seriously injured as a result of an unlawful act while within their care, having particular regard to reforms in other jurisdictions, and to recommend such changes in the law as may be thought appropriate.”*

## The Sub-committee

2. The Law Reform Commission appointed the Sub-committee on Causing or Allowing the Death of a Child or Vulnerable Adult under the chairmanship of Mr Alexander King SC<sup>1</sup>, to examine the current state of the law and to make recommendations. The current members of the Sub-committee are:

**Ms Amanda Whitfort**  
(Chairman)<sup>2</sup>

Associate Professor  
Faculty of Law  
University of Hong Kong

**Dr Philip S L Beh**

Associate Professor  
Department of Pathology  
University of Hong Kong

**Ms Diane Crebbin**

Barrister  
(formerly Senior Government  
Counsel  
Prosecutions Division  
Department of Justice)

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1 Mr King chaired the Sub-committee from December 2006 until his tragic death in February 2015, following an illness.

2 Ms Whitfort has been the Chairman since April 2015, and has been a member of the Sub-committee since its establishment.

<b>Mr Ho Chun-tung<sup>3</sup></b>	Senior Superintendent of Police (Crime Support)(Crime Wing) Hong Kong Police Force
<b>Mr Stephen Hung</b>	Solicitor
<b>Ms Lee Kam-yung, Dora<sup>4</sup></b>	Chief Social Work Officer (Domestic Violence) Social Welfare Department
<b>Ms Jacqueline Leong, SC</b>	Barrister
<b>Ms Lisa Remedios</b>	Barrister
<b>Mr John Saunders, SBS</b>	former Judge of the Court of First Instance of the High Court

3. The Police Force was previously represented on the Sub-committee by Mr Ma Siu-yip,<sup>5</sup> Mr Stephen Lee,<sup>6</sup> Mr Alan Man Chi-hung,<sup>7</sup> Ms Pang Mo-yin<sup>8</sup> and Mr Lee Wai-man.<sup>9</sup> Previous representatives from the Social Welfare Department on the Sub-committee were Ms Pang Kit-ling,<sup>10</sup> Mrs Wong Ho Fung-see,<sup>11</sup> Mr Yam Mun-ho,<sup>12</sup> Mr Lam Bing-chun,<sup>13</sup> Ms Annisa Ma Sau-ching<sup>14</sup> and Mrs Chang Lam Sook-ye.<sup>15</sup> Ms Michelle Ainsworth, formerly Secretary of the Commission, was formerly the Secretary to the Sub-committee.<sup>16</sup> The present Secretary to the Sub-committee is Ms Louisa Ng, Senior Government Counsel, with the assistance of Ms Michelle Ainsworth as Consultant Counsel.

4. The Sub-committee considered the reference over the course of 40 meetings held between December 2006 and September 2018. The recommendations put forward in this paper are the result of those discussions and are now presented for consideration by the community. We welcome any views, comments and suggestions on the issues and recommendations set out in this paper. These will be carefully reviewed by the Sub-committee and will assist the Commission, in due course, to reach its final conclusions.

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3 Since August 2017.  
4 Since November 2018.  
5 Until February 2008.  
6 From February 2008 until September 2010.  
7 From September 2010 until May 2012.  
8 From June 2012 until July 2014.  
9 From July 2014 until August 2017.  
10 Until June 2009.  
11 From June 2009 until November 2010.  
12 From November 2010 until December 2012.  
13 From January 2013 until May 2013.  
14 From August 2013 until February 2018.  
15 From May to June 2013 and March to October 2018.  
16 From December 2006 until March 2018.

## **Format of the consultation paper**

5. Chapter 1 of the Consultation Paper introduces the issues that are central to considering this important topic: the incidence of family violence against children and vulnerable persons which results in death and serious harm; the difficulties for the prosecution in establishing 'who did it' in these cases; and the concerns of the defence in ensuring that there is no miscarriage of justice against the parents or carers who are accused.

6. Chapter 2 reviews the state of the current law in Hong Kong on this topic, including the relevant common law and statutory offences and principles of criminal procedure. In Chapters 3, 4 and 5, we examine the recent developments in the United Kingdom, South Australia and New Zealand respectively, where specific offences to deal with these types of cases have been introduced. The wider position in other common law jurisdictions is reviewed in Chapter 6.

7. In Chapter 7, we set out the details of our interim proposals for a new offence of "*failure to protect*" to be introduced in Hong Kong. The Sub-committee's provisional recommendations are summarised in Chapter 9. The draft offence proposed by the Sub-committee is set out in Annex A, and Annexes B to G set out comparative offence models which the Sub-committee has considered from South Australia, the United Kingdom and New Zealand.

8. Chapter 8 discusses the topic of reporting of abuse, in both the local and international contexts, and includes some broader observations on protections of the vulnerable in domestic violence situations that we would like to bring to the Government's attention.

9. Appendices I to VI include further information on relevant cases and other materials related to our study.

## **Acknowledgements**

10. A number of individuals and organisations have assisted us during the course of this review, providing invaluable information and advice. We wish to express our thanks, in particular, to the following: the Office of the Director of Public Prosecutions, Hong Kong SAR; the Crime Wing of the Hong Kong Police Force; the Family and Child Welfare Branch of the Social Welfare Department; the Department of Pathology of the University of Hong Kong; the Office of the Director of Public Prosecutions, Crown Prosecution Service for England and Wales; the Attorney-General's Department of South Australia and the Office of the Director of Public Prosecutions for South Australia; and Prof Edward Ko-ling Chan, Department of Applied Social Sciences, The Hong Kong Polytechnic University.

# Chapter 1

## Overview of the problem

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### Introduction

1.1 In the United States, the statistics on child abuse and homicide have been described as “*absolutely staggering*,”<sup>1</sup> with homicide being the leading cause of death for children under the age of one.<sup>2</sup> At least five children in the US die each day “*from abuse and neglect by those who are obligated to protect them*.”<sup>3</sup>

1.2 In Australia, 42 children died by homicide in 2012 to 2014 and in 76% of these cases the death was caused by a parent or step-parent.<sup>4</sup> The figures for child homicides in New Zealand indicate that, on average, one child is killed every five weeks, and in 90% of these cases, by someone they know.<sup>5</sup> In Hong Kong, seven child deaths in 2012 and 2013 were attributed to

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1 Prof L Griffin, “Which One of You Did It? Criminal Liability for ‘Causing or Allowing’ the Death of a Child,” (2004, Paper 282, The Berkeley Electronic Press), at 1. See also Prof Glanville Williams, “Which of you did it?” (1989) 52 *Modern Law Review* 179, at 191, which details the problems found under the former English law, and informed Prof Griffin’s paper.

According to the 2016 annual Child Maltreatment report, there were around 676,000 child victims of abuse and neglect in that year, indicating an abuse rate of 9.1 victims per 1000 children in the population. For 91.4% of these victims, the maltreatment was by one or both parents; see: Children’s Bureau (Administration on Children, Youth and Families, Administration for Children and Families) of the US Department of Health and Human Services, “*Child Maltreatment 2016*”, at 18 and 23, available at: <https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf>

Among all victims of homicide in the US in 2017, 7.9 percent (1,208) were children and youths under the age of 18. See: Federal Bureau of Investigation, *Crime in the United States, 2017* (Washington, DC: US Department of Justice, 2017), calculated from Expanded Homicide Data Table 2. Available at: <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/expanded-homicide-data-table-2.xls>

2 Griffin (2004), above, at 1. Children younger than three years of age account for nearly 75% of child deaths from abuse and neglect in the US, with the rate mostly decreasing with age: see discussion in Australian Institute of Family Studies, *Child abuse and neglect statistics* (CFCA Resource Sheet – June 2017), available at: <https://aifs.gov.au/cfca/publications/child-abuse-and-neglect-statistics>

3 Griffin (2004), above, at 1. The population in the US is 328 million. See: <https://www.census.gov/popclock/>

4 Willow Bryant, Samantha Bricknell, *Homicide in Australia 2012–13 to 2013–14: National Homicide Monitoring Program report* (2017, Australian Institute of Criminology), at iii and 20. Available at: <https://aic.gov.au/publications/sr/sr002>  
According to the national data from the Australian Bureau of Statistics (2016), 22 children aged 1 to 14 years died from assault in Australia in 2015; see *Child deaths from abuse and neglect, Child Family Community Australia Resource Sheet – October 2017*, available at: <https://aifs.gov.au/cfca/publications/child-deaths-abuse-and-neglect>

The population of Australia in 2018 is 24.8 million, see: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/3101.0>

5 See UNICEF, “A League Table of Child Maltreatment Deaths in Rich Nations”, in *Innocenti Report Card Issue No 5* (Sept 2003, UNICEF Innocenti Research Centre, Florence), at 8. There were 141 homicides within families in New Zealand between 2002 and 2006, with 38 of

assault on the child by a parent, and five of these cases occurred in the child's home.<sup>6</sup>

1.3 A survey conducted by the National Society for the Prevention of Cruelty to Children (NSPCC) in England showed that from January 1998 to December 2000, more than three children per week under the age of 10 were unlawfully killed or seriously injured by their parents or carers.<sup>7</sup> An important observation arising from this study was that 61% of these cases did not reach court, and even where they did, convictions were secured in only 27% of the prosecuted cases.<sup>8</sup> “So for every one hundred children killed, in only sixteen cases was there a successful prosecution.”<sup>9</sup>

## Victims without a voice: the problem of “which of you did it?”

1.4 The primary reason for the relatively low conviction rate for murder or manslaughter in child abuse cases as illustrated above was the

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the victims being children who died at the hands of their parent, parent's partner or caregiver. See: Jennifer Martin, Rhonda Pritchard. *Learning from Tragedy: Homicide within Families in New Zealand 2002-2006* (2010), at 43. Available at: <http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/research/learning-from-tragedy/>

In terms of child abuse generally, physical abuse was substantiated for 3,051 children in the year to September 2016, compared to 3,011 for the year to September 2015. See New Zealand State Services Commission: *Better Public Services: Supporting vulnerable children* (at 13 March 2017). Available at: <http://www.ssc.govt.nz/bps-supporting-vulnerable-children>

The population of New Zealand is 4.9 million. See: [http://archive.stats.govt.nz/tools\\_and\\_services/population\\_clock.aspx](http://archive.stats.govt.nz/tools_and_services/population_clock.aspx)

6 See Child Fatality Review Panel, *Third Report: for child death cases in Hong Kong in 2012 and 2013* (Aug 2017), at 80. Available online at:

[https://www.swd.gov.hk/storage/asset/section/2867/en/CFRP\\_Third\\_Report\\_Aug2017\\_Eng.pdf](https://www.swd.gov.hk/storage/asset/section/2867/en/CFRP_Third_Report_Aug2017_Eng.pdf)

In one further case in that period, the perpetrator of the assault on the child was a stranger: see same as above.

In the years 2006 to 2013, 40 child deaths in Hong Kong were attributed to assault on the child by either a parent (35) or a relative (5), with 36 cases occurring in the child's home.

7 See NSPCC, *Stop Parents Getting Away with Murder* (2002). A more recent NSPCC report found that across the United Kingdom in 2016/17, there were 98 child homicides (involving offences of murder, manslaughter or infanticide) and 58 deaths of children aged 14 years and under by assault, neglect and undetermined intent (though the offender/victim relationship was not indicated). Although these statistics evidenced a downward trend over a five-year average in the UK, the report also noted that there were 15,204 recorded cruelty and neglect offences in 2016/17, and there was an increasing trend of such offences in most parts of the UK. See Holly Bentley, et al, *How safe are our children? The most comprehensive overview of child protection in the UK 2018* (NSPCC, 2018), at 16 to 18, 20 to 22 and 32 to 34. Available at: <https://www.nspcc.org.uk/globalassets/documents/research-reports/how-safe-children-2018-report.pdf>

See also UK Office of National Statistics/UK Home Office, *Homicide in England and Wales: year ending March 2017*. Available at:

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/homicideinenglandandwales/yearendingmarch2017>

8 See CMV Clarkson and Sally Cunningham (ed), *Criminal Liability for Non-Aggressive Death* (2008, Ashgate), at 126 to 127.

9 Same as above, at 127. At page 126, it is stated that in England and Wales, infants under the age of one are more at risk of being killed than any other age group, and the parents are the principal suspect in nearly 80% of these cases. The population of England and Wales is 58.8 million. See:

<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2017>

prosecution's inability to prove which member of the household actually caused the death of the child.<sup>10</sup> Archbold notes:

*"In many of these cases, there is no problem in proving the non-accidental causes of the death or injury, but rather, the difficulty is in proving who caused that death or harm."*<sup>11</sup>

1.5 Even though the suspicions of the prosecution may rest more heavily with one person than another, they may be unable to establish which adult in the home was directly responsible for the act which killed or seriously harmed the child.

*"If you have got a victim without a voice then you have got to prove whoever had responsibility for that child is the person that caused that injury. ... The [prosecution] will not prosecute a case where there is a possibility someone other than the offender has caused that injury."*<sup>12</sup>

1.6 The situation is often further complicated by the suspects' silence, or by their mutual accusations, and by the silence of other family members in their attempts to protect the suspects. The statements below explain the problem further:

*"The difficulty is ... child abuse cases often involve a complex factual matrix: the adults involved often lie; the expert evidence can be equivocal; and the victims are unable to provide accounts of what happened. ..."*

*"The court is frequently unable to discover exactly what happened ... the judge is unable to penetrate the fog of denials, evasions, half truths which all too often descend in court at fact-finding hearings."*<sup>13</sup>

1.7 The attitude of the courts in such circumstances has traditionally been *"quite clear"*.<sup>14</sup> In order to avoid the possibility of a miscarriage of justice, all parties should be acquitted if it cannot be proven beyond reasonable doubt

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10 Even in serious injury cases where the victim has survived, another contributing factor would be the inability of very young children (and some vulnerable adults) to state what had happened to them and to give evidence of such quality as would be accepted by the court to prove the case beyond reasonable doubt.

11 *Archbold News* 2005 (2), at 7.

12 Statement given in evidence by a police officer in the United Kingdom, referring to the approach (then) of the Crown Prosecution Service: see G Davis, L Hoyano, C Keenan, L Maitland and R Morgan, *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions: A Report for the Home Office* (1999), at 43; also referred to in CMV Clarkson and Sally Cunningham (2008), above, at 127.

13 See CMV Clarkson and Sally Cunningham (ed) (2008), above, at 127, referring first, to the English Court of Appeal judgment in *Re W, S and C* [2005] EWCA Crim 1095, then to *Re H and R* [1996] AC 563, per Lord Nicolls.

14 See Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy Across Boundaries* (2007, OUP), at 158.

which one of them was responsible,<sup>15</sup> even though “[v]ery likely one or other must have committed the [criminal act], but there was no evidence of which one.”<sup>16</sup>

1.8 It is useful to note also that, given the similarity in their circumstances of vulnerability, issues along these lines would arise not only in cases involving child victims, but also where victims are vulnerable adults.

### ***Point of view of the prosecution***

1.9 In the absence of evidence to pinpoint who was responsible for the injuries which killed the victim, or that the victim's death was the result of a joint enterprise, the prosecution cannot proceed on a murder or manslaughter charge. The result is that parents or carers who have killed children (or vulnerable adults) in these situations may only be convicted of much lesser offences, such as child abuse or neglect in the case of a child victim.

1.10 The Prosecutions Division of the Department of Justice has advised that it faces similar evidentiary problems, and that cases do arise from time to time in Hong Kong where the charges of murder or manslaughter, which the prosecution believes better represent the level of likely culpability involved, have to be “*scaled down*” to charges of, for example, ill-treating or neglecting a child under section 27 of the Offences against the Person Ordinance (Cap 212).

### ***Point of view of the defence***

1.11 Reforming the law to better facilitate the prosecution of offences where victims are killed in the home may have significant implications for key doctrines of criminal law and the law of evidence. These include the presumption of innocence, the accused's right to silence and the privilege against self-incrimination. It is likely to be the view of defence counsel and others that any inroads into these fundamental principles of justice should not be undertaken without the clearest evidence of pressing need, or should not be undertaken at all.

### ***Overview of developments in other jurisdictions***

1.12 In 2003, the English Law Commission recommended changes to England's substantive criminal law and rules of evidence and procedure in an effort to resolve the problems faced by the prosecution in cases involving the

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15 Or that they had acted in concert as part of a “*joint enterprise*”: see discussion later in this chapter and in Chapter 2.

16 *R v Abbott* (1955) 39 Cr App R 141 (CA), at 148, *per* Lord Goddard.

non-accidental deaths of children.<sup>17</sup> In essence, the Law Commission proposed that new, more serious child abuse offences should be introduced, as well as special evidential rules to subject offenders to more serious criminal liability even where the prosecution could not identify which offender had “*struck the final blow*” that killed the child.

1.13 The Law Commission's recommendations were implemented in England in 2004, and a new offence of “*causing or allowing the death of a child or vulnerable adult*” was created under section 5 of the Domestic Violence, Crime and Victims Act 2004. The grounds for conviction under this offence are significantly wider than those prescribed in a murder or manslaughter charge.<sup>18</sup>

1.14 An offence entitled “*criminal neglect*,” with similar scope and effect to the English reform, was introduced in South Australia in 2005 (although it underwent significant amendment in 2018).<sup>19</sup> Other Australian states and territories have also been considering the issue.<sup>20</sup> In September 2011, the new offence of “*failure to protect a child or vulnerable adult from risk of serious harm*” was enacted in New Zealand.<sup>21</sup>

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17 Law Commission of England and Wales, *Children: Their Non-accidental Death or Serious Injury (Criminal Trials)* (Sep 2003, Law Com No 282), at 3 to 4. See also their earlier Consultative Report on the same subject (Apr 2003, Law Com No 279).

18 Under these provisions, a person over 16 years of age who was a member of the same household as the victim and had frequent contact with the victim, and who was aware that the victim was at significant risk of serious harm but failed to take reasonable steps to prevent the harm, may be convicted of this offence. See sections 5(1), 5(3) and 5(4), Domestic Violence, Crime and Victims Act 2004 (“DVCVA”). See Chapter 3, below, for a detailed discussion of the UK offence.

19 See section 4, Criminal Law Consolidation (Criminal Neglect) Amendment Act 2005 (4/2005) (South Australia), which inserted a new Division 1A, section 14, into the Criminal Law Consolidation Act 1935 (South Australia). Section 14 was subsequently amended in August 2018 by the enactment of the Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018 which came into force on 6 September 2018. See Chapter 4, below, for a detailed discussion of the SA offence.

20 Government of South Australia News Release, “Baby Protection Bill Extended to Cover Vulnerable Adults” (18 June 2004).

In the state of Victoria, a discussion paper in 2011 proposed new offences regarding failure to protect a child from abuse or sexual abuse, but it appears only the offence regarding sexual abuse was eventually introduced (ie, the Crimes Act 1958 (Vic) was amended by the Crimes Amendment (Sexual Offences) Act 2016 from 1 July 2017 by inserting a new section 49O – Failure by person in authority to protect child from sexual offence). See Lenny Roth, *Criminal liability of carers in cases of non-accidental death or serious injury of children* (NSW Parliamentary Research Service, 2014), at 13, available at:

<https://www.parliament.nsw.gov.au/researchpapers/Documents/criminal-liability-of-carers-in-cases-of-non-acc/Criminal%20liability%20of%20carers%20in%20cases%20of%20non-accidental%20death%20or%20serious%20injury%20of%20children.pdf>

In NSW, a proposal to introduce a new offence was made in 2013 (see Lenny Roth (2014), above, at 1) and was reported to be under consideration in 2014: see Chloe Hart, “Cootamundra baby death prompts investigation of state laws” (ABC, 16 July 2014). Available at: <http://www.abc.net.au/news/2014-07-16/ag-scifleet/5600144>

See Chapter 6, below, for a detailed discussion of the position in these jurisdictions of Australia.

21 See Crimes Amendment Act (No 3) 2011, which came into effect in March 2012. The new offence was comprised in section 195A, Crimes Act 1961 (NZ). This offence and the related New Zealand reforms are discussed in detail below, in Chapter 5 of this paper.

1.15 In the United States, at least one writer has advocated similar changes to the law there.<sup>22</sup>

1.16 The subject of this reference is clearly an important and controversial one, requiring a full and balanced examination of the existing law, developments in other jurisdictions and the implications of any proposed reforms.

1.17 Before proceeding to a detailed examination of the legal implications of the “*which of you did it?*” cases in the next chapter, it would be useful first to consider what is meant by “*child abuse*” and what are its social implications. Set out later in this chapter is a similar discussion regarding the abuse of “*vulnerable adults*”.

## **Child abuse in its wider context**

### ***Rights of children***

1.18 The protection of children from all forms of violence is a fundamental right guaranteed by the United Nations Convention on the Rights of the Child and other international human rights treaties and standards<sup>23</sup>. Under Article 19 of the UN Convention on the Rights of the Child:

*“1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

*2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”*

1.19 The UN Committee on the Rights of the Child has also commented that:

*“All forms of violence against children, however light, are unacceptable. [...] Frequency, severity of harm and intent to harm are not prerequisites for the definitions of violence. States parties*

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22 See Griffin (2004), above, at 38.

23 UNICEF (United Nations Children's Fund): Children from all walks of life endure violence, and millions more are at risk, see UNICEF web-site at: <https://data.unicef.org/topic/child-protection/violence/#>

*may refer to such factors in intervention strategies in order to allow proportional responses in the best interests of the child, but definitions must in no way erode the child's absolute right to human dignity and physical and psychological integrity by describing some forms of violence as legally and/or socially acceptable.*<sup>24</sup>

### **Domestic violence: victims' rights**

1.20 Domestic violence is intimately linked to the fundamental human rights protected by the Basic Law, Bill of Rights, and various international instruments.<sup>25</sup> The reality of domestic violence can mean that victims are effectively denied their fundamental rights, including those guaranteed under: Art 1 BOR (non-discrimination); Arts 2 and 5 BOR and 28 BL (right to life and liberty); Arts 16 BOR and 27 BL (freedom of expression); Arts 14 BOR and 30 BL (privacy); Arts 8 BOR and 31 BL (freedom of movements); Arts 19 BOR and 37 BL (right to family life).<sup>26</sup>

1.21 Commentators have observed that:

*"The government has a duty under its international obligations, the Basic Law and the Bill of Rights to protect children. Indeed, such duties are part of the common law.*

*These duties include, inter alia, the duty to investigate child abuse and neglect, initiate and pursue necessary court proceedings, ensure children in care are safe and that their status is regularly reviewed. The corollaries to such duties are the constitutional rights of child victims of abuse and neglect to remedies (include declaratory relief, damages, and injunctions) when these duties are breached.*

*However, the above rights of children are illusory without a proper state system of child protection in place.*<sup>27</sup>

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24 United Nations Committee on the Rights of the Child, General Comment No 13 on the Convention on the Rights of the Child, at Part IV.

25 Keith Hotten, Azan & Shaphan Marwah, *Hong Kong Family Court Practice* (2nd ed, 2015), at para 6.6.

26 Same as above, at para 6.7.

27 Same as above, at paras 5.146 to 5.148. Hotten and Marwah go on to comment (at para 5.148): *"Unfortunately, it appears that despite the best efforts of professionals involved in child protection, the current system is inadequate and under-resourced. In particular, professionals have criticised: the separation of the powers and responsibilities for child protection, the lack of rules for mandatory reporting, the lack of independent oversight of child protection decisions, the lack of access to independent legal advice for children, the insufficient training of child protection personnel, and the lack of proper systems for deciding which children require protection, how they are looked-after and reviews of their status when in care."*

For further discussion of some of these issues, see later in Chapter 8 of this paper.

## **Child abuse defined**

1.22 The Social Welfare Department (SWD), referring to its procedural guide for the handling of child abuse cases,<sup>28</sup> defines child abuse as:

*“[A]ny act of commission or omission that endangers or impairs the physical/psychological health and development of an individual under the age of 18. Such act is judged on the basis of a combination of community standards and professional expertise. It is committed by individuals, singly or collectively, who by their characteristics (e.g. age, status, knowledge, organisational form) are in a position of differential power that renders a child vulnerable. Child abuse is not limited to a child-parent/guardian situation but includes anyone who is entrusted with the care and control of a child e.g. child-minders, relatives, teachers etc. For child sexual abuse, the acts may also be committed by strangers to the child.”<sup>29</sup>*

## **Manifestations of child abuse<sup>30</sup>**

1.23 Injuries inflicted by a caregiver on a child can take many forms. Serious harm or death in abused children is most often the consequence of a head injury or injury to the internal organs. Head trauma as a result of abuse is the most common cause of death in young children, with children in the first two years of life being the most vulnerable. The World Health Organisation (WHO) states:

*“Because force applied to the body passes through the skin, patterns of injury to the skin can provide clear signs of abuse. The skeletal manifestations of abuse include multiple fractures at different stages of healing, fractures of bones that are very rarely broken under normal circumstances, and characteristic fractures of the ribs and long bones.”*

### *The shaken infant and the battered child*

1.24 Shaking is prevalent form of abuse seen in very young children. The majority of shaken children are less than nine months' old. It has been observed that most perpetrators of such abuse are male, *“though this may be more a reflection of the fact that men, being on average stronger than women, tend to apply greater force, rather than that they are more prone than women*

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28 Social Welfare Department (SWD), *Procedural Guide for Handling Child Abuse Cases: revised 2015*, at para 2.1, available at: [http://www.swd.gov.hk/doc/fcw/proc\\_guidelines/childabuse/Procedural%20Guide%20for%20Handling%20Child%20Abuse%20Cases\(Revised%202015\)\\_updated%20May%202017\\_EN.pdf](http://www.swd.gov.hk/doc/fcw/proc_guidelines/childabuse/Procedural%20Guide%20for%20Handling%20Child%20Abuse%20Cases(Revised%202015)_updated%20May%202017_EN.pdf)

29 SWD website at: <http://www.swd.gov.hk/eng/english/faq.html>, citing the SWD Procedural guide for handling child abuse cases (2015), above.

30 See World Health Organisation (WHO), *World report on violence and health* (2002, WHO), see Chapter 3: “Child abuse and neglect by parents and other caregivers”, at 61.

to shake children.<sup>31</sup> Intracranial haemorrhages, retinal haemorrhages and small 'chip' fractures at the major joints of the child's extremities can result from very rapid shaking of an infant. Such injuries can also follow a combination of shaking and a head hitting the surface. *"There is evidence that about one third of severely shaken infants die and that the majority of the survivors suffer long-term consequences such as mental retardation, cerebral palsy or blindness."*<sup>32</sup>

1.25 One of the syndromes of child abuse is 'the battered child'. This term is generally applied to children showing repeated and devastating injury to the skin, skeletal system or nervous system. It includes children with multiple fractures of different ages, head trauma and severe visceral trauma, with evidence of repeated infliction. *"Fortunately, though the cases are tragic, this pattern is rare."*<sup>33</sup>

### *Sexual abuse*

1.26 Children may be brought to professional attention because of physical or behavioural concerns that, on further investigation, turn out to result from sexual abuse. It is not uncommon for children who have been sexually abused to exhibit symptoms of infection, genital injury, abdominal pains, constipation, chronic or recurrent urinary tract infections or behavioural problems. *"To be able to detect child sexual abuse requires a high index of suspicion and familiarity with the verbal, behavioural and physical indicators of abuse. Many children will disclose abuse to caregivers or others spontaneously, though there may also be indirect physical or behavioural signs."*<sup>34</sup>

### *Neglect*

1.27 Child neglect manifests in many forms, including non-compliance with medical recommendations, failure to seek appropriate medical treatment, depriving a child of food resulting in hunger, and the failure of a child physically to thrive. Other causes for concern include the exposure of children to drugs and inadequate protection from environmental dangers. As well as these forms, abandonment, inadequate supervision, poor hygiene and being deprived of education have all been considered as evidence of neglect.<sup>35</sup>

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31 Same as above.

32 Same as above.

33 Same as above.

34 Same as above.

35 Same as above.

## **Consequences of child abuse**

### *Escalation and long-term consequences*

1.28 Evidence suggests that the severity of child abuse tends to escalate over time, “making the early detection and intervention crucial in preventing victims from suffering severe abuses.”<sup>36</sup> While the reporting of child abuse cases has significantly increased in recent years, it has been observed that figures available may possibly “represent a serious underestimation, as low as 1-2% of total cases.”<sup>37</sup>

1.29 Child abuse, besides causing physical harm and mortality, also carries long-term consequences in terms of impaired brain development, poor physical health, poor emotional and mental health, and cognitive and social difficulties.<sup>38</sup> There is substantial evidence of “the co-occurrence of child abuse and adult domestic violence”.<sup>39</sup>

1.30 The WHO has outlined in more detail<sup>40</sup> how child maltreatment causes suffering to children and families and can have long-term consequences. Maltreatment causes stress that is associated with disruption in early brain development and extreme stress can impair the development of the nervous and immune systems. Consequently, as adults, maltreated children are at increased risk for behavioural, physical and mental health problems such as perpetrating or being a victim of violence, depression, smoking, obesity, high-risk sexual behaviours, unintended pregnancy, alcohol and drug misuse. Through these behavioural and mental health consequences, maltreatment can contribute to heart disease, cancer, suicide and sexually transmitted infections.<sup>41</sup>

1.31 The WHO has also observed<sup>42</sup> that there is a strong and growing body of evidence showing the impact of early relationships between children and their caregivers on the structural and functional development of the brain and the subsequent cognitive, emotional and social development of children. The research indicates that children growing up in environments without the benefit of safe, stable and nurturing relationships with parents or other caregivers have difficulty forming relationships with peers and others, lack empathy for others in distress and are at much greater risk of experiencing depression and anxiety, developing poor communication skills and adopting antisocial behaviours. They also have poorer educational

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36 See Phil W S Leung, William CW Wong, Catherine S K Tang and Albert Lee, “Attitudes and child abuse reporting behaviours among Hong Kong GPs” (2010) *Family Practice* 28(2): 195-201; at 195.

37 Leung, Wong, Tang and Lee (2010), above, at 196.

38 See Dr CB Chow, “Underreported, underacknowledged: child abuse can no longer be ignored” (paper) *Hong Kong Med J*, 2005 Dec; 11(6): 429 - 430, at 29.

39 See CMV Clarkson and Sally Cunningham (ed) (2008), above, at 139.

40 WHO, *Child maltreatment fact sheet* (Sept 2016), available at: <https://www.who.int/en/news-room/fact-sheets/detail/child-maltreatment>

41 Same as above.

42 WHO, *Global status report on violence prevention* (2014), available at: [https://www.who.int/violence\\_injury\\_prevention/violence/status\\_report/2014/en/](https://www.who.int/violence_injury_prevention/violence/status_report/2014/en/)

attainment and economic productivity over their lifetimes and are more likely to be a perpetrator or victim of violence.<sup>43</sup>

1.32 The United Nations Committee on the Rights of the Child has also commented on the devastating impact that violence has upon children, noting that it may threaten both their survival and development, and may lead to:

- fatal or non-fatal injury (possibly leading to disability);
- health problems (including failure to thrive, and lung, heart and liver disease and sexually-transmitted infections in later life);
- cognitive impairment (including impaired school and work performance);
- psychological and emotional consequences (feelings of rejection, impaired attachment, trauma, fear, anxiety, insecurity and shattered self-esteem);
- mental health problems (anxiety and depression, hallucinations, memory disturbances and suicide attempts);
- risky behaviours (substance abuse and early initiation of sexual activity);
- developmental and behavioural consequences, such as non-attendance at school, and antisocial and destructive behaviour, leading to poor relationships, school exclusion and conflict with the law.<sup>44</sup>

1.33 Beyond the health and social consequences of child maltreatment, the WHO has referred to the economic impact, including costs of hospitalisation, mental health treatment, child welfare, and longer-term health costs.<sup>45</sup> While all types of violence have been strongly linked to negative health consequences across a person's lifespan, violence against women and children contributes disproportionately to the health burden.<sup>46</sup> The WHO notes that the available evidence shows that victims of child maltreatment (and women who have experienced intimate partner and sexual violence) have more health problems, incur significantly higher health care costs, make more visits to health providers over their lifetimes and have more hospital stays (and longer duration of hospital stays) than those who have not experienced violence.<sup>47</sup>

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43 Same as above, at 30.

44 See United Nations Special Representative of the Secretary-General on Violence against Children: *Toward a world free from violence: Global survey on violence against children* (2013) at xv, available at: [https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/publications/towards\\_a\\_world\\_free\\_from\\_violence\\_global\\_survey\\_low\\_res\\_fa.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/publications/towards_a_world_free_from_violence_global_survey_low_res_fa.pdf)

45 WHO (2016), above.

46 WHO (2014), above, at 15.

47 Same as above.

## ***Incidence of child abuse in Hong Kong***

1.34 Over 10,000 cases of child abuse were recorded in Hong Kong in the years from 2007 to 2017.<sup>48</sup> In 2017, 947 cases of child abuse were recorded by the SWD. Of these, 374 were classified as involving physical abuse, 229 as involving neglect, 315 as involving sexual abuse and 24 as involving multiple abuse. Statistics indicate that 59.4% of the abusers were parents, 4.8% were step-parents, 3.2% were caregivers, 9.3% were family friends or friends, and 11.2% were unrelated persons.<sup>49</sup>

1.35 Of the 891 children who died in Hong Kong between 2006 and 2013,<sup>50</sup> 49 of these deaths were attributed to assault on the child.<sup>51</sup> The perpetrator was a stranger in seven of these fatal assault cases,<sup>52</sup> while in 40, either a parent (35) or a relative (5) was responsible for the death of the child. Thirty-six of the cases of fatal assault occurred in the child's home. The largest group of children to die from fatal assaults in this period was babies under the age of one (17 deaths).<sup>53</sup>

## ***Reporting of child abuse***

1.36 Hong Kong has detailed guidelines for voluntary reporting of child abuse contained in the SWD procedural guide for handling child abuse cases.<sup>54</sup> The content of the guidelines is discussed later, in Chapter 8, as are broader issues concerning the reporting of abuse, both in Hong Kong and overseas (see also discussion in Appendix VI).

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48 See SWD's website, regarding Statistics on cases involving child abuse, spouse/cohabitant battering and sexual violence recorded by the Child Protection Registry (CPR) and the Central Information System on Spouse/Cohabitant Battering Cases and Sexual Violence Cases (CISSCBSV). Available at: <http://www.swd.gov.hk/vs/english/stat.html>

49 See SWD, Child Protection Registry, Statistical Report 2017 (July 2018), at 2 and 21, available at: [https://www.swd.gov.hk/storage/asset/section/3219/en/Annual\\_CPR\\_Report\\_2017.pdf](https://www.swd.gov.hk/storage/asset/section/3219/en/Annual_CPR_Report_2017.pdf)  
See also SWD's website at: [https://www.swd.gov.hk/vs/stat/stat\\_en/201701-12/stat-en.pdf](https://www.swd.gov.hk/vs/stat/stat_en/201701-12/stat-en.pdf)

50 Where the population is 7.41 million. See: <https://www.censtatd.gov.hk/hkstat/sub/so20.jsp>

51 See Child Fatality Review Panel (2017), above, at 55. The review covered the deaths of 891 children, aged below 18, who died between 2006 and 2013 of both natural (572) and non-natural (319) causes. These deaths were reported to the Coroner's Court. The largest non-natural cause of child death was suicide (105), followed by accidents (111) and assault (49).

After reviewing the child death cases in 2012 and 2013, the Panel's report made 11 recommendations "concerning child death cases by assault and non-natural unascertained causes", including a recommendation "to reiterate the message that children have their own rights of survival which no one, including their parents, should take away" and that "for cases pending long-term placement and be restored home during the interim, there should be thorough assessment on the risk factors especially on the caregivers' capability in providing proper child care including child abuse, drug abuse, mental illness, violence, serious offences and dubious means of earning a living, etc."

52 Same as above, at 80.

53 Same as above, at 79.

54 SWD Procedural Guide for Handling Child Abuse Cases (2015), above.

## Abuse of vulnerable adults in its wider context

### *Categories of vulnerable adults*

1.37 Generally speaking, adults considered as “*vulnerable*” include those with physical or mental impairment,<sup>55</sup> and the elderly. It is also possible that adults may be rendered vulnerable through their personal situations of dependency (eg, those being held in hospitals, prisons or other institutions), as well as through their potential for exploitation (eg, persons imported from overseas and subjected to forced or compulsory labour, slavery or servitude).<sup>56</sup>

### *The example of elder abuse*

1.38 It has been noted in the US that, particularly with changes in demographics and the ‘greying’ of the adult population, the issue of elder abuse and neglect is becoming increasingly important:

*“The significant elder population that exists today, the large number of individuals in institutional settings, and the current reported levels of elder abuse in domestic and institutional settings help to illustrate the current magnitude of the elder abuse problem. ...*

*Victims of elder abuse are not only subject to injury from mistreatment and neglect, they are also at 3.1 times greater risk of dying. Not only do elders suffer greatly because of abuse, neglect, and exploitation, but society also bears the increased cost of health care and diminished public resources.”<sup>57</sup>*

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55 See *Black’s Law Dictionary* (10th ed, 2014, under definition of “Adult”: a “*vulnerable adult*” is an adult “*who is physically or mentally disabled: esp ... one dependent on institutional services.*”

For an analysis of the more narrow terms “*mental incapacity*”, “*mental handicap*” and “*mental disorder*”, see the LRC’s Review of Sexual Offences Sub-committee’s consultation paper on *Sexual Offences Involving Children and Persons with Mental Impairment* (Nov 2016), at Chapters 9 and 10, available at: <https://www.hkreform.gov.hk/en/publications/sexoffchild.htm>

56 See discussion in Patricia Ho, “Human Trafficking and the Legal Profession’s Role in Combating the Crime in Hong Kong”, *Hong Kong Lawyer* (Dec 2017), available at:

<http://www.hk-lawyer.org/content/human-trafficking-and-legal-profession%E2%80%99s-role-combating-crime-hong-kong>

See also the recent involuntary domestic servitude and abuse cases concerning domestic helpers: *HKSAR v Law Wan-Tung* [2015] HKDC 210 (case concerning Indonesian helper, Erwiana) and *ZN v Secretary for Justice and Ors* [2018] HKCA 473; CACV 14/2017 (date of judgment 2 Aug 2018) (CA) (concerning a male domestic helper). In that case, Hon Cheung CJHC (at para 139) referred to vulnerable people in the forced labour context as: “*people who might be simple, uneducated or unsophisticated, precisely the type of person who required protection of the law. Many of them might, because of social tradition, cultural background, upbringing or religious belief, be ignorant of their rights as a human being, over-submissive or tolerant, and be resigned to what they were made to suffer as simply realities of life.*”

See also further discussion, below, in Chapter 2, and additional cases in Appendix I.

57 See (US) National District Attorneys Association, “Policy Positions on the Prosecution of Elder Abuse, Neglect, and Financial Exploitation” (Mar 2003, NDAA), at 2.

1.39 In Hong Kong, the SWD's procedural guidelines for handling elder abuse cases<sup>58</sup> state that everybody has the right to survival, freedom and personal safety; and the right to obtain basic provisions for living; and that no one, including elders (defined in the guidelines as persons aged over 60 years), should be treated with cruelty, inhumanity or insult. Following on from this, elder abuse is defined as the commission or omission of any act that endangers the welfare or safety of an elder.<sup>59</sup>

1.40 When assessing whether a certain act constitutes elder abuse, the following should be noted:<sup>60</sup>

- the abusive act itself may constitute elder abuse, regardless of whether the elder considers himself/herself as being abused;
- elder abuse may occur within families, institutions or the community;
- an act of elder abuse act may occur once or repeatedly, or within a short period, or for a long duration; and
- an act that may cause harm to an elder, though not being committed intentionally, may also constitute elder abuse.

### ***Manifestations of abuse of vulnerable adults, eg, elder abuse***

1.41 The SWD procedural guidelines for handling elder abuse cases note that forms of abuse of elders may include those set out below.<sup>61</sup>

#### *Physical Abuse*

1.42 Physical abuse is physical injury or suffering inflicted on an elder where one can be certain, or reasonably suspect, that it has been inflicted non-accidentally or due to the absence of any preventive measures. Examples include acts of slapping, pushing, punching and kicking, and attack with an object or weapon, causing physical injury to an elderly person.<sup>62</sup>

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58 SWD, *Procedural Guidelines for Handling Elder Abuse Cases*: revised August 2006, (Appendices revised in Nov 2012) available at: [https://www.swd.gov.hk/doc/family/Procedural%20Guidelines%20\(Elder%20Abuse\)%20\(Eng\)%20\(Mar%202013\).pdf](https://www.swd.gov.hk/doc/family/Procedural%20Guidelines%20(Elder%20Abuse)%20(Eng)%20(Mar%202013).pdf)

While elder abusers may be known or unknown to the victims, the cases covered by the guidelines are confined to those where the abused elders and the abusers are known to each other, and to cases involving abusers who are responsible for the care of the abused elders.

59 Same as above, at 4.

60 Same as above.

61 Same as above, at 5 to 6.

62 SWD, Leaflet on Protecting Elderly Persons Against Physical Abuse, available at: [https://www.swd.gov.hk/doc/family/Physical%20Abuse%20\(2016\).pdf](https://www.swd.gov.hk/doc/family/Physical%20Abuse%20(2016).pdf)

## *Neglect*

1.43 Neglect is severe or persistent lack of attention to an elder's basic needs (eg, adequate food, clothing, shelter, medical treatment, nursing care, etc) that endangers or impairs the elder's health and safety. Neglect also includes the failure to provide medicine and aids according to medical advice, which causes physical harm to the elder.

1.44 If a formal service provider (eg, Residential Care Homes for the Elderly (RCHEs), Integrated Home Care Services Teams, hospitals, etc) fails to perform its caring responsibility and causes harm to an elder, the case can also be considered as neglect.

## *Sexual Abuse*

1.45 Sexual abuse is the act of sexual assault on an elder (including exposure of sexual organ to an elder, indecent assault and rape, etc).

## *Other forms of abuse*

1.46 Other forms of abuse against elders can include psychological abuse, financial abuse and abandonment.

1.47 Psychological abuse is the pattern of behaviour and/or attitudes towards an elder that endangers or impairs the elder's psychological health, including acts of insult, scolding, isolation, causing fear to the elder for a long duration, intrusion into the elder's privacy and unnecessary restriction of the elder's freedom of access and movement.

1.48 Financial abuse is any act which involves depriving an elder of his/her wealth, or not acting in an elder's interests, including taking away an elder's possessions, money or assets (eg, property or public housing tenancy, etc) without his/her consent.

1.49 Abandonment is the act of abandoning an elder without justifiable reasons, committed by a carer or guardian, which endangers or impairs the elder physically or psychologically. For example, where a family member deliberately abandons an elder with dementia after taking him/her to an unfamiliar place, making the elder unable to return home on his/her own, or giving a wrong residential address to the hospital upon the elder's admission, which makes it impossible for the hospital to contact the carer or guardian to discuss the medical and welfare issues of the elder.

## *Risk factors for, and indicators of, elder abuse*

1.50 The SWD guidelines identify the following non-exhaustive risk factors which may lead to elder abuse:

- poor family relationship between the elder and his/her family members;
- failing to adapt to the changes in family structure (eg, following the passing away of the elder's spouse);
- relatives/carers suffering from health problems themselves;
- elders relying on others physically and mentally, with little ability to defend themselves from abuse;
- stress of the carer, without adequate support, in providing care;
- elders with a weak social network outside their immediate carers, making it difficult for them to seek outside help in cases of abuse.<sup>63</sup>

1.51 The SWD guidelines also set out a detailed list of indicators, or warning signs, that any of the different types of elder abuse may have occurred.<sup>64</sup>

### ***Incidence of elder abuse cases in Hong Kong***

1.52 In terms of statistics on vulnerable adult cases, recent figures are available on abuse of elderly persons. These figures reveal that in 2017, 569 cases of elder abuse were reported to the Social Welfare Department.<sup>65</sup> Of these, 355 were classified as involving physical abuse, five involved sexual abuse, two involved neglect and 24 involved multiple abuse.<sup>66</sup> The abusers were spouses in 53.3% of the cases, sons in 12.3% of the cases, daughters in 2.3% of the cases, friends or neighbours in 8.1% of the cases, domestic helpers in 9.5% of the cases, and agency staff<sup>67</sup> providing service to the victim in 2.3% of cases.<sup>68</sup>

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63 SWD Procedural Guidelines for Handling Elder Abuse Cases (2006), above, at 7 to 8.

64 Same as above, at 9 to 13.

65 See SWD website on Statistics of Type of Elder Abuse Cases based on the information collected by the Central Information System on Elder Abuse Cases, available at: [https://www.swd.gov.hk/storage/asset/section/3119/CISEAC\(English\)\\_2017\\_clean.pdf](https://www.swd.gov.hk/storage/asset/section/3119/CISEAC(English)_2017_clean.pdf)

66 The statistics also cover psychological abuse and financial abuse.

67 Note in this context that, in December 2018, the Ombudsman issued a Direct Investigation Report on SWD's monitoring of the services of residential care homes for the elderly (RCHE), including a discussion of cases of abuse in RCHE. See Office of The Ombudsman, Hong Kong: *Direct Investigation Report on Social Welfare Department's Monitoring of Services of Residential Care Homes for the Elderly*. Available at: [https://ofomb.ombudsman.hk/abc/files/2018\\_12\\_FR\\_.pdf](https://ofomb.ombudsman.hk/abc/files/2018_12_FR_.pdf), discussed further in Chapter 2, below, at para 2.144.

68 Other abusers include sons-in-law, daughters-in-law, grandchildren, relatives and unrelated persons living with the victim.

### ***Reporting of abuse of vulnerable adults***

1.53 In terms of the different categories of vulnerable adults, Hong Kong currently has detailed guidance for the voluntary reporting of elder abuse. This guidance is contained in the SWD procedural guidelines on the handling elder abuse cases<sup>69</sup> which are discussed later, in Chapter 8.

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69 SWD Procedural Guidelines for Handling Elder Abuse Cases (2006), above.

## Chapter 2

# The current law and procedure in Hong Kong

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### Introduction

2.1 The law in Hong Kong concerning the death of an abused child in circumstances where it is unclear who killed the child largely follows the common law in England before the enactment there of the Domestic Violence, Crime and Victims Act 2004.<sup>1</sup> The English Law Commission summarised the pre-existing law in the following terms:

*“Where one person with the requisite mens rea kills or injures a child, that person will (in the absence of a valid defence) be guilty of a criminal offence, such as murder or manslaughter, or one of the various non-fatal offences against the person. Another person who assists or encourages these actions may also be guilty of one or other of these offences under the normal principles of accessory liability.”<sup>2</sup>*

*“In many cases of the type under consideration it cannot be proved which of two or more defendants was directly responsible for the offence and it cannot be proved that whichever defendant was not directly responsible must have been guilty as an accomplice. In the present context this may have involved an isolated act of violence by one parent and the other parent may have been absent at the time. The present law is that there is no prima facie case against either and therefore both defendants must be acquitted at the conclusion of the prosecution case.”<sup>3</sup>*

2.2 This illustrates the basic problem for the prosecution: although a child has died or been seriously injured in non-accidental circumstances, the law as it stands may not permit an appropriate level of criminal liability to be imposed on the child’s carers. To understand why this is the case, we need to examine the relevant statute law, common law and rules of criminal evidence and procedure.

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1 The relevant provisions of that Act are discussed in Chapter 3 of this paper.

2 Law Commission of England and Wales, *Children: Their Non-accidental Death or Serious Injury (Criminal Trials)* (Sep 2003, Law Com No 282), at para 2.1.

3 Same as above, at para 2.2.

## The substantive offences

2.3 Depending on the evidence available, the range of possible charges which the prosecution in Hong Kong might seek to bring against those implicated in a child's or vulnerable adult's death includes the common law offences of murder and manslaughter and, in the case of a child, the statutory offence of ill-treatment or neglect of a child under section 27 of the Offences against the Person Ordinance (Cap 212) (OAPO). (It is noted that, unlike section 27 of the OAPO, which deals with ill-treatment or neglect of a child, and section 65 of the Mental Health Ordinance (Cap 136) relating to ill-treatment of a patient in a mental hospital, there is no specific offence which deals with ill-treatment, neglect or abuse of other classes of vulnerable adults, such as the elderly.)

2.4 There are also other offences under the OAPO which might be considered in certain circumstances in relation to cases of child abuse or abuse of vulnerable adults, such as abuse of the elderly.<sup>4</sup> These include:

- wounding with intent to do grievous bodily harm – with maximum penalty of life imprisonment (section 17);
- wounding or inflicting grievous bodily harm – with maximum penalty of three years' imprisonment (section 19);
- exposing a child whereby life is endangered – with maximum penalty of ten years' imprisonment on indictment and three years' imprisonment for a summary conviction (section 26);
- assault occasioning actual bodily harm – with maximum penalty of three years' imprisonment (section 39);
- common assault – with maximum penalty of one year's imprisonment (section 40); and
- infanticide – with penalty same as manslaughter (section 47C) (see later below).

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4 SWD's *Procedural Guidelines for Handling Elder Abuse Cases* (Revised August 2006, Appendices revised in November 2012) provides a list of Ordinances (which it notes is not exhaustive) containing provisions that might be utilised in cases of elder abuse (see Chapter 2, Section 5 of the guidelines, at 14). The offences dealing with physical abuse of the elderly would include those listed under the OAPO (see para 2.4 of this paper). Sexual abuse is dealt with under the Crimes Ordinance (Cap 200). The Domestic and Cohabitation Relationships Violence Ordinance (Cap 189) deals with spousal elder abuse. The Criminal Procedure Ordinance (Cap 221) deals with mentally incapacitated persons participating in criminal proceedings. The Residential Care Homes (Elderly Persons) Ordinance (Cap 459) and the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap 165) govern the operation of residential care homes. Ordinances containing provisions dealing with financial abuse include the Theft Ordinance (Cap 210), the Mental Health Ordinance (Cap 136) and the Crimes Ordinance (Cap 200). The SWD guidelines are available at: [https://www.swd.gov.hk/en/index/site\\_pubsvc/page\\_elderly/sub\\_csselderly/id\\_serabuseelder/](https://www.swd.gov.hk/en/index/site_pubsvc/page_elderly/sub_csselderly/id_serabuseelder/)

2.5 Some of these offences will be discussed later in this chapter. Relevant offences under other Ordinances, depending on the circumstances, may include various sexual offences under the Crimes Ordinance (Cap 200) and offences against patients under section 65 of the Mental Health Ordinance (Cap 136).

## **Murder**

2.6 In order to establish a charge of murder, the prosecution must prove that the accused unlawfully killed the victim in circumstances where he intended to kill him or to cause him “*grievous bodily harm*.”<sup>5</sup> (The latter has been interpreted to mean “*really serious bodily harm*.”<sup>6</sup>) Halsbury notes that the prosecution must prove that the accused caused or accelerated the death of the victim.<sup>7</sup>

*“An act, in order to be considered as the cause of murder, need not be the sole cause of death as long as it is a substantial cause in the sense that it is more than a minimal cause. ... [A]n injury may be a substantial cause of death even if the deceased might not have died had he received proper medical treatment and that is so even if the treatment may be considered abnormal. ... Actual violence is not necessary as long as the act or omission is a cause of death.”*<sup>8</sup>

2.7 The necessary 'intention' to constitute the offence of murder, “*is not the same thing as motive or desire*.”<sup>9</sup>

*“[I]n deciding whether to infer intention to kill or to cause grievous bodily harm, [the jury] should ask themselves (1) whether death or grievous (really serious) bodily harm was a virtually certain consequence of D's conduct, and (2) if so, whether D foresaw that death or grievous bodily harm was a virtually certain consequence of D's conduct. If the jury are sure on both questions, then the jury may 'infer' the necessary intention.”*<sup>10</sup>

2.8 Halsbury states:

*“The harm intended by the accused need not be permanent as long as he intended serious bodily harm.”*<sup>11</sup>

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5 See Michael Jackson, *Criminal Law in Hong Kong* (2003, HKU Press), at 497.

6 *DPP v Smith* [1961] AC 290, at 335.

7 *Halsbury's Laws of Hong Kong - Commentary* (2017, LexisNexis Hong Kong), at para 130.301.

8 Same as above.

9 Jackson (2003), above, at 498 to 499, referring to the Hong Kong Court of Appeal judgment in *Wong Tak-sing* [1989] 2 HKC 94, which followed the English authorities of *Moloney* [1985] AC 905, *Hancock and Shankland* [1986] AC 242 and *Nedrick* [1986] 1 WLR 1025.

10 Jackson (2003), above, at 499.

11 *Halsbury's Laws of Hong Kong* (2017), above, at para 130.305.

2.9 The penalty for murder is a mandatory sentence of life imprisonment.<sup>12</sup>

### **Manslaughter**

2.10 Archbold observes that, “[a]t common law, a homicide which is not murder is manslaughter.”<sup>13</sup> This offence may be either “voluntary” manslaughter or “involuntary” manslaughter. Voluntary manslaughter is where all the elements of murder are present, including the intent to kill or inflict really serious bodily harm, “but the crime is reduced by reason of provocation, diminished responsibility, or a suicide pact has been proved by the defendant.”<sup>14</sup>

2.11 Involuntary manslaughter “is unlawful killing without an intent to kill or cause grievous bodily harm.”<sup>15</sup> Involuntary manslaughter may be manslaughter by an unlawful and dangerous act or manslaughter by gross negligence involving a breach of duty or recklessness.<sup>16</sup> To constitute the latter, the prosecution must prove that, “there was an obvious and serious risk of harm to the victim and the accused was either indifferent to that risk or having recognised the risk, deliberately chose to run the risk.”<sup>17</sup>

2.12 Where the defendant has a positive duty – such as a parent or a person *in loco parentis* – for the care and wellbeing of a child, his or her omission to prevent physical harm being caused to the child is a breach of his/her duty of care. If the child dies as a result of such ill-treatment, the parent or guardian can be convicted of manslaughter.<sup>18</sup>

2.13 Prior to a ruling of the Court of Appeal in November 2018, manslaughter by gross negligence in Hong Kong (unlike the United Kingdom) had included a subjective element. Thus, in order to establish manslaughter by gross negligence on the basis of a breach of duty, the former position was that the prosecution had to prove that the defendant was subjectively aware of the obvious and serious risk of death to the deceased, and the jury had to be directed to take into consideration – both for and against the defendant – the defendant’s subjective state of mind.<sup>19</sup> Therefore, under this former position,

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12 Section 2, OAPO, which states that: “Any person who is convicted of murder shall be imprisoned for life.” The section also provides, however, that where the defendant was under 18 years of age at the time of the offence, the court has a discretion to impose a shorter (determinate) sentence on him. See also, *Archbold Hong Kong* (2019 ed, Sweet & Maxwell), at para 20-42 and I Grenville Cross & Patrick Cheung, *Sentencing in Hong Kong* (8th ed, 2018, LexisNexis), at paras 3-3, 6-19 and App-125.

13 *Archbold Hong Kong* (2019), above, at para 20-99.

14 Same as above, at para 20-100.

15 Same as above, at para 20-101.

16 Same as above, at para 20-101 and see also Jackson (2003), above, at 526. For more detailed discussion of these aspects of involuntary manslaughter, see *Archbold Hong Kong* (2019), above, at paras 20-103 to 20-120 and Jackson (2003), above, at 527 to 547.

17 *Halsbury’s Laws of Hong Kong* (2017), above, at para 130.324.

18 *Archbold Hong Kong* (2019), at para. 20-118.

19 See *Archbold Hong Kong* (2019), at para 20-118, noting the decision in *HKSAR v Lai Shui Yin* [2012] 2 HKLRD 639, [2012] 3 HKC 251, where the defendant was charged with manslaughter

a defendant could not be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions.<sup>20</sup> However, in November 2018, the Court of Appeal in *HKSAR v Lai Chun Ho and Another*<sup>21</sup> decided that the breach of the duty by the defendant that was “*capable of being characterised as gross negligence and therefore a crime*”<sup>22</sup> is to be proved on the objective, reasonable man test only, in accordance with the terms of that judgment, and that the prosecution is not required to prove that the defendant was subjectively aware of the obvious and serious risk of death to the deceased.<sup>23</sup>

2.14 A person who is convicted of manslaughter “*shall be liable*” to life imprisonment.<sup>24</sup> However, depending on the circumstances of the case, the sentence can range from life imprisonment to probation.<sup>25</sup> In the context of a fatal child abuse case in 2011,<sup>26</sup> Hartmann JA made the following pertinent observation on the court’s approach to sentencing for manslaughter:

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by gross negligence. Archbold observes that in *Lai Shui Yin*, Barnes J applied the CFA decision in *Sin Kam Wah* (2005) 8 HKCFAR 192, [2005] 2 HKLRD 375 and ruled that “*the position in Hong Kong was different from that in the UK, and the jury must be directed to take into consideration the defendant’s subjective state of mind – both for and against the defendant, and the prosecution must prove that the defendant was subjectively aware of the obvious and serious risk of death to the deceased in order to establish manslaughter on the basis of breach of duty.*” The judge confirmed the ruling in *Lai Shui Yin* subsequently, in the case of *HKSAR v Chow Heung Wing, Stephen and Others*, (HCCC 437/2015).

In the case of *HKSAR v Lai Chun-ho* (HCCC 213/2016), the prosecution contended that: “*the proper test to be applied should be an objective reasonable man test only. The defendant’s foresight of the relevant risk of death is not an ingredient of gross negligence manslaughter. It is simply a factor to take into account when considering whether the defendant was grossly negligent in relation to the killing*” (at para 5 of the judgment). However, the court was not persuaded by the prosecution. Barnes J was of the view that: “[*the*] *underlying principle was that a conviction of a serious crime should depend not only on what the defendant had done (actus reus), but also whether the defendant’s state of mind (mens rea) was culpable. ... The law should not be such that a person who genuinely did not perceive a serious and obvious risk of death should be exposed to a conviction of such a serious offence*” (at para 33 of the judgment).

20 *Sin Kam Wah* (2005) 8 HKCFAR 192, [2005] 2 HKLRD 375 (CFA).

21 *HKSAR v Lai Chun Ho and Another* (CAQL 1/2018), [2018] HKCA 858 (CA).

22 Same as above, at para 67.

23 In November 2018, Barnes J referred the following Question of Law to the Court of Appeal: “*In the offence of manslaughter by gross negligence, should the gross negligence referred to in the last element of the offence as enunciated in R v Adomako [1995] 1 AC 171, namely ‘the breach of the duty by the defendant being capable of being characterised as gross negligence and therefore a crime’ be proved based on the objective reasonable man test only or that in addition to the objective reasonable man test, the prosecution is also required to prove that the defendant’s subjective state of mind was culpable in that the defendant was subjectively aware of the obvious and serious risk of death to the deceased?*” (*HKSAR v Lai Chun Ho and Another*, above, at para 2.) The answer of the Court of Appeal to the Question of Law reserved was that “*the breach of the duty by the defendant being capable of being characterised as gross negligence and therefore a crime’ is to be proved on the objective reasonable man test only, in accordance with the terms of this judgment. The prosecution is not required to prove that the defendant was subjectively aware of the obvious and serious risk of death to the deceased.*” (Same as above. at para 67).

24 Section 7, OAPO, which states that: “*Any person who is convicted of manslaughter shall be liable to imprisonment for life and to pay such fine as the court may award.*”

25 Cross & Cheung (2018), above, at para [App-120], citing *Tam Hon-ho v R* [1967] HKLR 26, at 43. Where a discretionary life sentence is imposed, “*the court must specify a minimum term to be served in accordance with section 67B of the Criminal Procedure Ordinance (Cap 221)*”: *Archbold Hong Kong* (2019), above, at para 20-121A.

26 *Secretary for Justice v Chan Man Yum Candy* [2011] HKEC 936 (CA); [2011] 5 HKC 72. The issue in that case was whether the sentence imposed (three years’ probation on condition) was

*“We start with the recognition of two primary facts. First is the fact that protection of human life is a foremost objective of our system of criminal justice. As such, when life is taken unlawfully, as it was in the present instance, the community is entitled to expect that the conduct be denounced by a punishment that is appropriate to the circumstances. Second is the fact that in our society, as in all compassionate societies, particular recognition is given to the need to protect the vulnerable. That is why special concern is aroused when an infant child dies at the hands of one of its parents, the very person entrusted to protect and nurture that child.*

*That being said, without in any way undermining the importance of those two primary facts, it must be recognised that the offence of manslaughter encompasses such a variety of circumstances and degrees of culpability that it is simply not possible to define any particular tariff or range of sentences. Indeed, even the comparison of one case with another is invariably of limited value. For that reason, it has been said from time to time that manslaughter is the most protean of crimes: infinitely variable.”<sup>27</sup>*

## **Degrees of participation**

### *Joint enterprise*

2.15 The doctrine of joint enterprise may be used in some circumstances to impose liability in situations where the principal offender (the person who physically commits the offence) cannot be identified.<sup>28</sup> In cases where it is unclear who may have struck the fatal blow, all suspects might be convicted as secondary parties to murder or manslaughter if the prosecution

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wrong in principle and manifestly inadequate, or whether exceptional circumstances justified the non-custodial sentence. The defendant in the case had killed her 13 month-old adopted daughter by repeatedly lifting up her legs, hanging her upside down and throwing her to the ground, causing fatal injuries including four skull fractures. Psychiatrists diagnosed the defendant as suffering from bipolar affective disorder and it was indicated that the offence could be the result of extreme frustrations at that time, and significant impairment of impulse control directly caused by the active manic symptoms. The defendant had no previous history of abuse and the court found her to have been “*exemplary in the care that she gave to her family and to others*” up until the moment she killed her daughter. The Secretary for Justice applied for review of the sentence of three years’ probation on the ground that it was manifestly inadequate and/or wrong in principle. The SJ’s application for review of sentence was dismissed by the Court of Appeal which held that the sentencing judge was entitled to find this case to be one where a logical and considered exercise of compassion would better protect the interest of society than some other sterner course.

27 Same as above, at paras 46 to 47. Based on the particular facts of the case, the court dismissed the application for review of sentence. Hartmann JA commented, at para 73, “... *our criminal law has always accepted that there will be cases when a logical and considered exercise of compassion will better protect the interests of our society than some other sterner course. The [trial] judge found this to be such a case. In our opinion, she was entitled to do so while remaining within the range of her discretion.*”

28 Jackson (2003), above, at 360.

can prove beyond reasonable doubt that the act giving rise to the offence arose out of a joint enterprise.<sup>29</sup> Jackson notes:

*“Where two or more persons enter into a ‘joint enterprise’, or ‘agreement’, to commit a crime, then each of them will be liable for any offence(s) committed by the parties to the agreement while carrying out and pursuant to the joint enterprise, whether as a principal (if he or she commits the actus reus) or as a secondary party. Each party’s liability in this instance is based on his or her ‘participation’ in the criminal enterprise, having contemplated the commission of the ‘acts’ (constituting the offence(s)) as a possible incident of carrying out their enterprise.”<sup>30</sup>*

2.16 Halsbury summarises the concept of “joint enterprise” in the following terms:

*“The general principles governing the liability of members of a joint enterprise to commit a criminal act apply to liability for murder. Where it is proved that there were two or more persons engaged in a joint enterprise, where it was expressly or implicitly contemplated that unlawful violence resulting in serious harm might occur and during the course of the joint enterprise a person is killed, those who were members of that joint enterprise are all liable to be convicted of murder.”<sup>31</sup>*

2.17 A joint enterprise does not have to amount to an express agreement among all alleged parties. It may arise out of a spontaneous and tacit understanding among them.<sup>32</sup>

*“To succeed with joint enterprise liability, the prosecution must prove the existence and continuation of the alleged joint enterprise and D’s participation in it beyond reasonable doubt.”<sup>33</sup>*

2.18 There may be circumstances where not all parties to joint enterprise are equally culpable, however. Halsbury observes:

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29 Same as above, at 361.

30 Same as above, at 360.

31 *Halsbury’s Laws of Hong Kong* (2017), above, at para 130.308. In *HKSAR v Chan Kam Shing* [2016] HKCU 3051, the Hong Kong Court of Final Appeal (CFA) firmly rejected following the change of approach adopted by the UK Supreme Court in *R v Jogee* and *R v Ruddock* [2016] 2 WLR 681. The CFA held that: “*The joint criminal enterprise doctrine based on Chan Wing Siu and the cases following it, endorsed by this Court in Sze Kwan Lung, continues to apply in Hong Kong, operating alongside the traditional accessorial liability principles.*” Per Ribeiro PJ, at para 98.

32 Jackson (2003), above, at 362, referring to *Lau Sik Chung* [1982] HKLR 113, later overruled by the Privy Council on other grounds, see [1984] HKC 119.

33 Jackson (2003), above, at 362.

*“An accused is not liable for acts of any of the others which go beyond that which is expressly or tacitly agreed. However, it is open to the jury to find that some in the joint enterprise did not agree to or contemplate that serious harm might occur and in such a case such a person might be guilty of manslaughter even if others in the party are guilty of murder.”<sup>34</sup>*

2.19 Jackson comments<sup>35</sup> that the inference of a joint enterprise is difficult to prove in child abuse cases causing death, as the mere fact that both parents had “*joint custody and control*” of the abused child at the relevant time does not have any probative value in proving a joint enterprise:

*“... the fact that the child was in the defendants' joint custody and control did not raise an inference that they were 'jointly responsible and so both guilty' ... 'general responsibility for custody and care' should not be treated as establishing 'presence' when the injury was inflicted.”<sup>36</sup>*

2.20 In addition, the concept of joint enterprise may not satisfy the particular facts of the case, as the separate individuals involved may not have embarked upon their offence in a joint fashion. Jackson states:

*“... even where A and B are both principal offenders there is not always a joint enterprise; exceptionally they may be committing the same offence independently ... .”<sup>37</sup>*

### *Secondary liability*

2.21 In addition to convicting particular persons on the basis that they had all acted as principals or secondary parties in a joint enterprise, it may also be possible to prove that one party had acted as a principal whilst another had acted as a secondary party. The other parties, by assisting, encouraging or procuring the commission of the offence by the principal, are collectively known as “*secondary parties*” or “*accessories*.”<sup>38</sup>

2.22 The basis of secondary party liability in Hong Kong lies in section 89 of the Criminal Procedure Ordinance (Cap 221), which applies, *prima facie*, to all statutory or common law offences recognised under Hong Kong law.<sup>39</sup> Section 89 states:

*“Any person who aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence.”*

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34 *Halsbury's Laws of Hong Kong* (2017), above, at para 130.308.

35 Jackson (2003), above, at 362 to 363.

36 *R v Lane* (1986) 82 Cr App R 5, at 17.

37 E Griew, “It must have been one of them” [1989] *Crim LR* 129, at 130.

38 Jackson (2003), above, at 329.

39 Same as above, at 335.

2.23 A potential problem with charging someone as a secondary party in the types of cases being considered is that for secondary party liability to be established there must be proof of the commission of an offence by the principal:<sup>40</sup>

*“To establish secondary party liability, it is therefore necessary both to ascertain the substantive offence or offences alleged to have been committed by the parties, and also to identify the party who is to be treated as the principal.”<sup>41</sup>*

2.24 Furthermore, the meaning of “encouragement” is extremely narrow under the doctrine of complicity:

*“On a charge against the parents jointly, based on the hypothesis that one of them (unknown) injured the child while the other was present encouraging the act, it is not enough to say, on the point of presence, that the child was in the joint care and control of the parents at the time. It must be shown that both parents were present (not merely theoretically in control) at the very time in question. If there is a reasonable possibility that one was out of the room at the time, and if there is no other evidence of joint action, the prosecution should fail.”<sup>42</sup>*

2.25 The difficulty with this limited construction of the term 'encouragement' is that even in cases where the child has suffered abuse over an extended period of time, a party's knowledge and failure to prevent the abuse from occurring is not evidence that he *encouraged* the killing of the child. As Williams observes:

*“[I]n none of these cases did any judge say that a person could be regarded as a party to an attack on his child merely because he culpably failed to prevent it. The trial judge in R v Gibson & Gibson<sup>43</sup> required “active participation and encouragement” and the conjunctive makes it plain that passive encouragement ... is not enough.”<sup>44</sup>*

### **Section 27 of Offences against the Person Ordinance (Cap 212) (OAPO): Ill-treatment or neglect of a child**

2.26 In light of the various evidential problems discussed in this paper, the charge otherwise available in Hong Kong to substitute for the charges of

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40 Jackson (2003), above, at 335.

41 Same as above, at 335 to 336.

42 Prof Glanville Williams, “Which of you did it?” (1989) 52 *Modern Law Review* 179, at 197.

43 *R v Gibson & Gibson* (1985) 80 Cr App 24.

44 Williams (1989), above, at 197.

murder or manslaughter where a child has been killed in the home is comprised in section 27 of the OAPO. This states:

*“If any person over the age of 16 years who has the custody, charge or care of any child or young person under that age wilfully assaults, ill-treats, neglects, abandons or exposes such child or young person ... in a manner likely to cause such child or young person unnecessary suffering or injury to his health ... (he or she) shall be liable (a) on conviction on indictment to imprisonment for 10 years; (b) on summary conviction to imprisonment for 3 years ...”*

2.27 On the issue of who may have “custody, charge or care” of the child for the purposes of the offence, Halsbury comments:

*“The phrase 'custody, charge or care' implies joint custody and includes those who have assumed responsibility for a child and the fact that there is a parent or legal guardian looking after the child, does not prevent others who have assumed responsibility from being liable. The words are not restricted in their ambit to those with legal guardianship of the child. A person who does not have custody, charge or care, may aid and abet the conduct of someone who does, and be liable under this provision. A parent, by living apart from a child, cannot divest himself of custody of or responsibility for a child or liability to be prosecuted under this provision.”<sup>45</sup>*

2.28 In relation to the elements of this provision generally, Halsbury states:

*“[T]he types of conduct described are not separate and individual watertight offences and there is a considerable overlap in the conduct denoted by each. Only one offence is created but with a number of different ways in which it may be committed. However, the word 'wilful' qualifies each type of conduct and requires full mens rea as to each of the acts.”<sup>46</sup>*

2.29 In relation to joint liability of parents, Archbold comments:

*“Section 27(2) provides that a person may be convicted notwithstanding that the actual suffering or injury to health was obviated by the action of any person. This would cover the situation where one of two or more persons having the custody, charge or care of the child or young person knows of the neglect or ill-treatment by the other person or persons but does nothing to stop it. There is plainly a duty to act in such*

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45 Halsbury's Laws of Hong Kong (2017), above, at para 130.410.

46 Same as above.

*situations ...<sup>47</sup>. The failure to act becomes an act in concert with the neglect or ill-treatment. However, if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to acquit both...<sup>48</sup>*

2.30 As an offender may be convicted of the section 27 offence notwithstanding the death of the child or young person,<sup>49</sup> this provision can serve as an alternative charge if a charge of murder or manslaughter fails.<sup>50</sup> Obviously however, the maximum penalty for a section 27 offence (imprisonment for three years on summary conviction, or 10 years on indictment<sup>51</sup>) is far less than the penalty for murder or manslaughter.<sup>52</sup> Archbold notes that, in sentencing:

*“Factors that must be taken into account are primarily the need to protect the vulnerable and the need to deter. A further highly material consideration is the question whether there has been visited upon the child long-term disability or a real danger of it. The court will also take into account whether the maltreatment is an isolated act or has been constituted by a course of conduct.”<sup>53</sup>*

### **Section 26 of OAPO: Exposing child whereby life is endangered**

*For example, ‘home-alone’ children*

2.31 Under section 26 of the OAPO, any person who unlawfully abandons or exposes any child, being under the age of two years, whereby the life of such child is endangered, or the health of such child is or is likely to be permanently injured, shall be guilty of an offence. According to information provided by the Police, the number of cases involving children left unattended at home handled by the Police from 2008 to 2012 were 40, 58, 60, 43 and 61 cases respectively.

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47 Citing the case of *Stone and Dobinson* [1977] 1 QB 354.

48 *Archbold Hong Kong* (2019), at para 20-303.

49 Section 27(3), OAPO.

50 For instance, in cases where the Prosecution has laid this charge as an alternative, as the offence under section 27 is not an automatic statutory alternative charge to murder or manslaughter.

51 Section 27(1), OAPO.

52 Even though, as noted above, the actual sentences imposed in manslaughter cases can range from life imprisonment to probation, depending on the particular circumstances of the case.

53 *Archbold Hong Kong* (2019), at para.20-302. A recent Hong Kong case which is highly relevant in this context is *HKSAR v Wong Wing-man, Mandy alias Wang Xuexin and Ling Yiu-chung, Rocky* [2018] HKCFI 1484; HCCC 76/2017, in which a seven year-old girl was left in a vegetative state following “*horrific*” abuse. The court in that case expressed the view that the 10 year maximum penalty for the section 27 OAPO offence should be considered for reform and increased to cover such extreme cases. See discussion later in this chapter.

2.32 Whether leaving a child unattended at home will constitute an offence under the OAPO depends on a number of factors and has to be assessed on a case by case basis (eg, the child's age and self-care abilities, whether the act has caused harm to the child, whether the person involved has a responsibility of care over the child, whether the person has intentionally neglected the child and is aware of the possible harm to the child caused by his act, etc).<sup>54</sup>

### ***Section 47C of OAPO: Infanticide***

2.33 Section 47C of the OAPO provides that, where a woman, by any wilful act or omission, causes the death of her child being a child under the age of 12 months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of infanticide, and shall be liable to be punished as if she were guilty of manslaughter.

2.34 Archbold comments that section 47C is intended to recognise the particular problems related to child birth, and to give the courts discretion in sentencing in such cases. According to Archbold, in these cases custodial sentences are extremely rare. Probation orders are generally made on the basis that the accused normally needs support and supervision rather than punishment. However, the provision has been criticized as it can be very difficult for mothers to bring themselves within the provisions of infanticide as the burden of proof is upon the mother.<sup>55</sup>

### ***Section 65 of the Mental Health Ordinance (Cap 136): Ill-treatment of persons of unsound mind***

2.35 In relation to vulnerable persons, section 65(1) of the Mental Health Ordinance (MHO) provides that any attendant, nurse, servant or other person employed in a mental hospital who ill-treats or wilfully neglects any

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54 In a reply to a Legislative Council (LegCo) question in 2013, the Government noted that, to support parents who are unable to take care of their children temporarily because of work or other reasons, the Social Welfare Department (SWD) has been providing subvention to non-governmental organisations (NGOs) to run a variety of day childcare services for children aged below six, including Child Care Centres which are standalone or attached to kindergartens, Occasional Child Care Services, Extended Hours Services and Mutual Help Child Care Centres. In October 2008, SWD implemented the pilot scheme of the Neighbourhood Support Child Care Project (NSCCP). Upon the review of its effectiveness and demand, NSCCP was regularised and extended to all 18 districts in October 2011, offering a total of at least 720 places. The SWD provides After School Care Programme (ASCP) through NGOs on a self-financing and fee-charging basis, offering support service for children aged between six and 12 to enable them to receive proper care. See: Labour and Welfare Bureau: Replies to LegCo Questions: Childcare services (June 26, 2013), available at: <http://www.lwb.gov.hk/eng/legco/26062013.htm>

55 Archbold Hong Kong (2019), at para 20-137.

patient shall be guilty of an offence and shall be liable on summary conviction to a fine and imprisonment for two years.<sup>56</sup>

## Relevant rules of evidence and procedure

### ***The accused's right of silence and the privilege against self-incrimination***

2.36 It will be apparent from the various cases described later in this chapter that the general and fundamental rules of evidence and procedure, which are designed to guarantee a fair trial for the accused, can place significant limitations on the prosecution's ability to sustain the most serious offence charges in fatal child abuse cases. As we will see below, these evidential and procedural rules are inter-related and concern the accused's right to silence and his privilege against self-incrimination.

2.37 The nature of the right to silence has been summarised as follows:

*"Those charged with criminal offences have the right to remain silent both during police interrogation and at trial. The 'right to silence' of a person accused of a criminal offence is a fundamental, longstanding principle of the English common law. It is closely related to the principle that the accused is 'innocent until proven guilty' and the 'privilege against self-incrimination'. All these principles are predicated on the basis that, in an allegation of criminal behaviour, the onus is on the state to construct a compelling case. The accused need not do anything. The accused is not responsible for proving innocence, or even providing a defence."<sup>57</sup>*

2.38 A broader statement of the scope and effect of the right to silence was put forward by Lord Mustill in the English House of Lords' decision in *Regina v Director of Serious Fraud Office, ex parte Smith*,<sup>58</sup> where his Lordship stated:

*"I turn from the statutes to 'the right of silence.' This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin,*

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56 Section 65(2) of the MHO further provides for protection against unlawful sexual intercourse of any man who is an officer or who is employed in the mental hospital, psychiatric unit of the general hospital or Correctional Services Department Psychiatric Centre with a woman detainee. Anyone convicted of the offence under section 65(2) is liable to imprisonment for 5 years on indictment. This is stated to be without prejudice to the general protection of mentally incapacitated persons against unlawful sexual intercourse under section 125 of the Crimes Ordinance (Cap 200), the maximum penalty for which is imprisonment for 10 years.

57 Angel Mak, "The Right to Silence and its Implications on Costs in Criminal Cases," *Hong Kong Lawyer* (May 2005), at 96.

58 [1993] AC 1, at 30.

*incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified:*

- (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.*
- (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.*
- (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.*
- (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.*
- (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.*
- (6) A specific immunity (at least in certain circumstances ... ), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.*

*Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not. In particular it is necessary to keep distinct the motives which have caused them to become embedded in English law; otherwise objections to the curtailment of one immunity may draw a spurious reinforcement from association with other, and different, immunities commonly grouped under the title of a 'right to silence.'<sup>59</sup>*

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59 See the useful discussion of this decision in Simon Young, *Hong Kong Evidence Casebook* (2004, Sweet & Maxwell Asia), at paras 6-005 to 6-006.

2.39 In Hong Kong, the accused's right to silence and privilege against self-incrimination are laid down in statute. Article 11 of the Hong Kong Bill of Rights, as set out in section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383), states:

*“(1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*

*(2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality-*

*... (g) not to be compelled to testify against himself or to profess guilt.”*

2.40 In section 54(1)(b) of the Criminal Procedure Ordinance (Cap 221), the prosecution is prohibited from commenting on the accused's failure to testify in all trials.<sup>60</sup> The provision states:

*“the failure of any person charged with an offence to give evidence shall not be made the subject of any comment by the prosecution.”*

2.41 In relation to the accused's silence outside the courtroom, the general rule is that no adverse inference is to be made against an accused who remains silent in the face of police questioning or accusations.<sup>61</sup> *“The position holds, despite what denials one might expect an innocent person to make in the circumstances.”*<sup>62</sup> Halsbury states that, in the same way, the failure of an accused person when questioned to mention some fact which he afterwards relies on in his defence cannot found an inference that the explanation subsequently advanced is untrue, for the accused has a right to remain silent.<sup>63</sup>

2.42 With respect to silence inside the courtroom, the failure of the accused to give evidence is generally not of itself to be treated as evidence:

*“The failure of the accused to testify on his own behalf may not be made the subject of any comment by the prosecution. The*

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60 See further *Halsbury's Laws of Hong Kong* (2018), above, at para 175.135 and Young (2004), above, at para 3-215.

61 See the early landmark case of *Rice v Connolly* [1966] 3 WLR 17, on a suspect's refusal to answer police questions.

62 Young (2004), above, at para 3-194. Referring to the Hong Kong Court of Appeal case of *HKSAR v Del Carmen* [2000] HKEC 805 (CA), Young comments (at para 3-214) that: *“The common law position protects the accused's right of silence in a robust way. Although not mentioned in Del Carmen, the right of silence could also have been put on a constitutional footing within the right to a fair trial as provided for in the Basic Law and Hong Kong Bill of Rights. To permit adverse inferences from silence outside the courtroom would be tantamount to making the exercise of a constitutional right a trap.”*

63 *Halsbury's Laws of Hong Kong* (2018), above, at para 175.135.

*judge may, in an appropriate case, make a comment, but he should make clear to the jury that failure to testify is not evidence of guilt and that the accused is entitled to remain silent and see if the prosecution can prove its case.*<sup>64</sup>

2.43 There are exceptions to the principle of the accused's right to silence inside the courtroom, however. Young observes:

*"With silence inside the courtroom (ie the failure of the accused to testify), there will be occasions when the Court can and should instruct the jury to see the failure to testify as strengthening the prosecution's case."*<sup>65</sup>

Lord Hoffman, in the leading case of *Li Defan & Another v HKSAR*,<sup>66</sup> stated:

*"[T]here are sometimes cases in which the prosecution case on a particular issue may be strengthened by the failure of the accused to put forward any contradiction or explanation in circumstances in which he could be expected to know the truth and be willing, if innocent, to testify under oath. ... The absence of a denial or explanation by the accused is still not treated as an independent admission but may in particular circumstances give the prosecution evidence greater probative force than it would gain from being merely uncontradicted."*<sup>67</sup>

2.44 There may be also statutory exceptions to the right to silence. Morrow comments:

*"The Hong Kong legislature has encroached upon the right to silence and has placed an obligation on persons in certain situations to provide police officers with certain information. A*

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64 Same as above. Further, Halsbury cites *Li Defan & Another v HKSAR* [2002] 1 HKLRD 527; (2002) 5 HKCFAR 320 (CFA) as authority for the statement that, "it is part of the standard jury direction that the silence of the accused does nothing to establish his guilt. Where the direction was inconsistent with the standard jury direction, it merits the attention of the appellate courts." See: same as above, at note 7.

65 Young (2004), above, at para 3-194.

66 (2002) 5 HKCFAR 320 (CFA).

67 Same as above, at para 16. The Court of Final Appeal held that one area where comment by the judge might be justified is where the defence case involves facts which are at variance with the prosecution evidence or additional to it and must, if true, be peculiarly within the knowledge of the accused, but he remains silent: see *Li Defan & Another v HKSAR* [2002] 1 HKLRD 527; (2002) 5 HKCFAR 320, at 333-334, discussed in Andrew Bruce and Gerard McCoy, *Criminal Evidence in Hong Kong* (3rd ed), at paras III [203 to 204]. Bruce and McCoy note that *Li Defan* "is concerned with the absence of an explanation strengthening an inference of guilt": same as above, at para III [203.1]. They also observe that, "The principles in the *Li Defan* must be applied with caution. It is to be noted that Lord Hoffmann indicated that the application of these principles was to be exceptional": same as above. In the Australian case of *Weissensteiner v The Queen* ((1993) 178 CLR 217 (High Court of Australia)), for example, a married couple had disappeared on board the yacht and were presumed murdered. The defendant, who was charged with their murders, had subsequently turned up in Papua New Guinea in possession of the yacht, claiming that it was his. He did not give evidence at trial. For a recent application of the relevant principles in a Hong Kong burglary case, see the Court of Final Appeal judgment in *HKSAR v Chiu Wai Keung* [2013] HKEC 443.

*person who fails to supply the information is guilty of an offence.*<sup>68</sup>

2.45 Whitfort states that the right to silence exists both pre and post arrest, *“unless specifically abrogated by statute.”*<sup>69</sup> An example given by Whitfort is the court's power under sections 3 and 4 of the Organised and Serious Crimes Ordinance (Cap 455) to order a person or group of persons to attend before a police officer to answer questions relating to the investigation of organised crime. Failure to comply with such an order without reasonable excuse is an offence.<sup>70</sup>

2.46 With respect to the privilege against self-incrimination, Halsbury states:

*“A person in any legal proceedings may refuse to answer a question or produce any document or thing which would, in the opinion of the court, incriminate him by exposing him to proceedings for a criminal offence, for forfeiture, or for the recovery of a penalty. ... [However, the rule does not apply] to an accused who is called as a witness on his own behalf in so far as the question relates to the offence with which he is charged.”*<sup>71</sup>

2.47 This is because of the effect of section 54(1)(e) of the Criminal Procedure Ordinance (Cap 221), which provides that every person charged with an offence may be a competent witness for the defence at every stage of the proceedings, and:

*“a person charged and being a witness in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged.”*

2.48 It is important to note generally, however, that the legal position in Hong Kong in this area is no longer the same as that in the United Kingdom. Since the enactment there of the Criminal Justice and Public Order Act 1994, juries have been allowed to use silence as evidence against the accused.<sup>72</sup> Young<sup>73</sup> notes that under section 34 of the UK Act, a court may draw such inferences from the failure of the accused to disclose certain facts when questioned or charged *“as appear proper.”*<sup>74</sup> He also points out that in the

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68 Peter Morrow, “Police Powers and Individual Liberty,” in Raymond Wacks (ed) *Civil Liberties in Hong Kong* (1988, OUP), at 261. See also *Archbold Hong Kong* (2019), above, at para 19-118.

69 Amanda Whitfort, *Criminal Procedure in Hong Kong: A Guide for Students and Practitioners* (2nd ed, 2012, LexisNexis), at 23.

70 Same as above, at 23 to 24. See also the discussion on statutory exceptions to the right to silence in Gary Heilbronn, *Criminal Procedure in Hong Kong* (2nd ed, 1994, Longman Asia), at 28 to 29.

71 *Halsbury’s Laws of Hong Kong* (2018), above, at para 175.103.

72 Mak (2005), above, at 96.

73 Simon Young, above, at para 3-206.

74 Same as above, at para 3-214.

English code of practice for the interviewing of suspects, the caution given by a police officer is now in these terms:

*“You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.”*<sup>75</sup>

## **Relevant English case law**<sup>76</sup>

2.49 The cases set out below illustrate how the underlying principles in this area were applied in England prior to 2004, when the statutory offence of causing or allowing the death of a child (discussed in detail in Chapter 3 of this paper) was introduced.<sup>77</sup> As will be seen, in almost all of these cases the Court of Appeal quashed the relevant convictions because the evidence was insufficient to prove which parent or carer was responsible for looking after the child at the time the fatal injury was inflicted. The principles laid down in these cases remain authoritative in Hong Kong.

### ***Cases where murder/manslaughter charged***

#### *Lane and Lane*

2.50 The Court of Appeal decision in *R v Lane; R v Lane*<sup>78</sup> is the leading case authority on the difficulties faced by the prosecution in establishing murder or manslaughter where parents or carers have been involved in the death of a child. In that case, the mother and step-father of a 22 month-old baby girl, who had each been charged jointly with manslaughter and with wilfully ill-treating the child, had their convictions for manslaughter quashed on appeal.

2.51 Between April and July 1983, the baby had been admitted to hospital three times, and on each occasion was found to be suffering from injuries that had not been caused accidentally. The baby was admitted to hospital again in September 1983 suffering from injuries from which she died. The child was unconscious on admission, had extensive haemorrhages in both eyes, a severe bruise on the right side of her face and ear, as well as a fractured skull. The doctor said the bruising and fracture could not have been caused by a simple fall onto the mat on the kitchen floor, as alleged. He argued that the injuries would have required considerable force, and this view was confirmed by the post-mortem examination which found that the injuries were consistent with having been caused by a single blow. The medical

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75 Same as above, at para 3-206.

76 The Sub-committee is indebted to our member Ms Diane Crebbin for her major input into the remainder of this chapter.

77 By virtue of sections 5, 6 and 6A of the Domestic Violence, Crime and Victims Act 2004 (Eng).

78 (1986) 82 Cr App R 5 (CA).

evidence went no further than to prove that the injuries causing death had been suffered by the child sometime between 12:30 pm and 8:30 pm on the relevant day. During that period, both defendants had been absent from the home at some time leaving the child in the care of the other, and there had been periods when they were both in the house together. Both defendants when interviewed by police denied responsibility for the child's death and told lies to provide each other with alibis.

2.52 In opening the case at trial, the prosecution had conceded that the evidence did not establish which of the appellants had inflicted the injuries, but in the absence of any innocent explanation, the prosecution invited the jury to draw the inference that both were jointly responsible. The trial judge rejected the defence's submission of no case to answer at the close of the prosecution case, and both defendants chose not to give evidence. The judge directed the jury that they might find that the prosecution could not establish on the available evidence which of the two defendants actually injured the child, but said that in the absence of any innocent explanation the only proper inference they could draw was that the defendants were jointly responsible. Both defendants were convicted of manslaughter.

2.53 The Court of Appeal held that the evidence against each appellant, taken separately, at the end of the prosecution case did not establish his or her presence at the time the child was injured (whenever that was) or any participation. Neither appellant had made any admissions and both had denied taking part in any injury inflicted on the child. While it was true that both appellants had told lies, lies did not lead to the inference of that appellant's presence at the relevant time. The Court of Appeal concluded that the trial judge should have upheld the defence's submission of no case to answer and the appellants' convictions for manslaughter were quashed.

2.54 The key findings in the case were that the prosecution had failed to establish on the evidence when the fatal blow was struck, who struck it and who was present at the scene when it occurred. The Court of Appeal rejected the lower court's approach that, even though the prosecution could not establish which of the two defendants had committed the act which fatally injured the child, an inference could be drawn that they were jointly responsible in the absence of any innocent explanation. The Court of Appeal ruled that the evidence against each appellant, taken separately, failed to establish a case of manslaughter against either, so they had no case to answer.

### *Aston and Mason*

2.55 In the case of *R v Roy Edward Aston; R v Christine Janet Mason*,<sup>79</sup> a mother and her live-in boyfriend were charged with the murder of the mother's 16-month-old daughter. The child was admitted to hospital suffering from subdural haemorrhage from which she died 24 hours later. The medical evidence revealed the child had suffered a number of injuries,

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79 [1992] 94 Cr App R 180.

including a fractured rib, which had occurred at the same time as the fatal head injury. The medical finding was that each injury had been caused by a single blow to the back of the body, probably by the child being thrown or slammed against a hard surface. On the day the fatal injuries took place, both the mother and her boyfriend were present in the flat with the child. They had advised the police in interviews that during the morning in question, each of them had been alone with the child for periods of time. The mother said that when she went out to get a newspaper, the child was in a coma on her return and she accused the boyfriend of causing the child's injuries. The boyfriend however, denied ever having injured child. The trial judge rejected the defence's submission of no case to answer on the murder charge. The defendants were convicted of manslaughter.

2.56 On appeal, the Court of Appeal ruled that there was no evidence of a joint enterprise between the two defendants to commit cruelty against the child. There was also a lack of evidence as to whether either defendant could have prevented the other from injuring the child. Ultimately, the verdict of manslaughter had to be quashed for uncertainty regarding who committed the crime. The court observed:

*"We have felt forced to come to the unwelcome conclusion that there was nothing in the evidence at the close of the prosecution case which indicated that one of the appellants rather than the other was responsible for inflicting the fatal injuries. Each of them had the opportunity ... . [There was] no evidence upon which the jury could properly come to the conclusion that either of these two expressly or tacitly agreed that [the baby] should suffer physical harm or that either had wilfully and intentionally encouraged the other to cause injury to [the baby] ... . The verdict cannot stand. The appeals must be allowed and the convictions of manslaughter quashed."<sup>80</sup>*

### *Strudwick and Merry*

2.57 A similar approach was taken in *R v Strudwick and Merry*.<sup>81</sup> In September 1991, a doctor was called to examine a three year-old girl at a caravan site. On arrival, the doctor found the child in a state of shock due to internal bleeding and she died before the ambulance arrived. The cause of death was found to be two blows to the abdomen. These blows had been delivered with considerable force which lacerated the tissue to which the small intestine was anchored causing the intestine to protrude through the tissues and turn gangrenous. Medical evidence established that the blows were delivered by an adult. The child was also found to have 170 bruises over her body. The child lived in the caravan with her mother, her mother's boyfriend and her four year-old brother.

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80 Same as above, at 185.

81 (1994) 99 Cr App R 326.

2.58 The mother and the boyfriend were charged with manslaughter and two counts of cruelty to a child. There were several witnesses who gave evidence of seeing the little girl with bruises over her face, arms, neck, back, abdomen and legs at various times, injuries which the carers always explained away as having been caused accidentally. The defendants admitted that the child was with them in the caravan during the period when her fatal injuries must have been inflicted, namely between 12 to 24 hours before her death. The defendants admitted sometimes chastising the child by smacking her and the mother said it must have been her boyfriend who caused the injuries and death because he did not know his own strength and she gave examples of various incidents of violence on his part. She said she had not caused any injuries to the girl herself. The boyfriend only admitted smacking the child on the bottom.

2.59 As in the line of earlier cases, a submission of no case to answer was made by the defence on the basis of a lack of evidence as to which defendant was the perpetrator of the act which fatally injured the child. The submission was rejected by the trial judge on the basis that the boyfriend had admitted some violence towards the child and had told manifest lies from which the jury could infer that he was guilty of manslaughter. Similarly, the mother had seen the violence used by her boyfriend and had lied. Both defendants were convicted of manslaughter by the jury.

2.60 Following its earlier judgment in *Lane*, the Court of Appeal held that lies on their own could not make out a positive case of manslaughter and since there was not sufficient evidence as to which appellant had struck the fatal blows, the convictions for manslaughter had to be quashed. The Court observed that the essential difficulty in these cases had been summed up in the earlier case of *R v Abbott*. In that case, Lord Goddard CJ had stated:

*“If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of Not Guilty in the case of both because the prosecution have not proved the case ... . Although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained rather than that there should be a failure in some particular case.”<sup>82</sup>*

### *Russell and Russell*

2.61 One case, however, where the appeal against conviction failed was in the case of *R v Russell & Russell*.<sup>83</sup> In this case a successful prosecution for manslaughter was upheld against both parents although there was no evidence as to which one had directly caused the child’s death. This

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82 *R v Abbott* [1955] 2 QB 497, at 503.

83 (1987) 85 Cr App R 388.

case related to a 15 month-old girl who died from a massive overdose of methadone. Her parents, with whom she lived, were registered drug addicts in receipt of daily prescriptions of methadone which they obtained in liquid form. After the child died, the parents were interviewed separately by police and both denied giving methadone to the baby except admitting that they had, on occasions, dipped her dummy into the liquid methadone to placate her when she was teething. The parents were jointly charged with manslaughter and with cruelty to a person under 16 years of age. The evidence at trial was that the amount of the drug in the child's body was such that it could not have been ingested solely by the dipping of the dummy into the mixture. Forensic evidence was given on the likely effect upon a baby of the administration of methadone on a dummy. At the close of the prosecution case, a no case to answer submission by the defence was rejected by the trial judge. The jury convicted both defendants of manslaughter, indicating that they did so on the basis that the drug had been deliberately administered.

2.62 The defendants appealed the manslaughter convictions on the ground that the prosecution had not established who had administered the drug or any joint enterprise. The Court of Appeal dismissed the appeals. The Court said that, generally speaking, parents of a child were in no different position from any other defendants jointly charged with a crime. To establish guilt against either defendant, the prosecution must prove at least that the defendant aided, abetted, counselled or procured the commission of the crime by the other. The only difference in the position of parents was that one parent might have the duty to intervene in the ill-treatment of their child by the other, whereas a stranger would have no such duty. The principle to be applied was whether the drug had been administered by either or both parents and if there was no indication that one parent rather than the other was responsible, then it could be inferred that they were jointly responsible. As there was evidence that in the past the appellants had jointly administered methadone to the child, and in the absence of any explanation from the father, the jury could infer on the manslaughter charge that the administration of the drug on the day in question was a joint enterprise, though doubtless not intended to be lethal.

2.63 In relation to the joint cruelty convictions, the basis of the joint cruelty charge as put by the judge to the jury was that the dummy dips of methadone might cause the basis or commencement of an addiction, and therefore might be likely to cause unnecessary suffering and/or injury to health. The Court of Appeal held that in relation to these convictions, there was ample basis for the judge to leave the matter for the consideration of the jury as he did, and accordingly the convictions were not unsafe or unsatisfactory.

## **Cases where inflicting grievous bodily harm with intent to do grievous bodily harm charged**

### *Gibson*

2.64 In the case of *R v Gibson; R v Gibson*,<sup>84</sup> a five week-old baby girl was admitted to hospital suffering from very severe injuries, including severe brain damage, seven rib fractures, fractures of the femur and tibia in both legs, a fractured radius and ulna in the right arm, as well as bruising to the face. The parents of the girl were charged with inflicting grievous bodily harm with intent to do grievous bodily harm and also with cruelty to a person under 16 years of age. The prosecution alleged that one or both parents had inflicted the injuries, but there was no evidence implicating the one rather than the other.

2.65 At trial, the parents elected to give no evidence, nor to call any evidence on their behalf. The defence called no evidence and made a submission of 'no case to answer' at the close of the prosecution case, because, they argued, it was not possible to prove who had caused the child's injuries. In answer, the prosecution submitted that on the evidence adduced, the jury could properly infer: (a) that one or both defendants had inflicted the injuries; (b) that on the doctor's evidence, the injuries had been inflicted on more than one occasion; and (c) that because the parents were together most of the time, the parent not responsible for the physical act must have known about the abuse and by not reporting the matter, must have encouraged further assault. The prosecution submitted that on this basis, both parents were guilty.

2.66 The trial judge rejected the defence's argument that there was no case to answer. The judge ruled that it would be sufficient to sustain a case against either of the parents if it were proved that they were parties to a joint enterprise to injure the child and that there was sufficient evidence to leave the lesser offence (of cruelty) to the jury. In summing up, the trial judge directed the jury that before they could be satisfied that a defendant who was not guilty of a physical act against the child should be guilty as a partner, they should be satisfied that the defendant actively approved and, by so doing, encouraged the other in inflicting the injuries. The jury convicted both parents.

2.67 On appeal, it was held that there was no evidence to support the trial judge's approach, in that there was insufficient evidence to support the inference of active approval and encouragement by the party who had not committed the physical act. The Court of Appeal stated that if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty in the case of both defendants because the prosecution has not proved its case. The appeals against conviction were therefore allowed.

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84 (1984) 80 Cr App R 24 (CA).

## S and C

2.68 In the case of *R v S; R v C*,<sup>85</sup> the mother of an 18 month-old boy and her co-habitee were jointly charged with the offences of causing grievous bodily harm with intent to do grievous bodily harm and with cruelty to a child. The consultant paediatrician who had examined the child found that he had sustained 30 bruises on the body, on the head, on the side of the face but principally around the torso. These were consistent with punching or poking the child. There were three injuries which could have been caused by burning: a lesion on the lower lip, abrasion marks on the right cheek and a lesion on the left loin which the doctor thought was a flame burn. There were also various puncture marks on the left thigh, on the right thigh and on the sole of the right foot, all consistent with having been made by a large needle. There were scratch marks on the scrotum and penis also consistent with the use of a needle. The baby had various fractures of his fingers and toes. Some were recent and some were healing. The consultant paediatrician concluded that there was no accidental cause for all these injuries. She stated in her evidence:

*“They were deliberately inflicted to cause the child pain. They are not typical of the sudden loss of temper. They were done cold-bloodedly and deliberately. He must have been screaming in severe distress ... Whoever did that must be a very violent person indeed ... The scenario would be a one and a half hour period of infliction of these injuries.”*

2.69 It was alleged in the case that during the relevant period, there were times when the boyfriend was alone with the abused child while the mother slept, and other times where the mother was alone with the child while the boyfriend slept or was out of the house. However, there was an absence of evidence to prove who had committed the assaults on the child.

2.70 At trial, the judge found at the conclusion of the prosecution's case that there was a case to answer on all counts, but gave no reasons in support of that finding. The jury convicted the mother of causing grievous bodily harm with intent, but the boyfriend was acquitted on this count. Both parties were convicted of cruelty to a child. The mother was sentenced to 18 months' imprisonment suspended for two years, while the boyfriend was sentenced to 18 months' imprisonment. They each appealed. The Court of Appeal quashed their convictions on the basis of the prosecution's failure to prove either that there was a joint enterprise between the two parties or that one had aided and abetted the other in committing the offences. The court stated:

*“... where a crime has certainly been committed, and where one or other or both of the appellants must have committed it, the jury might well be tempted to do one or other of two illegitimate things: to find both guilty in the absence of*

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85 [1996] Crim LR 346 (CA).

*evidence from which they could infer complicity; or to find one guilty on speculation alone, where the evidence against each of them was entirely neutral. To avoid these results, the Judge would have to explain against the background of the dangers of convicting the innocent and the necessity of considering each case separately, and paying careful regard to the burden and standard of proof, with all the difficulties that those rules raise in this type of case.*<sup>86</sup>

## Hong Kong cases

2.71 Having reviewed the common law position in the preceding section, we now turn to consider how these principles are applied in Hong Kong. Included within this discussion are cases where one or both of the parties either made no admissions or pleaded not guilty to manslaughter, other cases where the parties made some admissions of guilt and those where one or both of the parties pleaded guilty to manslaughter. We should point out that in respect of the last group of cases, it is possible that the prosecution might have had difficulty in successfully proving its case under the current law had the parties not pleaded guilty to the offences charged. We also include below, and in Appendix I, further examples of Hong Kong cases involving child abuse and abuse of vulnerable adults.

### ***Fatal abuse cases where one or both parties could not be charged/convicted of manslaughter***

*HKSAR v Lam Lui Yin and Yim Ching Ting*<sup>87</sup>

2.72 The infant victim in this case, Lam Bok Yam, was born in October 2001. He was one of triplets, but was born prematurely and suffered from congenital heart disease. He needed a number of operations as a result and spent most of the first two years of his life in hospital. He was finally discharged on 22 December 2003 and taken home by his parents. Because of his medical history, follow-up treatments were needed but all of these were missed. In late January 2004, a senior medical officer at the hospital called to ask why Bok Yam had not been brought in for a check-up. The child's mother assured the doctor he was fine. The next appointment scheduled for 6 February was missed, but was re-scheduled to 20 February. On the evening of 7 February, however, an ambulance was called to the family home and Bok Yam was rushed to hospital. Attempts were made to resuscitate him, but he was certified dead on arrival.

2.73 The autopsy found that he had died as a result of "*heavy impact of the head by or against a flat or blunt object*" sustained within 18 hours of his death, and that it was very likely that assault was involved. In addition to the

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86 Same as above, at 351.

87 DCCC 850/2005 (trial); [2007] 1 HKLRD 248 (CA) (sentence review).

head injury, his body was found to be covered in bruises and abrasions, a number of which were less than two days old and could have been inflicted about the same time as the fatal head injury. The autopsy indicated that most of the bruising and abrasions were likely the results of assaults. When questioned, the parents claimed the injuries were all self-inflicted as Bok Yam was prone to falling. The doctor who performed the autopsy disputed this and said that there was a high likelihood of child abuse involved.

2.74 Although Bok Yam died of his injuries, the court noted that it was not possible, however, to find on the evidence to the requisite standard of proof which of the defendants inflicted the fatal injuries, or whether they both did it acting in concert together. There was therefore no charge of manslaughter in the case.<sup>88</sup> The parents were eventually charged only with ill-treatment or neglect of a child under section 27 of the OAPO. They denied these charges. Both defendants were found guilty at trial and sentenced to two years' imprisonment. The prosecution sought a review of the sentence as "*manifestly inadequate*".<sup>89</sup>

2.75 In relation to the particular injuries which were the immediate cause of death, the Court of Appeal stated:

*"[T]he Judge was not satisfied on the evidence and up to the requisite standard whether it was the first respondent or the second respondent or both of them who inflicted the injuries. Although it was clear that Bok Yam had been subjected to 'a violent assault or assaults which involved the infliction of a massive trauma to his head' that led to his death and that there was no doubt that this was caused by either the first respondent or the second respondent, or both of them, the Judge found it impossible to find on the evidence just who was responsible: one, the other or both."*<sup>90</sup>

2.76 The Court of Appeal observed that trial judge in sentencing the defendants had therefore felt that he should put to one side the fatal head injuries, which had just left "*the regular beatings*" to consider. The judge classified these (in his words) "*on the less serious side of the scale of such contraventions*".<sup>91</sup> On review of sentence, the prosecution argued that the judge had erred in classifying the offence committed by the respondents in this way, and that this was in reality an extremely serious case of child abuse. It was also noted that the maximum sentence for the offence charged under section 27 of the OAPO was 10 years' imprisonment. The Court of Appeal agreed and increased the two year sentences for each respondent to four years' imprisonment.<sup>92</sup>

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88 See also *HKSAR v Ding Yuk Kwan* [2009] 1 HKC 36, at para 19, *per* Stock JA.

89 See [2007] 1 HKLRD 248 (CA), at para 1.

90 Same as above, at para 12, *per* Ma CJHC.

91 Same as above, at para 13(3).

92 In contrast to this type of case, one case where the culpable person was clearly identifiable was *HKSAR v Sunami Marwito* [2000] 1 HKLRD 892. In this case, the only people who had been present at the material time of the abuse were the deceased baby, her toddler sister and

2.77 In *HKSAR v Au Yeung Wing Yan and Chu Ka Man*<sup>93</sup>, the deceased child, who was aged three, had been subjected to prolonged abuse by her mother and her female partner. The cause of the child's death was shown to be "*drowning and brain injury*". There were also extensive and multiple injuries all over her body. Her buttocks, legs and the soles of her feet were covered in bruises, many consistent with having been hit with a ruler. She had several deep burn marks possibly inflicted by burning with a gas stove and cigarette lighter. The parties claimed that the assaults were inflicted in the interests of her education and to encourage her to learn, as she was not making good progress in her learning. Because of her injuries, the parties decided to withdraw her from nursery school.

2.78 On the day of the child's death, the parties admitted to have "*taught*" the child again, admitting taking turns to hit the child's buttocks with a ruler until she bled. They then made her stand by a wall for seven hours, refusing her dinner. The mother's girlfriend asked the child questions which she was unable to answer. The child was placed in the shower and the girlfriend admitted spraying water at the child's face for over a minute and the child later displayed clinical signs of drowning. The child then slipped and fell and she appeared to be unconscious. As these acts could have been the immediate cause of death, the mother's girlfriend pleaded guilty to one count of manslaughter. She received a sentence of 7 years, 10 months' imprisonment.

2.79 The pathologist found that the three year-old had been subjected to repeated episodes of physical abuse, resulting in the obvious multiple external injuries and the severe brain injuries of various ages. The pattern of injuries was strongly indicative of physical child abuse in the form of repeated assaults over a period of weeks with escalating severity resulting in the death of the deceased. However, the pathologist was unable to pinpoint one particular injury resulting in death, as even the bruising of the forehead leading to the subdural haematoma inflicted a few days before death was not the direct cause of death. It was the accumulative effect of the abusive head injuries which caused death - hence cause of death recorded as "*abusive head injuries.*"

2.80 The mother was charged with "*cruelty to child*" under section 27(1) of the OAPO, to which she plead guilty. The mother was sentenced to 6 years' imprisonment. The court noted that she could have taken steps to prevent the further abuse of her child but she did not do so. She did not take the child for medical treatment, or apparently go to her family. She also minimised the welfare worker's opportunity to see the child during a visit to the premises. As the child's mother, she had a duty to care for her. Her treatment of her own child was a gross dereliction of her duty as a mother.

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the domestic helper. The domestic helper was charged with manslaughter of the baby. The judge held that there was clearly a case to answer given the medical evidence which indicated that the baby had died of a deliberate assault involving the use of considerable force.

93 HCCC 67/2003.

2.81 This case highlights some of the possible difficulties in prosecuting cases of this type, in particular, establishing: (a) who inflicted the fatal injuries; (b) which were the fatal injuries; (c) what was the actual cause of death; and (d) on what basis should the prosecution proceed on a charge of manslaughter, etc.

### ***Cases where the parties made admissions against interest***

#### *HKSAR v Lam Wai Shu & Anor*

2.82 The case of *HKSAR v Lam Wai Shu & Anor*<sup>94</sup> related to the death of a four month-old baby girl who lived with her parents. On 5 December 2003, the child was certified dead on arrival at hospital. The post-mortem showed that the cause of death was subdural haemorrhage and diffuse brain injuries. The pathologist also found bruises and wounds on the head, and numerous other bruises and wounds over the rest of the baby's body.

2.83 When interviewed by the police, the father said that it was the mother who usually looked after the baby. He admitted that on 3 December 2003 he had noticed ulcers around his daughter's mouth and bruises on her face. The father admitted that the baby had cried a lot, which annoyed him, and that sometimes when the baby would not be comforted he would hit her arms, legs and face. The father also admitted picking up the baby and shaking her violently because she was crying and he did this by holding his hands under her armpits and shaking two or three times so she stopped making any noise. The father had also turned her upside down to stop her from crying. He further admitted that on several occasions he had rolled up a small towel and stuffed it into the baby's mouth to stop her crying. The father admitted on one occasion putting a cushion on the baby's head to muffle her voice, and on another occasion, opening the fridge door and trying to scare the child by putting her inside.

2.84 The mother was also interviewed by police and said she was a full-time housewife who took care of the baby. She said she had seen bruises on the child's neck. She said that she did not know what had happened and paid no attention. She had also seen bruises on the baby's chest, her right eye and her right arm. The mother said that a few days before the baby's death, she was playing with her. The mother said she had seen the father slap and put his hand on the baby's neck when the baby cried at night. She had also seen the father put a towel into the baby's mouth as a gag and described a time when he threatened to put the child in the fridge. The mother further said that when she bathed the child the day before her death there were black and blue bruises on her eye and chest which she said might have been caused when the child fell from the bed and hit a stool. She also admitted having used unintentional force to grab the baby's legs and arm to pull her from the pram, causing bruising.

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94 [2007] HKEC 1788.

2.85 The parents were jointly charged with manslaughter and cruelty to child under section 27 of the OAPO. Both pleaded guilty to the cruelty charge but not guilty to manslaughter.

2.86 At trial, the pathologist expressed the view that the wounds on the face and inside the mouth were unlikely to have been accidental and that they indicated the baby had been subjected to various forms of physical abuse before her death. The multiple wounds on the baby's mouth appeared to have been caused by an object with a sharp serrated edge, and by thrusting a hard object into the baby's mouth. The bruises were characteristics of bruises caused by forceful gripping or pinching, and were unlikely to have been caused solely by accident.

2.87 The combined effect of the medical evidence given by the pathologist and neuro-pathologist demonstrated that this was a "classic case" of child abuse. Clear signs were found of the deceased having received injuries to her head, estimated to have occurred several weeks prior to her death, and evidence was given that up to ten blows were inflicted upon the child's head within the 48 hours leading up to her death. These had left bruises but it was not possible to identify which of the bruises related to the fatal blow or blows. None of the actions which the defendants had described during their interviews could have led to the subdural haemorrhages and diffuse brain injuries which caused the death. There were, in the pathologists' view, non-accidental injuries.

2.88 In summing up at trial, the judge explained to the jury that the prosecution case on the manslaughter charge was based on two limbs: (a) that the father's and/or the mother's unlawful acts were a substantial cause of death; or/and (b) that the father's and/or the mother's failure to act was a substantial cause of death (ie, unlawful act and gross negligence manslaughter). The jury were told that if they were satisfied that either or both the father and the mother had intentionally inflicted one or more causative blows, they could convict and need not consider the gross negligence limb against that defendant. If they were not so satisfied, they should then go on to consider the gross negligence limb.

2.89 The jury convicted both parents of manslaughter, but then problems arose because the judge asked the jury to specify on which basis (unlawful act or gross negligence manslaughter) they had found against each defendant. It became clear that the jury were split on this issue. In relation to the father, four of the jury voted for unlawful act and three for gross negligence, and for the mother two voted for unlawful act and all seven voted for gross negligence. After legal argument about the validity of the verdicts, both defendants were sentenced on the basis of the most favourable limb to them of gross negligence.

2.90 Thus, although it was never proved in this case which parent inflicted the fatal blow, it was possible to obtain a conviction against both, partly because of the admissions of ill-treatment by both parties and because the evidence clearly indicated that, in effect, any harsh treatment by one

parent was condoned by the other who took no steps to intervene or take the child to a place of safety.

### ***Cases where the parties pleaded guilty to manslaughter***

#### *Chau Ming Cheong*

2.91 In the case from the 1980s, *R v Chau Ming-Cheong*,<sup>95</sup> both parents were jointly charged with the murder of their four year-old daughter. Both parents offered a plea of guilty to manslaughter which was accepted both by the prosecution and the court.

2.92 The facts of the case were that shortly after the couple married, the wife gave birth to twin girls. At about six months of age, the stronger twin (the deceased) was put into the care of her grandparents until 1980, when she was about two and a half years' old. There is no suggestion that the grandparents caused any harm to the child. It appeared that the mother resented the stronger twin once she returned home and a catalogue of abuse followed at the mother's hand. When the grandmother visited, she saw bruises on the twin's face and body on more than one occasion. She made a report to police and also enlisted the help of the organisation Against Child Abuse. The headmistress of the twin's kindergarten also saw injuries on the child and warned the mother not to chastise the girl in that way. The father was also persuaded by the grandfather to speak to the police but the father refused to take action against his wife although he clearly knew she was physically abusing the child.

2.93 On one occasion, the girl was examined in hospital and found to have multiple bruises, lash marks and scratch marks on her face and body. Police informed the Social Welfare Department but the child was still returned to the custody of her mother upon leaving hospital. The parents received counselling from social workers, but neglected to take the child back to the hospital for the follow-up appointment until directly summoned there by the doctor. The doctor then found numerous fresh injuries all over the girl's body. Following this, the mother was charged with cruelty. She pleaded guilty in January 1981 but was not sentenced until February. Tragically, during this time the mother continued to physically abuse the child. The child was subsequently placed by the Social Welfare Department into the custody of her aunt but was returned to her parents in late December 1981.

2.94 In January 1982 the parents took the twins to see their grandparents who again noticed bruising on the victim's face, arms and legs. The father admitted that some of these injuries had been caused by his wife but said that some had also been caused accidentally by a fall.

2.95 The little girl died on 6 February 1982 as a result of numerous injuries inflicted by the mother. The actual cause of death was peritonitis

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95 [1983] HKLR 187.

supervening upon rupture of the small intestine caused by a blunt force applied to the abdomen, probably by kicking. In all, 148 external injuries were found, mainly bruises and abrasions of varying sizes all over the girl's body and also some small superficial wounds. In the opinion of the pathologist, 113 of these injuries were less than four days old but some were about a week old and a few other healing scars ranged from between two weeks to two months' old.

2.96 All the injuries resulted from beatings and kickings inflicted on the child by the mother. These latest, and finally fatal, injuries were only a manifestation of a long, dreadful history of ill-treatment extending back several years. The prosecution accepted that the mother inflicted all the injuries and that the father never himself took part in any of the grossly excessive physical punishments inflicted by his wife. However, although he apparently remonstrated with his wife about her actions on occasions, once even mentioning divorce, he took no action to stop his wife or put the child out of harm's way.

2.97 Although he had pleaded guilty to manslaughter, the father subsequently appealed against his conviction on the basis that the agreed facts put before the court were insufficient for a plea of manslaughter. The prosecution had based its case against him on the proposition that *"he connived at his wife's unlawful behaviour by passively standing by and doing nothing to observe his duty as a parent to protect the child from assaults which he must have realised were wholly unjustified by reason of their frequency and severity or by taking any other reasonable steps to see that the welfare of his child was ensured whether by removing her from her mother's custody or otherwise."*<sup>96</sup>

2.98 At the appeal, the father argued that the injury which ruptured the child's intestine and caused her death was the result of some form of violence which wholly exceeded anything before the incident, and that he could not be held responsible as it was not part of the agreed facts (the basis on which he had pleaded guilty) that he had ever been present as a witness to any such exceptional behaviour. He had however, admitted to police that on the day his daughter died, he had seen his wife beating and kicking the little girl but said it was not a severe beating. He submitted to the Court of Appeal that, however guilty of dereliction of fatherly duty he had been at various times during his daughter's life, all that earlier course of conduct on the part of his wife became irrelevant.

2.99 The Court of Appeal found that this was a case involving a course of conduct not just one dramatic and fatal incident. The Court dismissed the father's appeal on the basis that it was established law that a reckless disregard for the victim's health and welfare on the father's part could amount to manslaughter. At that time, the relevant test for this was an objective one.<sup>97</sup> McMullin VP stated:

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96 Same as above, at 189.

97 *R v Stone* (1977) 64 Cr App R 186.

*“We have no doubt that a father who, over a long period of time, has first-hand experience of the fact that his wife habitually and violently assaults their child of tender years using both hands and feet in doing so, is showing a reckless disregard for the child’s health and welfare by neglecting to take any reasonable step to protect her. He has, by condoning it, joined in the course of conduct which not only did not ensure the child’s welfare, but put it at positive risk of severe damage. He could not, upon trial, conceivably have escaped responsibility by pleading that he did not appreciate that her health and welfare were greatly at risk. For these reasons the application must be refused.”*

2.100 This case, although clear as to who was the perpetrator of the abuse, shows how it might be possible to prosecute the other carers in certain circumstances. Silke JA observed:

*“Here it matters not that the applicant may not have been present when the fatal blow landed once that blow was part of a known course of conduct [which conduct, over a period and towards a young child] was of such continuing severity that there was a high risk of grievous bodily harm, not to speak of danger to her welfare, being caused. By his indifference or recklessness of the consequences of that which he knew to be happening, whether resulting from weakness of character or stupidity, the applicant who had a duty of care condoned the risk and his conduct attracted to himself the high degree of negligence sufficient to found the crime of manslaughter . . . .”<sup>98</sup>*

2.101 It should be noted that the court’s application of an objective test to the concept of recklessness was subsequently overruled in Hong Kong in the Court of Final Appeal decision in *Sin Kam Wah & Another*.<sup>99</sup>

#### *NG Tin Wah and FUNG Kin-man*

2.102 In *HKSAR v NG Tin Wah and FUNG Kin-man*,<sup>100</sup> the defendants were the natural parents of a little girl who was two years’ old when she died. The child had been in the care of the HK Society for the Protection of Children since birth (the mother being a prostitute and the father being unemployed) but was returned to her parents in March 2003. Records show that the child was normal, fit and healthy at the time of her return to the parents. They also had another son who lived with the mother of the father.

2.103 On 5 May 2003, the defendants took the child to hospital for urgent medical treatment. The child was declared dead before arrival. Examination revealed that her chest, left arm and abdomen were covered with

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98 [1983] HKLR 187, at 194 to 195.

99 [2005] HKEC 792. See discussion in *Archbold Hong Kong* (2019), above, at para 20-116.

100 香港特別行政區 訴伍天華及馮健雯案 HCCC 249/2003.

multiple bruises and she also had multiple scabs and scars on her scalp, lips, both legs and dorsum of both feet. As the injuries did not appear to be accidental, the hospital notified the police.

2.104 The parents were the only carers of the child. Although the child was clearly suffering due to her injuries, she was never taken to hospital in case trouble would be caused due to the obvious maltreatment. In fact on the day of the child's death, the father prevented the mother taking the child to hospital even though she was clearly very unwell. The father had also been violent to the mother. The mother said that she had asked the father to stop abusing the child and the father had promised not to beat the child but he failed to keep his promise. She had also asked the father to take the child to see the doctor but the father refused and threatened her that he would tell the doctor that it was the mother who had abused the child. She was afraid that if she took the child away, she would not be able to see her other son who was living with the mother of the father.

2.105 At post-mortem, it was found that the little girl's body weight was only 70% of her weight from the last record. The deceased was found to have burn marks on parts of her body caused by a heated fork, a lighted cigarette and a lighter; injuries from rubber bands fired at her and an extensive area of bruising over the front of both shoulders, left and right collar bone and upper right and left of the outer front chest. These injuries were consistent with violent shaking or forceful pulling. The internal examination showed extensive bruising of the scalp with severe injuries to the brain in the form of bilateral subdural haematoma and patches of subarachnoid hemorrhages and bruising over the cortex. The brain was swollen and microscopy showed extensive hypoxic damage and neuronal injuries. These brain injuries were estimated to be two to four days' old and likely to have been caused by blunt impacts to the head. However, there was also evidence that the brain had been subjected to previous hypoxic or traumatic events within a few weeks of death. The cause of death was "*abusive head injuries.*"

*"The only logical conclusion one can make is that the deceased had been subjected to repeated episodes of physical abuse, resulting in the obvious multiple external injuries and the severe brain injuries of various ages. ... The injuries pattern was strongly indicative of physical child abuse in the form of repeated assaults over a period of weeks with escalating severity resulting in the death of the deceased."*

2.106 At trial, the father pleaded guilty to manslaughter, and the second count of ill-treatment of a child contrary to section 27(1) of the OAPO was left on file. The mother pleaded guilty to manslaughter and ill-treatment. The court noted that the facts of the case showed that most of the injuries were caused by the father and the mother had tried to, although unsuccessfully, take the child to see the doctor. Therefore the legal responsibility of the mother was less than the father. The father received a sentence of imprisonment for 10 years and the mother received a total sentence of imprisonment for 8 years.

2.107 Although this case had a successful conclusion as far as the prosecution was concerned, it does highlight some of the possible difficulties in prosecuting cases of this type, in particular, establishing: (a) who inflicted the fatal injuries; (b) which were the fatal injuries; (c) what was the actual cause of death; and (d) on what basis should the prosecution proceed on a charge of manslaughter, etc.

*Kow Chi-Ming and Ng Bik-Fung*

2.108 In *HKSAR v Kow Chi-Ming and Ng Bik-Fung*,<sup>101</sup> the deceased was an 8 month-old baby boy who had lived with his mother and her boyfriend. The cause of death was a recent head injury including an axonal brain injury. Externally, a bruise was found at the back of the head and internally there was deep bruising found at the back of the head, top of the head, left outer front of the head and right side of the head. Upon internal examination of the neck, deep bruising including muscle bruising was found at the centre upper back of the neck around the junction between the base of the skull and the spine. The pathologist said that the head and neck injury were non-accidental and could have been due to blunt force impact and shaking impact syndrome was a strong possibility because of the acute subdural haemorrhage, the underlying brain injury and the deep seated bruises in the neck.

2.109 There were also approximately thirty other injuries found, including bruises, abrasions and wounds all over the deceased's body including the arms, eyes, ears, abdomen, neck and penis. These injuries had all occurred within two weeks prior to death and were considered by the pathologist to be non-accidental injuries. He described how the bruises on the eyes and penis for example were due to local impact such as flicking hard with a finger, the sort of injury that cannot be accidental. Other injuries could have been caused by poking or pinching with the finger nails digging in, and bruises to the neck were likely to have been inflicted when someone grasped the baby's neck to try to silence him. Importantly, the pathologist considered that the bruises found over the child's body should have been apparent when the baby was washed and changed a few days prior to death. The deceased was also found to have suffered from a broken arm which, due to the state of healing, had occurred one to two weeks before death. The nature of these fractures indicated child abuse, as they could only be caused by deliberately chopping downward in a karate-type blow or by the arm being deliberately bent and twisted. This injury would have caused the child considerable pain and the arm would have been swollen, yet the baby was never taken to a doctor for treatment.

2.110 The time of death was an important issue in the case as the mother looked after the baby during the day, but the care was taken over by the boyfriend at night when the mother went out to work as a hostess. On the night in question the mother left for work at 10 pm and left the baby in the boyfriend's charge. The mother went home about 5 am and found the baby lying on the bed facing the wall, and she left him believing him to be sleeping.

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101 HCCC 9/2004.

The boyfriend told her that he had done something wrong which could not be remedied. He eventually told her that he had killed someone by accident. More than two hours later, the mother went to look at the baby and found he was apparently dead. The mother then told the boyfriend to leave the premises, but she did not make a report to police, giving the boyfriend time to escape. After the boyfriend had left, the mother told her neighbours what had happened and they called the police.

2.111 The mother admitted that she bathed and changed the baby every day, including the day of his death, but denied seeing any injuries on the child at any time. Subsequently she told police that a week earlier she had seen the baby with a bleeding mouth and a swelling at the back of his head but did not notice a broken or swollen arm then, but did notice it three days prior to death. She said she never took the child for medical treatment because she had no money. She further said that when she questioned her boyfriend about the arm and facial injuries he said they must have occurred as the result of an earlier fall from the bed to the floor.

2.112 The boyfriend gave various explanations to police of how the fatal injuries occurred, including demonstrating how when he was changing the baby's nappies when the baby was lying on the floor, he (the boyfriend) somehow lost his balance which resulted in him sitting on the baby's abdomen. He said the baby's face then turned red and he started to convulse and subsequently stopped breathing so he covered the baby with a quilt and waited for the mother to come home. All the various explanations given by both the mother and the boyfriend about how the injuries occurred and demonstrated in the boyfriend's reconstruction video were disproven by the pathologist having considered the excuses and watched the reconstruction.

2.113 Initially, the defendants were only charged with a joint wilful neglect charge under section 27 of the OAPO. Subsequently, however, the boyfriend was charged with manslaughter. It was the prosecution case that all injuries inflicted on the deceased started after the boyfriend became responsible for the caring of the baby. There was no evidence to show exactly how each injury was caused to the child other than the admissions made by the boyfriend and the fact that the boyfriend admitted causing injuries over a period of time to the child, including the fatal injury to the head. His explanations as to how death had occurred were established to be not true according to the pathologist.

2.114 Further, the pathologist explained that after the head injury was caused, the baby would have been expected to show signs of distress and then his condition would have deteriorated over a period of time leading to unconsciousness and then death. Based on these points, the pathologist put the age of the fatal injury as most likely within six hours prior to death, at around 3.30 am. This was when the boyfriend was the sole carer of the child. Also he never took the baby to seek medical treatment during the period of two weeks when the baby was repeatedly abused before he suffered the fatal brain injury.

2.115 Subsequently, the mother pleaded guilty to ill-treatment under section 27 of the OAPO. The boyfriend then decided to plead guilty to manslaughter and the ill-treatment charge against him was left on file. The boyfriend was sentenced to 10 years' imprisonment and the mother to three years' imprisonment.

2.116 This case highlighted the importance of establishing as far as possible when the fatal injury occurred, and who was responsible for the child at that time, as well as ensuring that steps were taken to disprove 'innocent' explanations.

*HKSAR v Ng Man Kwong and Ho Yuk Kuen*

2.117 In *HKSAR v Ng Man Kwong and Ho Yuk Kuen*,<sup>102</sup> a 16-month old girl died after consuming methadone which her parents, who were recovering drug addicts, had stored in their refrigerator.<sup>103</sup>

2.118 The parents claimed that on the day of the child's death, they woke up around 10 am to find the infant and her three year-old brother playing with opened medicine bottles.<sup>104</sup> Around midday the boy began vomiting but then appeared to recover. The infant slept. At around 3 pm she was unresponsive and on the verge of vomiting. The parents grew concerned that the children had taken methadone, but thought the infant would probably be fine once the drug wore off. They made repeated attempts to wake her until sometime after 6 pm when they decided to take her to the hospital. The baby was declared dead later that evening. The cause of death was found to be an overdose of methadone, although the autopsy also showed that she had consumed the drug at least once before.

2.119 In this case, the parents both pleaded guilty to manslaughter, child neglect under section 27 of the OAPO and possession of dangerous drugs.<sup>105</sup> They were each sentenced to 3½ years' imprisonment. The judge accepted that the parents had shown genuine remorse, however their negligence in leaving methadone unguarded at home, and their delay in seeking medical attention for the children was considered so gross that a substantial period of custodial sentence was called for.

*HKSAR v Takahashi Koyo and Chu Wing Hon*

2.120 In the case of *HKSAR v Takahashi Koyo and Chu Wing Hon*,<sup>106</sup> the 10 year-old son of both accused died of lack of oxygen because they chose to discipline him when he was naughty by locking him into a hard-shell suitcase for almost two hours. Both parents pleaded guilty to manslaughter.

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102 HCCC 277/2005.

103 For another case involving drugs taken by a child, see the English case of *Russell & Russell* (1987) 85 Cr App R 388 (CA), discussed above.

104 It was indicated that the three year-old was able to open the cap of a plastic medicine bottle similar to those seized from the premises.

105 Recovering addicts are required to consume methadone at a methadone clinic.

106 HCCC 113/2006.

The father, who had left the premises shortly after the child was locked in the suitcase, was sentenced to 18 months' imprisonment. The mother, who remained at home and for two hours ignored the child's pleas to be released, was sentenced to 2 years' imprisonment. The judge indicated that this was because of the greater negligence on her part, as the length of the confinement was in her direct control.

2.121 The court rejected the plea for non-custodial sentences despite the powerful mitigation that supported it, including that: (1) there was a six year-old surviving child who needed his parents; (2) the lack of malice of the parents, as the motive of the conduct was to discipline the child; (3) the parents suffered the most terrible punishment by reason of their own guilt and agony of loss every day for the rest of their lives; (4) deep and genuine remorse of the parents; (5) the parents were good people; and (6) deterrence did not call for imprisonment as the conduct in relation to the death itself was founded in a lack of foresight and not wilful conduct.

2.122 Despite the psychologist's plea for leniency, the court noted that it could not focus only on the private dimension of the case, as cases involving criminal conduct leading to death have an important public dimension. The court noted that, regardless of the lack of malice, it was a dreadful thing to have done as the suitcase was small, the time in it was long, and the boy's dread of confinement was obvious.

2.123 The judge acknowledged that these sentences appeared light when compared to other sentences for manslaughter, but said that it sought to reflect that the real punishment for these parents would be their constant pain for what had been rightly described as a family tragedy.<sup>107</sup>

#### *HKSAR v Gurung Hem Kumar*

2.124 In *HKSAR v Gurung Hem Kumar*,<sup>108</sup> the father, fuelled by alcohol, inflicted serious injuries on his son, aged two and a half months, as he was angry about having a child. The defendant pleaded guilty to manslaughter.

2.125 The defendant and his wife were both reluctant participants in a marriage arranged by their parents in India in 2005. Psychiatrists noted that the defendant appeared to have had problems adjusting to marriage and life in Hong Kong. He punched the baby, handled the baby roughly and carelessly that he dropped the baby while throwing or manhandling the baby into the cot. The defendant and his wife brought the unconscious baby to the hospital. The cause of the baby's death was "*fractured skull with brain injury*". The forensic pathologist opined that the injuries to the baby's head were the result of an impact against a hard object; the rib fractures showed acute and chronic injuries; and the injuries were of different ages and inflicted at different

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107 See also "Parents jailed for son's suitcase death", *South China Morning Post* (19 Oct 2006).

108 [2011] HKCFI 1251; HCCC 432/2010 (3 March 2011).

times. Those symptoms could indicate intracranial haemorrhage and/or shaken baby syndrome.

2.126 The court found it was not clear whether or to what extent the mother was aware of her son's injuries, or how and by whom they had been caused. The defendant said several times in his video interviews that his wife did not know about the injuries, although he suggested that when she did discover marks on the body of her son, she did nothing about them as she considered them unremarkable. The father was sentenced to 10 years' imprisonment.

2.127 The court noted that the dreadful injuries were inflicted by one of the two primary carers, from whom the child had the right to expect protection and care. The judge was of the opinion that:

*"The courts must take a very severe view of acts of this nature committed in the manner that they were. Society, through the courts, tries to ensure that children are protected, and when that protection is ignored, abused, or removed by the parent or parents, the court must consider sentences of specific and general deterrence."*<sup>109</sup>

#### *HKSAR v Tse Kam Fai*

2.128 In *HKSAR v Tse Kam Fai*,<sup>110</sup> the defendant pleaded guilty to the manslaughter of his father, aged 76 years at the time of his death. The defendant had been suffering from schizophrenia since 2009 and had been the prime carer of his bedridden father since he suffered a stroke in 2003. The cause of death of the father was bronchopneumonia, which was a complication of the deceased's prolonged coma forced by right chronic subdural haematoma. The defendant admitted to the doctor and to the police that he had shaken his father out of momentary anger, causing him to bump against the bed. The defendant and his family members were all of the view that the deceased's death was as a result of an accident as the defendant had no intention to harm his father. The defendant regretted his acts and his family members did not blame him. The defendant was sentenced to 180 hours of community service.

2.129 The court noted that:

*"Any person who is convicted of manslaughter shall be liable to imprisonment for life and to pay such fine as the court may award. No one will dispute that a conviction of manslaughter is very serious. Normally speaking, a person convicted of manslaughter would be looking at a very long term of imprisonment, if not a life sentence, but that does not mean that a person convicted of manslaughter must be locked away for*

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109 Same as above, *per* Hon Ms Justice Claire-Marie Beeson.

110 [2011] HKCFI 1403; HCCC 334/2010 (5 July 2011).

years. *The sentencing judge must consider all the circumstances of any particular case to decide the appropriate sentence.*<sup>111</sup>

2.130 The court observed that the defendant had been the prime carer of his father for a number of years and, by all accounts, he was doing a good job. There was no evidence of the defendant abusing his father. This court noted that this case was to be distinguished from cases in which the defendant was habitually ill-treating the deceased; or cases in which the perpetrator used a lethal or offensive weapon to attack the deceased. The judge also accepted the defendant was remorseful of what he had done and took into account that the defendant admitted his guilt even when there was uncertainty whether the prosecution could prove the cause of death was linked to his act. The court also took into account the mental state of the defendant at the time when he lost his temper.

### ***Non-fatal injuries, but victim left in vegetative state***

*HKSAR v Wong Wing-man, Mandy alias Wang Xuexin and Ling Yiu-chung, Rocky*<sup>112</sup>

2.131 In this case, seven year-old Ling Yun Lam, Suki was severely abused by her mother and suffered horrific injuries. As a result of the abuse, she suffered permanent brain damage and would be in a vegetative state for the rest of her limited life.

2.132 On 18 July 2015<sup>113</sup>, Yun Lam was taken by her mother to the hospital. She was in a state of cardiac arrest and had stopped breathing. She had multiple wounds and bruises all over her body, including gangrenous wounds, which were inadequately and improperly treated. There had been a previous trauma to her head, and this would indicate that she had been previously physically abused. She was also suffering from malnutrition. Her body weight was 14.8 kilograms two weeks after admission, after a period of parenteral nutrition supplementation. Her condition of severe malnutrition was most likely caused by starvation either intentionally or through neglect. She had become very weak due to her prolonged bedridden status and immobility, which had led to a life threatening cardiac arrest. Even though she had been successfully resuscitated, she sustained permanent brain damage. The doctor was of the opinion that Yun Lam was suffering from severe malnutrition and the likely causes included chronic illnesses and child abuse.

2.133 After Yun Lam was admitted to hospital, the mother, and later together with her husband (who was not the natural father of Yun Lam),

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111 Same as above, *per* Hon Mrs Justice Barnes.

112 [2018] HKCFI 1484; HCCC 76/2017, *per* Hon Zervos J (as he then was).

113 See also “Arrests after malnourished Hong Kong girl, 7 was ‘beaten with a cane, left with gangrene and skin ulcers all over her body’”, *South China Morning Post* (8 Sep 2015). Available at: <https://www.scmp.com/news/hong-kong/law-crime/article/1856160/abuse-probe-hong-kong-girl-seven-lies-unresponsive-hospital>

embarked on a course of conduct providing false information about the background, medical history and conditions of Yun Lam. They depicted her as a child with physical and mental disabilities. The mother conveyed to others making inquiries that Yun Lam suffered from anorexia nervosa, that she passed out after having congee and taking a shower. The mother provided false information that the child had congenital development defects and problems, that she had been badly cared for in mainland China, and that she had only recently arrived in Hong Kong in June 2015. In fact, Yun Lam came to Hong Kong in November 2014 and attended, *albeit* with increasing irregularity, a local kindergarten in Tsuen Wan. She was withdrawn from school after the teacher inquired about her injuries, and she was locked away in the flat and kept away from the social worker who looked after the family. The mother lied that Yun Lam had quit school because she could not adapt to life in Hong Kong and that she was sent back to mainland China where her family members would take care of her. From the evidence provided by Yun Lam's teacher, the girl presented as a bright young seven year-old who was doing well at school with nothing physically or mentally wrong with her.

2.134 The mother in her evidence sought to distance herself from having any connection to, or responsibility for, the care of Yun Lam and said that the husband was the carer. The mother said that what she told others about her daughter was what she was instructed to by the husband, as she was acting under duress from him. Evidence at trial showed that the mother instructed her other twin daughters to tell a false story to the authorities about Yun Lam's condition. Her husband supported her lies, and lied himself to the authorities in relation to Yun Lam's case. He lied about being the carer of Yun Lam initially, and later denied that he was the carer as he was separated from the mother and was living with his own mother in Tsing Yi. He said that he was acting under duress as a result of threats of suicide and harm to his family members by the mother.

2.135 The court found that Yun Lam was subjected to physical abuse, which also included isolating her and keeping her restricted and hidden in the family home, without the provision of food and sustenance, and without appropriate and timely medical care and aid.

2.136 In the Reasons for Sentence in the case, the court noted that the maximum sentence for a person convicted for an offence of ill-treatment or neglect of a child under section 27(1) of OAPO is 10 years' imprisonment. (This had been increased from a maximum sentence of two years' imprisonment in 1995.)

2.137 The circumstances and gravity of cases would vary greatly, but the facts of this case put it into the category of the worst case of its kind. A crucial factor that had to be taken into account when sentencing for this offence was the need to protect the young and the vulnerable, as well as the need to deter abuse or neglect of them. Other crucial factors to be taken into account were the age and circumstances of the child; the relationship between the offender and the child as well as the responsibility the offender had for the child; the nature, degree and duration of the ill-treatment or

neglect of the child; the suffering and injury to the child; and the long term prospects it would have on the child both physically and psychologically.

2.138 The court noted that this was a case of extreme cruelty to a child over a protracted period. There was deliberate, sadistic and systematic abuse of Yun Lam. The offence was aggravated by the following factors. The mother targeted one particular child of the family, Yun Lam. She isolated Yun Lam, and prevented her from disclosing or revealing the abuse to which she had been subjected, and from others becoming aware of it. She engaged in deliberate concealment of Yun Lam from the authorities. She failed to seek medical help for Yun Lam in clearly grave and obvious circumstances. She also abused the power and the position of trust as a mother over Yun Lam. The abuse inflicted on Yun Lam had resulted in her suffering severe physical and psychological harm in the most indescribable way. In the short life that was predicted for Yun Lam, she would be under constant medical care for the rest of her life, with severe mental impairment and other serious ailments.

2.139 The mother, who had pleaded not guilty, was sentenced to 9 years and 6 months' imprisonment for ill-treatment or neglect of a child under section 27(1) of the OAPO and 5 years and 9 months' imprisonment for perverting the course of justice,<sup>114</sup> the two sentences to run consecutively. Accordingly, she was sentenced to 15 years and 3 months' imprisonment. The father, although not the natural father of the child, was sentenced to 4 years and 6 months' imprisonment for perverting the course of justice.

2.140 The judge expressed the view that the maximum penalty for this offence needed to be considered for reform, as the punishment did not fit the serious levels of the crime in some cases. The judge noted that cases which had been referred to the court in this case concerned circumstances where the neglected child had died, and as a consequence, a manslaughter charge together with a neglect of child charge had been laid against the offender or offenders. In this case, whilst the child had survived her ordeal, she was unable to live a normal life.<sup>115</sup>

2.141 The court also commended the efforts and dedication of the persons involved in the welfare and care of children who each played a role in bringing this tragic case to justice, including the teacher, social worker, social welfare department personnel, medical staff and the police.

### ***Abuse cases involving the elderly***

2.142 As we saw in Chapter 1, available statistics indicate that a significant number of elderly persons suffer abuse and neglect each year, usually in the home.<sup>116</sup>

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114 Under common law and punishable under section 101(1) of the Criminal Procedure Ordinance (Cap 221).

115 Same as above, at paras 162 and 163.

116 See Chapter 1, above, at para 1.52.

2.143 Elderly persons in Hong Kong are also cared for in residential care homes for the elderly (RCHE). SWD monitors the operations of all RCHE through a licensing scheme under the Residential Care Homes (Elderly Persons) Ordinance (Cap 459) (Ordinance) and the Residential Care Homes (Elderly Persons) Regulation (Regulation). In addition, the Code of Practice for Residential Care Homes (Elderly Persons), issued by the Director of Social Welfare pursuant to the Ordinance, sets out the principles, procedures, guidelines and standards for operators' compliance with respect to how they should operate, keep or manage RCHEs.<sup>117</sup> The Ordinance provides that if a RCHE licence holder commits an offence under the Ordinance, the Director of Social Welfare may cancel, suspend or refuse to renew the RCHE licence, or amend any condition of the licence.<sup>118</sup>

2.144 From time to time, cases of abuse in RCHE are reported in the media.<sup>119</sup> In December 2018, the Ombudsman issued a Direct Investigation

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117 Section 22(1) of the Residential Care Homes (Elderly Persons) Ordinance (Cap 459).

118 Office of The Ombudsman, Hong Kong: *Direct Investigation Report on Social Welfare Department's Monitoring of Services of Residential Care Homes for the Elderly*, (December 2018) at para 3.18. Available at: [https://ofomb.ombudsman.hk/abc/files/2018\\_12\\_FR\\_.pdf](https://ofomb.ombudsman.hk/abc/files/2018_12_FR_.pdf)  
See sections 10, 19 and 21(6) of the Residential Care Homes (Elderly Persons) Ordinance (Cap 459).

119 See, for example:

- "Hong Kong hospital patient, 75, told family to fight for justice after suspected shower attack left him fatally wounded", *South China Morning Post* (27 Jun 2018). Available at: <http://www.scmp.com/news/hong-kong/hong-kong-law-and-crime/article/2152659/hong-kong-hospital-patient-75-dies-after>  
It was noted in the article that: "*The press release did not provide details about who might have been responsible, but a source familiar with the case told the Post the object had been inserted in a suspected attack by a patient care assistant... .*"
- "Hong Kong elderly are badly in need of comprehensive care policy: Latest family tragedy once again raises questions as to whether those who look after aged relatives receive sufficient treatment and support", *South China Morning Post* (11 Oct 2017), which stated: "*It is a sad and all-too-familiar story, a son with a mental condition is suspected of murdering his bedridden mother before jumping from their flat in a suicide attempt. The family tragedy, the third of its kind in eight months, was greeted with the same old pledge from the government – a review of the relevant support services... .*" Available at: <http://www.scmp.com/comment/insight-opinion/article/2114811/hong-kong-elderly-are-badly-need-comprehensive-care-policy>
- "Who cares for the carers? Third killing this year raises alarm in Hong Kong after man thought to have killed elderly mother before his own attempted suicide, scrutiny falls on government policy and oversubscribed services", *South China Morning Post* (10 Oct 2017). Available at: <http://www.scmp.com/news/hong-kong/community/article/2114672/who-cares-carers-third-killing-year-raises-alarm>  
The article stated: "*The murder, the third this year in which a carer has been involved, has highlighted the poor community support for the city's carers. In February, a man was believed to have strangled his 56-year-old wife, who had dementia, with a belt at home before killing himself. And in June, an 80-year-old man was arrested on suspicion of killing his chronically ill, disabled wife in a bid to end her suffering ... .*"
- "Scholar calls for law to protect the elderly in Hong Kong - Ongoing study by the Chinese University's Centre for Rights and Justice found Hong Kong is lagging behind other regions when it comes to legal protections for senior citizens", *South China Morning Post* (6 Apr 2017), which stated: "*Zou also called for a mandatory reporting system on abuse of the elderly, citing the United States, which criminalised those who failed to report such cases ... .*" Available at: <http://www.scmp.com/news/hong-kong/health-environment/article/2085482/scholar-calls-law-protect-elderly-hong-kong>
- "Hong Kong police probe care home for leaving elderly naked in open air: care home in Tai Po reportedly exposes its residents on a podium before their showers", *South China Morning Post* (27 May 2015). Available at:

Report on SWD's monitoring of services of RCHE.<sup>120</sup> The investigation identified four areas of inadequacy in monitoring, including antiquated legislation, lax enforcement, an inadequate inspection mechanism and non-comprehensive provision of information on non-compliance by RCHEs.<sup>121</sup> Amongst the comments on the relevant legislation, it was observed that serious breaches by some RCHEs resulting in residents' physical and mental harm were not indictable offences under the Ordinance and the Regulation (such as infringement of residents' privacy, wrong administration of drugs, improper use of restraints, etc).<sup>122</sup> The Ombudsman recommended, *inter alia*, that amendments to the Ordinance should be initiated as soon as possible, including considering extending the scope of the legislation to cover offences currently not within the purview of the Ordinance and the Regulation. It was also recommended that all suspected elder abuse cases should be followed up diligently, and for serious incidents (such as the death of residents in RCHEs), SWD should actively and regularly follow up such cases with the police and/or the court, so as to take timely action against the RCHEs in question once the police or the court has reached a conclusion.<sup>123</sup>

### ***Abuse cases involving domestic workers***

2.145 The cases below illustrate the special position of domestic workers in the context of abuse cases. As one of the parties caring for and living under the same roof with their employers, they hold a duty of care towards members of that household, making them potential defendants if they fail to meet their duty of care. At the same time, due to the potential lack of bargaining power with their employers (and possible fear to seek assistance from the police if they have legal issues regarding their passports or visas<sup>124</sup>), domestic workers can also themselves be vulnerable to oppression or abuse.

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<http://www.scmp.com/news/hong-kong/law-crime/article/1810017/hong-kong-police-probe-care-home-leaving-elderly-naked-open>

- 120 Office of The Ombudsman (Dec 2018), above.
- 121 The Ombudsman has reviewed four cases without naming the RCHEs. See various news reports:
- "Editorial: Lack of oversight of nursing home", *Ming Pao* (14 Dec 2018, Chinese) (17 Dec 2018, English). Available at: <https://news.mingpao.com/pns/%E8%8B%B1%E6%96%87/article/20181217/s00017/1544984972145/editorial-lack-of-oversight-of-nursing-homes>;
  - "Has time come to change way homes for elderly in Hong Kong are operated? Lawmaker Fernando Cheung certainly thinks so", *South China Morning Post* (14 Dec 2018). Available at: <https://www.scmp.com/news/hong-kong/society/article/2177985/has-time-come-change-way-homes-elderly-hong-kong-are-operated>;
  - "Time to bring in mandatory accreditation scheme for Hong Kong's care homes, says senior government official", *South China Morning Post* (15 Dec 2018). Available at: <https://www.scmp.com/news/hong-kong/society/article/2178163/time-bring-mandatory-accreditation-scheme-hong-kongs-care>
- 122 Office of The Ombudsman (Dec 2018), above, Executive Summary (Annex I), at para 5. Available at: [https://ofomb.ombudsman.hk/abc/files/2018\\_12\\_Ombuds\\_News\\_E.pdf](https://ofomb.ombudsman.hk/abc/files/2018_12_Ombuds_News_E.pdf)
- 123 Same as above.
- 124 See "The Indonesian Child Maids of Hong Kong, Singapore: Why They're Suffering in Silence". *South China Morning Post* (25 Mar 2017). Available at: <http://www.scmp.com/week-asia/society/article/2081823/indonesian-child-maids-hong-kong-singapore-why-theyre-suffering>

*HKSAR v Siti Fatimah*

2.146 In *HKSAR v Siti Fatimah*,<sup>125</sup> the defendant was charged with child abuse under section 27(1) of the OAPO. She was a domestic worker employed by the victim's family, mainly responsible for taking care of the victim. The victim was an infant aged four months when he suffered a fracture to both of his arms. The fractures were noticed by the victim's grandmother when she was taking care of the crying victim in midnight. She questioned the defendant, who denied any knowledge of the child's injury. The doctor examining the victim said that such injury could not be caused by the infant himself.

2.147 The court doubted the reliability of the defendant, who claimed she had no knowledge of the infant's injury. The court considered it unreasonable for the defendant to claim that when the victim's grandmother shook the child's left arm the victim was laughing. It was also noted that the defendant had tried to stop the grandmother from giving the child a bath. All of the above suggested that the defendant was not credible and had knowledge of the injury. The defendant was sentenced to imprisonment for two years and nine months. The Deputy Judge commented that in a modern society where most mothers work to support their families, having domestic helpers to take care of family members had been a trend, and that as an employee, the defendant had the responsibility to protect the child rather than intentionally inflicting harm and pain; furthermore, that the increase in the maximum sentence for the offence in 1995 had indicated the seriousness of such offence.

*HKSAR v Law Wan-Tung*

2.148 *HKSAR v Law Wan-Tung*<sup>126</sup> is a well-known case related to the Indonesian domestic worker, Erwiana Sulistyaningsih. Law Wan-Tung was the employer of two domestic helpers, Erwiana and another Indonesian maid, Tutik Lestari Ningsih. It appeared both of them were victims of Law's abusive behaviour, with Erwiana receiving more severe injuries.

2.149 The defendant lived in Hong Kong with her family including two teenage children, who denied seeing their mother use violence towards the domestic helpers. Her husband did not live in the premises. The judge noted that it was significant that the defendant was the only adult in her household where the offences took place against Erwiana. During her employment, Erwiana was given little rest, sleep and nutrition. She was ordered to clean incessantly with cleaning detergent without the protection of gloves, and was forced to have plastic bags tied around her feet to keep the floor clean. Law had stripped the maid of her clothes in the bathroom, splashed her with cold water and pointed a blowing fan at her. Law had punched Erwiana so hard that her incisor teeth were fractured. On one occasion, Law twisted a

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125 *香港特別行政區 訴 Siti Fatimah* [2008] HKCA 705; CACC 116/2008 (5 Dec 2008).

126 [2015] HKDC 210; see DCCC 421/2014 & 651/2014 (10 & 27 Feb 2015). The defendant's application for leave to appeal was refused by the Court of Appeal (CACC 86/2015).

metal tube from a vacuum cleaner in the maid's mouth, causing cuts to her lips. For this particular assault, Law was found guilty of inflicting grievous bodily harm with intent, the most serious charge of all. Law had also made threats to kill Erwiana's parents. By January 2014, Erwiana was unable to physically work any longer, so Law sent her home with less than HK\$70.

2.150 Law pleaded guilty to one charge of failing to take out insurance policy for employee, and was convicted of 18 of the 20 remaining charges including inflicting grievous bodily harm, assault occasioning actual bodily harm and common assault. She was sentenced to six years in prison and fined HK\$15,000.

2.151 The court noted that the sole issue in this case was the credibility of witnesses and there were no independent witnesses, but the specificity and the diversity of the details of the individual incidents of the assaults charged led the judge to be sure that Ms Erwiana did not fabricate her evidence in order to frame the defendant. The medical and photographic evidence were capable of supporting her version of events. She was a simple young lady trying to financially better her life and that of her family like many others working away from home as domestic helpers in countries unfamiliar to them and in cultures different to their own. The court noted that she knew no one in Hong Kong and had no contact with any other Indonesian helpers whom she could have talked to. She was completely isolated and this helped to explain why the abuse could go on for so long without her retaliating or anyone knowing.

2.152 The court found the defendant's attitude towards the victims was contemptible and the defendant had no compassion towards the victims; people she considered beneath her. It was regrettable that such conduct, attitude, physical and mental abuse described by the victims was conduct not rare and, sadly, often dealt with in the criminal courts. In the court's view, such conduct could be prevented if domestic helpers were not forced to live in their employer's homes. Another issue highlighted by this case was the manner in which domestic helpers were charged significant fees by an agency at home, and their only means to repay it was to have it deducted from their wages in Hong Kong for a period of months. This deduction in this manner was illegal and the legislation was in place to protect such vulnerable persons. In reality, it was hard to detect. What might happen was the domestic helpers might become trapped when they were unable to leave or change employers because the debt had yet to be paid off. It could lead to their agencies turning a blind eye even if their safety or health was in danger because the domestic helper had to work to pay off the debt.

2.153 In *HKSAR v Gee Hoo Giok*, a 78-year old Indonesian Chinese woman was found guilty of causing grievous bodily harm with intent by pouring hot water on her Indonesian domestic helper, Ismiati. She was hired to take care of the husband of the defendant, however the husband died before Ismiati arrived from Indonesia. The defendant blamed Ismiati and scolded her for the husband's death. She also complained about her slow cooking and one day suddenly poured hot water from a kettle onto Ismiati's back while she was preparing dinner. The domestic helper was also fired on the same day. Subsequent medical examination found that she had moderate-degree burns, with redness on her back as well as blisters. She felt in pain and could not lie down on her back. She subsequently recovered from her injuries. The defendant denied that she had poured hot water on the domestic helper. The clinical psychologist in the case reported that since the defendant denied the incident, it was not possible to make an assessment. However, it was believed that the defendant attacked the helper in a moment of impulse, given that she was still grieving for her husband and that she had had to adjust to a new helper. She needed psychiatric treatment following the incident as she was worried about the case and suffered from depressive illness.

2.154 The District Court accepted that the case was an isolated incident with no premeditation, and understood that the death of a life partner could bring immense pain, and that the victim had said things to provoke the attack. However, the court also noted that the victim was attacked from behind with no opportunity to defend herself, and that she must have experienced a painful recovery. The court believed that imprisonment was the only option. Having considered the defendant's age, the court reduced the starting point of sentence from 15 months to 12 months, and imposed a fine of \$500 for terminating the contract of service during the victim's incapacity.

### **Issues which must be considered by the prosecution in bringing child abuse and vulnerable adult abuse cases**

2.155 As will be seen from the discussion below, there are significant practical issues which must be addressed by the prosecution before charges can be brought in child abuse and vulnerable adult abuse cases.

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127 香港特別行政區 訴 倪荷玉案 DCCC 136/2018, [2018] HKDC 1425. See "Woman, 78, jailed for a year by Hong Kong court for pouring hot water on Indonesian domestic helper" *South China Morning Post* (19 Nov 2018). Available at: <https://www.scmp.com/news/hong-kong/law-and-crime/article/2174008/woman-78-jailed-year-hong-kong-court-pouring-hot-water>

### ***Where a child or vulnerable adult dies as a result of abuse***

2.156 If there is more than one parent or carer responsible for looking after the victim and the suspects do not assist the police with their enquiries, the following matters are relevant to the prosecution in deciding which person(s) to charge.

#### *The time of infliction of injury and time of death*

2.157 If there is only one injury and it proved fatal, it is easier to determine who was responsible if these timings can be established, because often both carers would not have been present with the victim throughout the relevant period. Unfortunately, forensic pathologists can give only an approximate time of death (within a time frame of a few hours). The age of the injury is also highly relevant (for example, a fatal head injury can take some hours before unconsciousness sets in and death results).

#### *The actual cause of death*

2.158 For example, if a subdural haemorrhage has occurred, the question would be whether this was caused accidentally or by shaking and/or impact.<sup>128</sup>

#### *Possible accidental cause of death*

2.159 If an explanation is given by the carer as to how a victim accidentally received certain injuries, expert opinion (normally from a forensic pathologist) may be needed on this point. There are many cases where charges cannot be laid because a determination of accident or deliberate abuse cannot be made to the requisite standard of proof.

#### *More than one injury*

2.160 It is easier to infer abuse if there is more than one injury to the victim, but this may cause more difficulties in deciding who is responsible, particularly if the abuse has continued over a period of time (for example, some bruises and fractures weeks old, some very recent). This type of abuse tends to indicate that both parents/carers are likely to be abusers (or have condoned the abuse), because each of them would be expected to have noticed over time the increasing number of injuries to the victim, but clearly neither has taken any preventative action.

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128 It should be noted that problems have arisen recently in this area because medical opinion has shifted on 'shaken baby syndrome' (see Mark Hansen, "Unsettling Science", 97(12) *ABA Journal* 49 (2011)) resulting in successful appeals and more cases of non-prosecution. (For an example of a case where a conviction for the manslaughter of an infant was quashed on this basis, see *Allen v United Kingdom* [2013] ECHR 25424/09.)

### *Which injury caused death*

2.161 Sometimes it is difficult in such situations to determine which particular injury caused the death, especially if there are several possibly fatal injuries which were caused at different times. This again makes it more difficult to decide who is responsible. In some cases a medical cause of death cannot be established even though it is clear that the child victim must have been maltreated, so child neglect may be the only charge that can be laid, and even that may not be viable. It is essential that prosecutors have a conference with the forensic pathologist or other doctors involved (particularly in circumstances where there are problems as to when or how the death was caused) to try to narrow down the issues and ensure that appropriate charges can be laid against the appropriate people.

### *Intent indicated*

2.162 The question must be asked: did the carer/carers *intend* to kill or at least cause grievous bodily harm to the victim when the abuse/injuries were inflicted or when the event which caused the death occurred? For example, in a case where the evidence indicates that a baby was shaken deliberately and then slammed against a hard surface causing severe head injuries leading to death, murder may be considered the appropriate charge, as such actions tend to show an intention to cause at least grievous bodily harm. However, for various reasons it appears that often in these cases only a charge of manslaughter may be brought.<sup>129</sup>

### *Possible unfairness of resulting conviction*

2.163 In a situation where there are two carers responsible for a victim who dies of abuse, sometimes one may make admissions and take responsibility for the death and in the process exonerate his/her partner. Those involved in the investigation and prosecution may consider that the person exonerated was more likely to be the person who caused the victim's death but on the evidence available there is no choice but to proceed only against the carer who made the admissions.

2.164 The accused's right of silence before and during a criminal trial is of the utmost importance. However, there are often occasions when neither parent/carer is prepared to say anything to identify the perpetrator, nor will any potential witnesses. This can allow time to the person who may have killed the victim to think up an innocent explanation for the victim's injuries, without the fact that they originally refused to say anything being held against them at trial. As a result, cases can often only proceed if the medical evidence can prove that the injury which killed or harmed the victim was

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129 This should be contrasted with other types of child killing, such as the case of a mother who sat her baby on her lap in a confined toilet space whilst smoking heroin. The baby died from ingesting the heroin smoke. There was no evidence to suggest in that case that the mother intended any harm to come to her baby and therefore manslaughter was the appropriate charge on the basis of both unlawful act and gross negligence. (Compare the facts of other drugs-related cases: *HKSAR v Ng Man Kwong and Ho Yuk Kuen* HCCC 277/2005 and the English case of *Russell & Russell* (1987) 85 Cr App R 388 (CA), discussed above.)

caused deliberately during a time period when it was known that only one person was looking after the victim. Therefore, even where a child victim has died or suffered appalling injuries from abuse, the prosecutor often has to resort to laying a charge of child neglect under section 27 of the Offences against the Person Ordinance (Cap 212), rather than the more serious murder or manslaughter charges.

### ***Where the child or vulnerable adult is physically abused but survives***

2.165 There are additional issues which may arise in non-fatal abuse cases where a victim may be called to give evidence.

#### *Multi-disciplinary teams*

2.166 In cases involving child and other vulnerable witnesses, such as mentally handicapped persons, successful investigation and prosecution depends on the co-operation of various departments and professionals (for example, doctors, social workers, psychologists, teachers, police officers and lawyers).

2.167 Often a victim who is the subject of abuse is first sent to hospital and treated by a doctor. If the doctor suspects that it is a case of child abuse, he will refer the matter to the police. The role of the doctor is particularly important because he has to distinguish between sexual and/or physical abuse and accidental trauma. A trained doctor, with his or her experience and medical examination techniques, can identify a case of child abuse and preserve the evidence. Preservation of evidence is often an essential tool in subsequently obtaining a conviction in court.

#### *Interviewing the victim*

2.168 As soon as possible after the complaint has been made, the victim is first interviewed by police (often supported by a multi-disciplinary team) while the victim's memory is still fresh. This interview is often recorded for use in the court proceedings. It is important that those conducting the interviews are trained to ask the right question so as to elicit the right answer from the victim but without coaching by asking too many leading questions. (The extent to which leading questions are permissible is the subject of debate.<sup>130</sup>) The dangers of a victim being, in effect, told what to say by the use of leading questions by the interviewer are obvious. However, the danger of this does not necessarily render such questions objectionable.<sup>131</sup>

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130 Children may fantasise or exaggerate, or their memories may play tricks when interviewed, and a question which is leading in nature may help the quest to distinguish a case of actual abuse from one of accidental trauma or one of fantasy. Also a child may have been manipulated in some way, perhaps by one parent at the expense of the other. This is particularly prevalent where one partner is trying to shift the blame for his or her actions onto the other partner.

131 In *R v Dunphy* (1994) 98 Cr App Rep 393, the Court of Appeal endorsed the guidelines for interviewing child victims of sexual assaults as set out by Butler-Sloss LJ in her inquiry into child abuse in Cleveland (HMSO, Cm 412 & HMSO, Cm 413, July 1988). The same guidelines are appropriate in relation to cases involving any form of child abuse. Recommendation 4 of

### *The age of the victim*

2.169 If the victim is under six or seven years of age, it is highly unlikely that he or she will be able to give evidence in court. A charge in relation to the abuse and injuries suffered may not be able to proceed in such circumstances unless there is a confession or other evidence to rely on. Even with slightly older children who can give evidence, there are often difficulties associated with trying to get them to come up to proof in court.

### *Corroboration of victim's testimony*

2.170 Under the law prior to 1995, a child<sup>132</sup> could give unsworn evidence, but a person could not be convicted on the unsworn evidence of a child without corroboration. This corroboration rule was abolished in 1995.<sup>133</sup> In sexual offence cases, however, a judge must give a warning to the jury of the danger of convicting on the uncorroborated evidence of a witness. From the prosecution's point of view, this rule can make convictions more difficult to obtain in cases of child sexual abuse.

### *Video recorded evidence for vulnerable witnesses*

2.171 In 1996, the vulnerable witness legislation came into force in Hong Kong<sup>134</sup> allowing, among other things, for child and mentally handicapped victims to give evidence in court *via* live television link and by means of video recorded evidence.<sup>135</sup> These measures have afforded better protection to children and mentally incapacitated victims and have enabled more perpetrators of abuse to be brought to justice.<sup>136</sup>

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the report stated that, *"the style of interview should be open-ended questions to support and encourage the child in free recall"*.

132 Meaning in this context a person under 14 years of age.

133 Following an amendment to the Evidence Ordinance (Cap 8) in that year.

134 Ie, the Live Television Link and Video Recorded Evidence Rules (Cap 221J). See also Practice Direction 9.5, *Evidence by Way of Live Television Link or Video Recorded Testimony*.

135 A child in this context means a person who, in the case of an offence of sexual abuse, is under 17 years of age, and in the case of an offence which involves cruelty, assault or injury or threat of injury to a person, is under 14 years of age.

136 The Department of Justice has stated that it has:

*"... established procedures in handling the prosecution of cases involving vulnerable witnesses. In particular, the processing of the cases concerned would be expedited. "The Statement on the Treatment of Victims and Witnesses" (the Statement) sets out the rights of and the standard of service that victims and witnesses (including mentally incapacitated persons) should deserve in the criminal legal process. The Statement sets out the principles and guidelines regarding how the rights of witnesses (including mentally incapacitated persons) should be protected, e.g. where justified, prosecutors should make appropriate applications to the court for, e.g. the use of screens to shield witnesses while testifying in court, the use of two-way closed circuit television to enable witnesses to give evidence outside the courtroom through a televised link to the courtroom, and admission of video-recorded interviews as evidence-in-chief of witnesses who are mentally incapacitated persons.*

*However, to respect the rule of law, prosecutors should, at the same time, consider the right of a defendant to a fair trial. A prosecutor remains under a duty continually to review a prosecution that has been commenced. The prosecution must be discontinued if, following a change of circumstances (as in the current case where the Complainant has become unfit to be called, and hence could not be cross-examined by the defence), a re-application of the prosecution test at any stage indicates that the evidence is no longer sufficient to justify a*

2.172 The issues in this area can be complex, however. In 2016, the Department of Justice withdrew the prosecution against a care home warden charged with unlawful sexual intercourse with a mentally incapacitated female inmate contrary to section 125(1) of the Crimes Ordinance (Cap 200). The prosecution had arranged for the complainant to be video interviewed in accordance with section 79C of the Criminal Procedure Ordinance (Cap 221), and planned to apply to the court for leave to admit the recording as evidence. However, the complainant was diagnosed to be suffering from post-traumatic stress disorder and was unfit to be called as a witness for cross-examination. The video recording could not be admissible as evidence under the Criminal Procedure Ordinance and the Department of Justice formed the view that there was no reasonable prospect of proving any relevant charge against the defendant with the remaining evidence.<sup>137</sup>

*Hearsay evidence reform: Evidence (Amendment) Bill 2018*

2.173 Since the above case, the Government has gazetted the Evidence (Amendment) Bill 2018, on 22 June 2018, which was introduced into LegCo on 4 July 2018. The purpose of the amendment is to reform the common law rule against hearsay evidence in criminal proceedings<sup>138</sup> by way of a legislative scheme (and thus to align it with the developments in other major common law jurisdictions). The proposal is formulated on the basis of the recommendations of the LRC in its report, *Hearsay in Criminal Proceedings*, published in November 2009.<sup>139</sup> One of the LRC's recommendations was to empower the court with a discretion to admit hearsay evidence of a declarant who is unfit to be a witness because of his or her age, physical or mental condition, provided the court is satisfied with the reliability of the evidence. The Government anticipates that this reform will be conducive to protecting the special needs and interests of vulnerable persons.<sup>140</sup>

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*reasonable prospect of conviction or the interests of public justice no longer require the prosecution to proceed.”*

See: Department of Justice, Press Release (20 June 2018), available at: [https://www.doj.gov.hk/eng/public/pr/20180620\\_pr1.html](https://www.doj.gov.hk/eng/public/pr/20180620_pr1.html)

137 Department of Justice, Press Release (27 October 2016), available at: [https://www.doj.gov.hk/eng/public/pr/20161027\\_pr1.html](https://www.doj.gov.hk/eng/public/pr/20161027_pr1.html)

138 The common law rule against hearsay renders hearsay evidence generally inadmissible in criminal proceedings unless that evidence falls within one of the common law or statutory exceptions to the rule. The hearsay rule seeks to ensure that the witness's credibility and accuracy can be tested in cross-examination. Despite this rationale, the hearsay rule has been the subject of widespread criticism over the years from academics, practitioners and the bench. One of the main criticisms against the hearsay rule is that the rule is strict and inflexible, and excludes hearsay evidence even if it is otherwise cogent and relevant to the determination of the guilt or innocence of an accused. This sometimes results in the exclusion of evidence which by standards of ordinary life would be regarded as accurate and reliable, and can result in absurdity and also injustice.

139 Available at: <https://www.hkreform.gov.hk/en/publications/rcrimhearsay.htm>

140 See Legislative Council Brief (LP 5019/16C), Department of Justice (20 June 2018), at 3 to 4, available at: [http://www.legco.gov.hk/yr17-18/english/bills/brief/b201806221\\_brf.pdf](http://www.legco.gov.hk/yr17-18/english/bills/brief/b201806221_brf.pdf)

## Further issues

2.174 Issues which remain in relation to children and mentally impaired victims giving evidence in these cases include the following.

- (a) The law can only step in when there is a complaint and usually only if the victim is willing to, or capable of, giving evidence.<sup>141</sup>
- (b) Pending abuse cases are very easily compromised if the child/mentally impaired victim and the offender are part of the same family or live under the same roof. Family pressure is often applied, either to stop the victim making a complaint to police or to stop the victim giving evidence in court. The child/mentally impaired victim may also be made to feel that whatever happened was his or her fault.
- (c) Young children (victims or witnesses)/mentally impaired victim have difficulty in remembering exactly what happened or in what sequence after a few months have elapsed. They also find it difficult to be precise on certain details, such as timing. This problem is now helped by police making a video recording of the child/mentally impaired victim's evidence which can be presented to court as the evidence in chief, but the child/mentally impaired victim still has to be subjected to cross-examination at trial some months after the incident.
- (d) Children/mentally impaired victims can feel intimidated by the entire court experience. This may result in child/mentally impaired witnesses becoming distressed, staying silent, becoming confused, being afraid to tell the truth, or even distorting the truth. Children/mentally impaired victims may, due to the pressure of coming to court, come up with an answer to questions because they feel obliged to say something without thinking through precisely what it is they are saying.<sup>142</sup>

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141 Some mentally impaired teenagers, for example, have only the mental age of a 3 or 4 year-old.

142 It should be noted that following the introduction of the new legislation in 1996 in Hong Kong, the Chief Justice issued a Practice Direction to ensure that cases involving all vulnerable witnesses (including children and mentally handicapped persons) should be given priority for listing purposes. The Criminal Procedure Ordinance was amended in February 1996 to provide for a transfer of a case from the Magistrates Court direct to the Court of First Instance without going through committal proceedings. This procedure allows for more speedy trial of such cases and spares the child from giving evidence twice, once in committal proceedings and again in the trial. The intention is to avoid any prejudice to the welfare of the child because of delay. There is a list of practice directions to be followed when dealing with vulnerable witness cases all designed to make the trial less traumatic for the vulnerable victim.

For a discussion generally of issues related to vulnerable witnesses, see: Amanda Whitfort, *Criminal Procedure in Hong Kong: A Guide for Students and Practitioners* (2nd ed, 2012, LexisNexis), at 108 to 112.

## The need for reform in Hong Kong

*“The home is a secret place and few of the events that take place in it are witnessed by people other than the protagonists.”<sup>143</sup>*

2.175 The purpose of the criminal law is to blame those who have committed a defined wrong.<sup>144</sup> However, as the discussion of the law in this area reveals, the filing of a charge against a specific perpetrator in cases of physical abuse of children and vulnerable adults is particularly problematic where there was shared care at the time of the alleged assault. The main witness, the child, *“may be dead, badly injured or too young to give clear evidence.”<sup>145</sup>* Therefore, it may be impossible to identify which of the carers injured the child, and thus who can be held culpable.<sup>146</sup>

2.176 Those prosecuting these cases may consider that in too many instances, the charges which can be laid against individual carers do not fully reflect the gravity of the crimes committed against the victim. Not only is the identification of the person who committed ‘the unlawful act’ (ie, where the victim has died, the immediate cause of death) a difficult issue, but there may also be concern that the level of liability which can be imposed on ‘bystanders’ under the present law (ie, those who must be aware that serious harm is being inflicted on a victim by another) is limited and difficult to prove.

2.177 The seriousness of acts involving abuse and neglect of children has been fully noted by the legislature in Hong Kong:

*“Our law-makers have thought fit to increase the maximum sentence [for child abuse and neglect] to 10 years. It is evident that the legislature takes a very serious view of cases of this kind. That is a view which the courts cannot ignore.”<sup>147</sup>*

2.178 Although the maximum sentence for contravention of section 27 of the Offences against the Person Ordinance (Cap 212) was increased from

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143 Laura Hoyano & Caroline Keenan, *Child Abuse: Law and Policy across Boundaries* (2007, OUP), at 158.

144 The WHO has commented: *“Laws against violence send a clear message to society about unacceptable behaviour and legitimize the actions needed to ensure people’s safety at all times. ... The enactment and enforcement of legislation on crime and violence are critical for establishing norms of acceptable and unacceptable behaviour, and creating safe and peaceful societies. ... Legislation is a key component of any violence prevention policy or plan. For instance, appropriate legislation can encourage parents to move away from using harsh physical discipline toward their children.”* See World Health Organization, *Global status report on violence prevention* (2014, WHO), at 38.

145 Laura Hoyano & Caroline Keenan (2007), above, at 158.

146 Same as above.

147 *R v Lam Wai Mei* (1995) CACC 197/95, at para 3. See also *HKSAR v Lam Wai Man* [1999] 3 HKLRD 855, at 861, where the court stated: *“Legislation has in recent years increased the maximum sentence for ill-treatment or neglect by those in charge of a child from two years to ten years in order to enable the courts to be equipped to deal with cases as grave as this one.”*

two to ten years' imprisonment in 1995,<sup>148</sup> this reform appears to have been insufficient for the courts to deal with severest cases of child abuse and abuse of vulnerable adults where the victim is fatally injured.<sup>149</sup> Further change to the law may therefore be necessary. This is discussed later in this paper in Chapter 7 (in relation to Recommendation 3).

2.179 In considering any options for reform, it is essential that a careful balance should be struck, however, between the public's interest in seeing those guilty of extremely serious conduct towards children and vulnerable adults brought to justice, and the rights of individuals accused of crimes to receive a fair trial.<sup>150</sup> This has been one of the guiding principles of the Sub-committee considering this reference.

2.180 As will be seen later in this paper, while our review of this area has led us to propose the introduction of a new offence for Hong Kong (as detailed in Chapter 7), we do not consider it necessary or appropriate to propose any measures to place restrictions on the accused's right of silence or other procedural safeguards in criminal trials.

2.181 In addition to our proposed new offence for Hong Kong discussed in Chapter 7, we set out in Chapter 8 some more general observations on matters concerning the protection of children and vulnerable adults which we wish to bring to the attention of the Government, including further information on the reporting of abuse.

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148 This occurred in 1995, pursuant to section 51 of the Administration of Justice (Miscellaneous Provisions) (No 2) Ordinance 1995 (68 of 1995), which repealed and replaced the former sentence for indictable child abuse ("a fine of \$2,000 and to imprisonment for 2 years") and summary child abuse ("a fine of \$250 and to imprisonment for 6 months") to 10 years' imprisonment and 3 years' imprisonment respectively.

149 *HKSAR v Lam Wai Man*, same as above, at 861.

150 *R v S; R v C* [1996] Crim LR 340, at 347.

## Chapter 3

# Overseas legislative models for a new statutory offence – United Kingdom

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### Introduction

3.1 Following a series of high profile cases in England,<sup>1</sup> a survey conducted by the National Society for the Prevention of Cruelty to Children sought to address the question of whether these were “*isolated, sensationally reported cases, or is there truly a failure in our society to afford justice to child victims of serious crime?*”<sup>2</sup> The survey showed that from 1 January 1998 to 31 December 2000, more than 492 children under the age of 10 were unlawfully killed or seriously injured by their parents or carers.<sup>3</sup> This amounted to the alarming rate of three cases per week. Just over half of the victims were under six months' old, and 83% were under two years' old. It was revealed that “[d]espite it being clear to the police and to the Crown Prosecution Service that one of two people must have caused the child's injury or death, the majority of cases were nevertheless discontinued and never reached court.”<sup>4</sup> Of the 27% of cases of non-accidental death which resulted in conviction for a criminal offence, “*only a small proportion of those led to conviction for either homicide (murder or manslaughter) or wounding/ causing grievous bodily harm.*”<sup>5</sup> This contrasted with a 90% conviction rate for children killed by a stranger.<sup>6</sup>

3.2 In 2003, at the culmination of its landmark study on criminal trials concerning the non-accidental death or serious injury of children,<sup>7</sup> the English Law Commission produced a consultative report and final report on the issue. In answering the question of why there was a failure to prosecute

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- 1 For example, see the English cases discussed in Chapter 2, above, at para 2.49 *et seq.*
  - 2 Judge Isobel Plumstead, Papers for the NSPCC “Which of you did it?” Conference in Cambridge, 2 November 2002, Introduction and Background, para 8, referred to in English Law Commission report, *Children: Their Non-accidental Death or Serious Injury (Criminal Trials)* (Sep 2003, Law Com No 282), at para 2.28.
  - 3 See NSPCC, *Stop Parents Getting Away with Murder* (2002) and NSPCC report, *Which of you did it? Problems of achieving criminal convictions when a child dies or is seriously injured by parents and carers* (2003, NSPCC). See discussion of the research in Prof Mary Hayes, “Criminal Trials where a child is the victim: extra protection for children or a missed opportunity?” *Child and Family Law Quarterly* (1 Sep 2005) 17 3 (307), at 307, and in English Law Commission report (2003), above, at paras 2.28 to 2.31.
  - 4 Prof Mary Hayes (2005), above, at 307.
  - 5 See English Law Commission report (2003), above, at para 2.29.
  - 6 Prof Mary Hayes (2005), above, at note 1.
  - 7 See English Law Commission report (2003) above, and the Law Commission's earlier consultative document, *Children: Their Non-accidental Death or Serious Injury (Criminal Trials): A Consultative Report* (Apr 2003, Law Com No 279).

in almost 75% of cases where children were killed or seriously injured by one and/ or the other of their parents/ carers,<sup>8</sup> the Commission observed:

*“The primary reason for this is that the rules of evidence and procedure make it impossible in many cases for fact finders to be given the opportunity accurately to decide which member(s) of the small group of people who must have inflicted the injuries or killed the child is guilty. This is because the present law, as reflected in the decision of the Court of Appeal in Lane and Lane,<sup>9</sup> requires the trial judge to withdraw the case from the jury at the end of the prosecution case before any of the defendants has given evidence if at that stage the prosecution are unable to establish a 'case to answer' against either defendant.”<sup>10</sup>*

3.3 Amongst the many submissions it received in response to its consultation, the Law Commission highlighted those from members of the judiciary. One stated, “[h]aving tried a number of murders in which babies are the victim, I consider the law is long overdue for reform.”<sup>11</sup> Another stated, “[The consultation paper] gives a depressingly accurate account of the way in which courts ... have felt obliged to subordinate the particular interests of child protection to the demands of general and non-situation specific rules of English procedure.”<sup>12</sup> The Law Commission also noted that the Criminal Bar Association had begun its detailed response to the consultation with the explicit statement, “doing nothing is not an option.”<sup>13</sup>

3.4 The Law Commission recommended in its final report a scheme of reform which would comprise three initiatives: the creation of two new offences (one to apply where a child had died and the other to apply where the child suffered serious harm but survived); significant changes to certain evidential and procedural rules which would apply to both offences; and an underlying principle of statutory responsibility on parents and other carers of children to assist the police and the court by providing information about how the offence was committed.

3.5 The reforms which were subsequently enacted in the Domestic Violence, Crime and Victims Act 2004, while relying heavily on the research and findings of the Law Commission’s study, differed from the Commission’s model in several important respects. In particular, the Law Commission’s recommended underlying principle of statutory responsibility placed on parents and other carers of children was not adopted, nor were the specific

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8 English Law Commission consultative document (2003), above, Executive Summary, at para 1.

9 (1986) 82 Cr App R 5 (CA). In *Lane and Lane*, the mother and step-father of an infant girl were jointly indicted for manslaughter in relation to her death. They both had to be acquitted of the charge because the evidence showed only that one or the other of them had to have been responsible. See the discussion of this case in Chapter 2, above, at paras 2.40 to 2.44.

10 English Law Commission consultative document (2003), above, Executive Summary, at para 1.

11 *Per* Curtis J, see English Law Commission report (2003), above, at para 2.27.

12 *Per* Buxton LJ, same as above.

13 English Law Commission report (2003), above, at para 2.27.

offence and procedural reform models proposed by the Commission, and thirdly, while the Commission's offence provisions were to cover both fatal and serious harm cases, the offence and procedural reforms enacted in 2004 applied only to cases where the child or vulnerable adult had died as a result of his or her injuries.<sup>14</sup> (The relevant provisions were extended to cover cases involving serious physical harm to the victim in 2012.<sup>15</sup>)

3.6 The details of the two reform models (the English Law Commission's proposed model and the model which was subsequently enacted as part of the Domestic Violence, Crime and Victims Act 2004) are discussed below.

### **The reform model proposed by the English Law Commission**

3.7 As noted above, the English Law Commission recommended a scheme of reform which would comprise:

- the creation of two new offences; one for fatal cases, the other to apply where the child suffered serious harm but survived;
- certain changes to evidential and procedural rules which were to apply to both offences; and
- an underlying principle of statutory responsibility placed on parents and other carers of children to assist at the investigation and trial stages in disclosing what happened to the child.<sup>16</sup>

3.8 The recommendations were encapsulated in a draft Bill appended to the Law Commission's report.<sup>17</sup> The proposed offence provisions were set out in Part 1 of the Bill and the provisions on the statutory responsibility and evidential and procedural changes in Part 2. (The text of the Law Commission's draft Bill appears at Annex D to this paper.)

#### ***Part 1 of the Law Commission's draft Bill***

##### *The Law Commission's proposed first offence: "cruelty contributing to death"*

3.9 The Law Commission's proposals under this head were to augment the existing 'child neglect' provisions in section 1 of the Children and

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14 See sections 5 and 6, Domestic Violence, Crime and Victims Act 2004 (UK) ("DVCVA").

15 The Domestic Violence, Crime and Victims (Amendment) Act 2012 amended sections 5 and 6 and added a new section 6A to the DVCVA.

16 See English Law Commission report (2003), above. See also commentary on the Law Commission's recommendations by Richard Ward and Roger Bird, *Domestic Violence, Crime and Victims Act 2004 – A Practitioner's Guide* (2005, Jordan), at paras 3.5 and 3.34 and Prof Mary Hayes (2005), above.

17 English Law Commission report (2003), above, at Appendix A, at 79 *et seq.*

Young Persons Act 1933,<sup>18</sup> which is similar to Hong Kong's section 27 of the Offences against the Person Ordinance (Cap 212) discussed earlier in Chapter 2.

3.10 The Law Commission described its proposed first offence as “*an aggravated form*” of the offence of cruelty under section 1 of the 1933 Act.<sup>19</sup> In its commentary on the proposed offence, the Law Commission stated:

*“6.6 The intention of this draft clause is to state accurately the mechanism by which the basic culpability of the person who commits the offence under section 1 becomes aggravated by the death of the child, including those cases where the blow is struck by a third party. We believe that the clause achieves our aim of making it clear that it is not necessary for a conviction under the proposed new section that the person who is guilty of the basic section 1 offence causes the child's death in a sense sufficient to justify a conviction for manslaughter.*

*6.7 It is sufficient for a conviction under section 1 that the person has, by wilful cruelty or neglect, brought about a state of affairs which is likely to cause suffering or injury to health. Cases under section 1 indicate that a person may be liable where the likelihood is that a third party will injure the child. The aggravated offence will be committed where, in addition, such suffering or injury to health as was likely to happen has in fact occurred, and has resulted in or contributed significantly to the child's death. It is the establishment, by this mechanism, of a connection between the person's breach of section 1 and the death of the child which exposes the person to a possibly higher level of sentence and ensures that the label attached to their crime reflects that fatal outcome.*

*6.8 We have retained the maximum sentence at 14 years. There were a small number of respondents who argued that a discretionary life sentence should be available. For the reasons we gave in the Consultative Report we are of the view that a maximum of 14 years gives the judiciary sufficient ‘headroom’ to reflect the full range of seriousness of the*

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18 Under the 1933 Act, the defendant must have attained the age of 16 years and have “*responsibility*” for the child before he can be prosecuted. The definition of “*responsibility*” appears in section 17 of the 1933 Act. Responsibility is presumed for: anyone with parental responsibility for the child within the meaning of the Children Act 1989; anyone otherwise legally liable to maintain the child (such as an unmarried father); and anyone who has “*care*” of the child (which is a question of fact). (Those with “*parental responsibility*” include: all mothers and married fathers, some unmarried fathers, anyone who has a residence order under section 8 of the Children Act 1989 and prospective adopters with a placement order under section 25(3) of the Adoption and Children Act 2002.)

19 English Law Commission report (2003), above, at para 4.5 and English Law Commission consultative document (2003), above, at para 7.13. Section 1 of the Children and Young Persons Act 1933 is similar to Hong Kong's section 27 of the Offences against the Person Ordinance (Cap 212). Note: for the text of section 1 of the 1933 Act, see Annex E to this paper.

*offence whilst differentiating it from manslaughter.”*<sup>20</sup>  
[Emphasis added.]

*The Law Commission’s proposed second offence: “failure to protect a child”*

3.11 Significantly, the second offence proposed by the Law Commission was not confined to serious harm *resulting in death*, but included awareness of the risk of several non-fatal serious offences being inflicted on the child. The Law Commission recommended:

*“That a new offence should be created by which it would be an offence, punishable by a maximum of seven years imprisonment, for a person who has responsibility for a child to fail, so far as is reasonably practicable for him or her to do so, to prevent the child suffering serious harm deriving from ill treatment.*

*That the offence will only have been committed if the child has suffered serious harm deriving from ill treatment which will only be the case where the child has been the victim of one or more of the following offences: murder; manslaughter; an assault under section 18 or 20 of the Offences Against the Person Act 1861 [ie, wounding and causing grievous bodily harm]; rape; or indecent assault.*<sup>21</sup> [Emphasis added.]

3.12 It was proposed that the offence would apply to cases where the defendant was at least 16 years old, had responsibility for the child and was “connected” with the child. Clause 2(4) of the draft Bill defined “connected” with the child:

*“The defendant is connected with the child if:*

- (a) they live in the same household;*
- (b) they are related; or*
- (c) the defendant looks after the child under a child care arrangement.”*

3.13 The child and the defendant are “related” under clause 2(5) of the draft Bill “*if they are relatives within the meaning of Part 4 of the Family Law Act 1996.*” A “relative” for the purposes of that Act<sup>22</sup> means:

- “(a) the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather,*

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20 English Law Commission report (2003), above, at paras 6.6 to 6.8.

21 English Law Commission report (2003), above, at para 6.9. The full range of offences was set out in Schedule 1 to the Law Commission’s Draft Bill.

22 See section 63 (the “interpretation” provision) in Part IV of the Family Law Act 1996. This part of the Act relates to “Family Homes and Domestic Violence”.

*grandson or granddaughter of that person or of that person's spouse, former spouse, civil partner or former civil partner, or*

- (b) *the brother, sister, uncle, aunt, niece, nephew or first cousin (whether of the full blood or of the half blood or by marriage or civil partnership) of that person or of that person's spouse, former spouse, civil partner or former civil partner,*

*and includes, in relation to a person who is cohabiting or has cohabited with another person, any person who would fall within paragraph (a) or (b) if the parties were married to each other or were civil partners of each other*.<sup>23</sup>

3.14 Clause 2(6) of the draft Bill states that the defendant looks after the child “*under a child care arrangement*” if the defendant -

- (a) looks after the child (whether alone or with other children) under arrangements made with a person who lives in the same household as, or is related to, the child; and
- (b) does so wholly or mainly in the child's home.

3.15 Clause 2(7) notes that it does not matter whether the defendant looks after the child “*for reward or on a regular or occasional basis.*”

## ***Part 2 of the Law Commission's draft Bill***

3.16 The evidential and procedural changes proposed in Part 2 of the draft Bill were to apply in respect of both the “*cruelty contributing to death*” and “*failure to protect a child*” offences described above.<sup>24</sup>

### *A new statutory responsibility*

3.17 To underpin the changes proposed in this Part, the Law Commission recommended that persons with responsibility for a child at the time when a serious offence against the child was committed were to be regarded by law as having “*statutory responsibility*” for the child (clause 4 of the draft Bill).<sup>25</sup> The nature of this statutory responsibility was to assist the

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23 Section 63 of the Family Law Act 1996 also refers to “*relevant child*”, which is given the meaning attributed to it in section 62(2). Section 62 deals with “*Meaning of 'cohabitants', 'relevant child' and 'associated persons'.*” Section 62(2) states that “*‘relevant child’ in relation to any proceedings under this Part, means: (a) any child who is living with or might reasonably be expected to live with either party to the proceedings; (b) any child in relation to whom an order under the Adoption Act 1976[, the Adoption and Children Act 2002] or the Children Act 1989 is in question in the proceedings; and (c) any other child whose interests the court considers relevant.*”

24 See Ward and Bird (2005), at paras 3.8 and 3.33.

25 See English Law Commission report (2003), above, at paras 6.35 to 6.36.

police in any investigation of the offence and to assist the court in any proceedings in respect of the offence “by providing as much information as the person was able to give about whether and, if so, by whom and in what circumstances the offence was committed” (clause 4).

#### *Investigations by the police*

3.18 The Law Commission recommended under clause 5 of the draft Bill that a police officer would be required to explain the nature and implications of this statutory responsibility to an accused person when administering the normal caution. The officer would be required to spell out to the accused that adverse inferences might be drawn by a court should the accused fail to mention, when questioned, facts that he or she should mention in the light of the statutory responsibility.<sup>26</sup>

#### *Responsibility of witnesses in criminal proceedings*

3.19 Clause 6 specified the proposed ways in which the responsibility operated for a person who was a witness, but not a defendant, in relevant criminal proceedings. Such a witness who declined to give information to the court would be open to proceedings for contempt of court.<sup>27</sup>

#### *Special procedure during trial*

3.20 The Law Commission stated that clause 7 of the draft Bill set out “the mechanism by which we intend that the effects of *Lane v Lane* may be avoided”<sup>28</sup> (ie, that where the prosecution cannot establish a *prima facie* case against a defendant, the court is obliged to dismiss the case at that stage even though it must have been one of the two defendants who committed the offence and neither has given an explanation).<sup>29</sup>

3.21 Under clause 7 of the draft Bill, the Law Commission recommended a special procedure to handle trials for a serious offence against a child where two or more persons were charged. Three conditions would have to be met for the special procedure to be triggered:

- (1) the judge would have to be sure that the offence charged, or any alternative offence, had been committed;
- (2) the prosecution would have to prove that there was a closed group of persons amongst whom one, or some, or all must have committed the offence (this condition was described as a “*crucial provision for the operation of the scheme*”<sup>30</sup>); and

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26 Same as above, at para 6.37.

27 Same as above, at para 6.49.

28 Same as above, at para 6.58.

29 Same as above, at note 38.

30 Same as above, at paras 6.61 to 6.62.

- (3) that at least one of the defendants was subject to the statutory responsibility. (*“Thus, the non responsible boyfriend who is one of the known group of suspects and is a defendant will not be able to have the case against him discharged before he or his co-accused have had the opportunity to give evidence.”*<sup>31</sup>)

3.22 The Law Commission recommended that where the three specified conditions were met at the conclusion of the prosecution case, the defence would not be allowed to submit a no case to answer at this stage and the trial would continue. A submission of no case to answer would not be made until the conclusion of the defence case.<sup>32</sup>

#### *Inferences from accused's silence*

3.23 Under clause 8 of the draft Bill, the Law Commission proposed that in cases where a defendant was on trial for a serious offence against a child and owed the statutory responsibility, the court or the jury could draw adverse inferences from the defendant's failure or refusal to give evidence or to answer questions. Where a defendant chose not to give evidence, he would be warned by the court that inferences could be drawn from his silence in the light of his statutory responsibility, including inferences leading to a determination of guilt.<sup>33</sup>

3.24 As discussed below, the English Law Commission's proposals were not closely followed by the UK Government in the subsequently enacted section 5 offence under the Domestic Violence, Crime and Victims Act 2004 and its related evidential and procedural reforms in section 6 (and subsequently, section 6A) of the Act.<sup>34</sup>

## **The reform model enacted in the UK's Domestic Violence, Crime and Victims Act 2004**

### ***Introduction***

3.25. On the 5 November 2004, the Domestic Violence, Crime and Victims Act 2004 received Royal Assent. It was described at the time as *“the biggest overhaul of the law of domestic violence in the last 30 years.”*<sup>35</sup>

3.26 Included within its range of reforms in the three distinct areas of domestic violence, crime and victims, was a new offence of *“causing or allowing the death of a child or vulnerable adult”*, comprised in section 5 of the

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31 Same as above, at para 6.63.

32 Same as above, at para 6.67.

33 Same as above, at paras 6.78 to 6.97.

34 Ward and Bird (2005), above, at paras 3.5 and 3.17.

35 See UK Home Office Circular 9/2005, “The Domestic Violence, Crime and Victims Act 2004. The new offence of causing or allowing the death of a child or vulnerable adult”, at para 1.

Act. (This offence is also referred to as “*familial homicide*”<sup>36</sup>.) To support the new offence, section 6 (and now section 6A) introduced significant changes to the pre-existing rules of evidence and procedure to better facilitate the prosecution of cases under the section 5 offence. (These provisions are set out in full in Annex C to this paper.)

## **Reforms to the substantive law**

### *Creation of a specific offence*

3.27 The enacted offence in section 5 of the 2004 Act draws on but does not replicate the recommendations of the English Law Commission.<sup>37</sup> While the enacted offence is wider than the Law Commission’s recommendations in extending the scope of the new offence to include “*vulnerable persons*”, in other respects the Act “*draws the law more narrowly,*” in particular, by not (then) extending the offence to cover cases of “*serious assaults or woundings, or cruelty, which do not result in death.*”<sup>38</sup> (It was so extended in 2012.<sup>39</sup>) Further, the concept of “*statutory responsibility*” underlying the Law Commission’s reform proposals also was not adopted in the enacted model.

### *Nature of the offence*

3.28 The operative part of the offence is set out in section 5(1):

- “(1) A person (“D”) is guilty of an offence if-
- (a) a child or vulnerable adult (“V”) dies or suffers serious physical harm as a result of the unlawful act of a person who-
    - (i) was a member of the same household as V, and
    - (ii) had frequent contact with him,
  - (b) D was such a person at the time of that act,
  - (c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and

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36 See Crown Prosecution Service guidelines, under “Familial Deaths and Serious Physical Harm” in “Homicide: Murder and Manslaughter”, available at: <https://www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter>

37 See Ward and Bird (2005), above, at para 3.2.

38 See Ward and Bird (2005), above, at paras 3.5 and 3.7.

39 By virtue of the Domestic Violence, Crime and Victims (Amendment) Act 2012, discussed below.

- (d) *either D was the person whose act caused the death or serious physical harm or-*
  - (i) *D was, or ought to have been, aware of the risk mentioned in paragraph (c),*
  - (ii) *D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and*
  - (iii) *the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.”*

3.29 The scope of the section 5 offence and its various elements are discussed below.

#### *Overview of what has to be proven*

3.30 The offence applies only in domestic situations. It can be committed either by the defendant having caused the death or serious physical harm to the victim, or by the defendant having failed to take reasonable steps to protect the victim from the risk of serious physical harm which the defendant should have been aware of.<sup>40</sup> The prosecution does not have to prove which of these alternatives applies.<sup>41</sup> The Crown Prosecution Service (CPS) has stated:

*“In other words, D is equally liable to conviction whether he or she was the perpetrator of the act that actually caused V’s death or serious physical harm or simply failed to protect V from a foreseeable risk of serious physical harm from another member of the household who had frequent contact with V.”<sup>42</sup>*

The CPS goes on to state:

*“It will quickly be appreciated how this dual basis for criminal liability remedies one of the main perceived difficulties with the*

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40 Ward and Bird (2005), above, at para. 3.1.

41 Section 5(2) of the DVCVA. See Ward and Bird (2005), above, at para 3.15. The provision does not appear to offend the principle against duplicity since section 5 involves only a single count, notwithstanding the fact that it stipulates two possible ways in which one could be convicted of the offence: *“The s 5 offence is, arguably, to be regarded as one offence, albeit with two, alternative, means of commission, and probably does not infringe the principle of duplicity if indicted in one count. There is one maximum punishment, and Parliament clearly intends that this one offence can be committed in one of two ways, the prosecution being under no obligation to prove which. Often the prosecution will not know, at the time of charge and arraignment, which route to go down – this is, after all, why the offence has been created”*: see same as above, at para 3.15. See further the case of *R v McCarney* [2015] NICA 27, discussed below.

42 See Crown Prosecution Service guidelines, under “Homicide: Murder and Manslaughter”, (“Familial Deaths and Serious Physical Harm”), above.

*law relating to other possible charges such as murder or manslaughter.*<sup>43</sup>

3.31 Situations where it is considered that the offence will *not* apply, include:

*“[W]here the death was an accident, or was the result of a cot death (sudden infant death syndrome). Nor will it apply where there was one specific known risk within a household, such as a violent or abusive person, but the child or vulnerable person died or may have died from a different cause. The offence therefore does not criminalise members of the household for allowing the death if the death was the result of an event which they could not have anticipated or avoided.”*<sup>44</sup>

*The victim – “a child or vulnerable adult”*

3.32 The term “*child*” is defined in section 5(6) of the Act as “*a person under the age of 16*”.

3.33 “*Vulnerable adult*” means, pursuant to section 5(6), “*a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.*”

3.34 As will be seen later in this chapter, the courts have adopted an expansive interpretation of the term “*vulnerable adult*”. The state of vulnerability does not need to be long-lasting; it may be short, or temporary and a fit adult may become vulnerable as a result of accident, injury or illness; the anticipation of full recovery may not diminish the individual’s temporary vulnerability.<sup>45</sup>

3.35 Halsbury observes that the words “*or otherwise*” in the definition of “*vulnerable adult*” in section 5(6) have created a separate third category, which can simply be defined as a cause (other than physical or mental disability or illness or old age) which has the effect on the victim of significantly impairing his ability to protect himself from violence, abuse or neglect.<sup>46</sup> In principle, there is no limit to the facts and circumstances that might lead to a person finding himself or herself in a state of impaired ability to obtain protection; the inquiry the court must perform is fact- and context-sensitive; the causes of vulnerability may be physical, psychological or may

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43 Same as above.

44 UK Ministry of Justice, Criminal Law & Legal Policy Unit, “Domestic Violence, Crime and Victims (Amendment) Act 2012” (Circular No 2012/03, June 2012), at para 13.

45 *Halsbury’s Laws of England/Criminal Law* (Volume 25 (2016)) (“*Halsbury’s Laws of England* (2016)”), para 123, footnote 2; see also *Archbold Criminal Pleading Evidence and Practice* (2019 ed, Sweet & Maxwell) (“*Archbold UK* (2019)”), at para 19-170.

46 *Halsbury’s Laws of England* (2016), above, at para 123, footnote 2.

arise from the victim's circumstances, but the third category is not limited to cases of "utter dependency".<sup>47</sup>

3.36 In *R v Khan and Others*,<sup>48</sup> a case discussed further below, there was some consideration of scope of the term "vulnerable adult", with the conclusion that "an adult who is utterly dependent on others, even if physically young or apparently fit, may fall within the protective ambit of the Act".<sup>49</sup> The judgment highlights that the courts were not ruling out that an individual isolated by a lack of friends and a language barrier (the situation of the victim in *Khan*) may be considered "vulnerable" for the purposes of the causing or allowing offence under section 5 of the Act.

*The offender – "a member of the same household"*

3.37 It should be emphasised that section 5 applies only in a "domestic, family environment, and is not intended to apply to cases where the victim was in public institutional care."<sup>50</sup>

3.38 The concept of "living in the same household" also extends to include non-cohabiting couples.<sup>51</sup> Section 5(4)(a) provides that a person is to be regarded as a "member" of a particular household even if he does not live in that household, provided that he visits it so often and for such periods of time that it is reasonable to regard him as a member of it. Archbold notes that no further guidance is given by the Act as to how findings of fact are to be made. Issues such as the number of visits, the length of visits and other factors which will render a person a "member of the household" are left unspecified.<sup>52</sup> The uncertainty over the meaning of "household" has raised criticism. For example, Jonathan Herring has noted:<sup>53</sup>

*"Notably the Act does not cover relatives who are not a member of the child's household. If a close relative was present at the time when the child was killed it is not obvious that they should escape liability. For example, if a father who no longer lives with the child and has only occasional contact with the child is present at the time of the killing why should he not be expected to protect the children from a serious danger? All will depend on whether his visits to the household are 'so often and for such periods of time that it is reasonable to regard him as a member of it'. It is far from clear what frequency of contact will do that. And what of a father who sees the child very regularly but not at the child's house?...It might be stretching it too far to say that a*

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47 Archbold UK (2019), above, at para 19-170.

48 [2009] 4 All ER 544 (CA).

49 Same as above, at para 26.

50 Ward and Bird (2005), above, at para 3.19.

51 Section 4, DVCVA.

52 Archbold News 2005 (2), above, at 7. See also Ward and Bird (2005), above, at para 3.19.

53 Jonathan Herring, "Mum's Not the Word: An Analysis of Section 5, Domestic Violence, Crime and Victims Act 2004" in C M V Clarkson and Sally Cunningham (eds) *Criminal Liability for Non-Aggressive Death* (Ashgate, Hampshire, 2008), at 130.

*father who has never entered the house is a member of the household.”*

### *“Frequent contact”*

3.39 The prosecution must show *“frequent contact”* between the victim and the individual who caused the victim's death or serious harm. It is a simple question of fact and is a free-standing concept which is irrelevant to the determination of the criteria found in section 5(1)(d).<sup>54</sup> Nevertheless, in making the final determination as to whether a defendant is a member of the household, it is *“the conclusion of the court that matters, not the state of mind of D, although that will, no doubt, be a relevant consideration in deciding whether in fact it is reasonable to so regard the defendant.”*<sup>55</sup> The court will make such a determination having regard to the policy behind the legislation (that the section 5 offence was created to punish only those who are *“guilty of, or complicit in, violence within the domestic context”*<sup>56</sup>).

3.40 Section 5(4)(b) of the Act provides for cases where the victim lived in different *“households”* at different times.

3.41 While other household members must be over 16, a parent of the child who is under the age of 16 may face prosecution for a section 5 offence under section 5(3).

### *The victim has died or suffered serious physical harm*

3.42 As noted earlier, the original section 5 offence applied only in cases of fatality and so did not cover assaults, woundings or cruelty to children which did not result in death, on the basis that these offences were dealt with under section 1 of the Children and Young Persons Act 1933.<sup>57</sup> It was suggested that the failure to extend the provisions beyond fatal cases in the 2004 version of the offence, *“reflect[ed] a cautious approach by Government, perhaps showing an awareness of the difficult balance to be struck between securing convictions and the rights of defendants.”*<sup>58</sup> In 2012, however, the offence was extended to cover causing or allowing serious physical harm (equivalent to grievous bodily harm) to a child or vulnerable

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54 Archbold UK (2019), above, at para 19-170 and Halsbury's Laws of England (2016), above, para 123, footnote 5. The Court of Appeal in the case of *R v Khan* rejected the appellants' argument that the term *“frequent contact”* has to be interpreted in conjunction with sections 5(1)(d)(i) and (iii), ie, *“to be examined in the context of the risk against which the victim required protection, and the Defendant's awareness of that risk”*. It was held that the frequency of contact was a *“free-standing”* concept, in which no statutory definition is required. See para 29.

55 Ward and Bird (2005), above, at para 3.19.

56 Same as above, at para 3.20.

57 Section 1 of the 1933 Act states: *“If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats (whether physically or otherwise), neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated (whether physically or otherwise), neglected, abandoned or exposed, in a manner likely to cause him unnecessary suffering or injury to health (whether the suffering or injury is of a physical or a psychological nature), that person shall be guilty of an offence.”* The relevant provisions are set out in Annex E to this paper.

58 Ward and Bird (2005), above, at para 3.8.

adult.<sup>59</sup> “Grievous bodily harm” is taken to mean “really serious harm”<sup>60</sup>, and the level of harm is to be judged objectively.<sup>61</sup>

#### “Unlawful act”

3.43 This is defined by section 5(5). Ward and Bird note that it includes any act that amounts to an offence:

*“The DVCVA 2004 does not in any way limit the type or nature of the conduct or offence that may constitute the ‘unlawful act’ for the purposes of s 5. Clearly, the mischief being addressed by s 5 means that murder and the wide range of offences against the person (grievous bodily harm, assaults, sexual offences) obviously fall within the scope of s 5.”*<sup>62</sup>

3.44 The reasoning behind the construction of this provision requiring an “unlawful act” is so that it will not criminalise those who are careless with the safety of the victim.<sup>63</sup> This acts as a safeguard which ensures that only those who have neglected to protect their child from a significant level of risk of serious harm would be punished accordingly on an indictable basis. This is due to the fact that the offence under section 5:

*“... is a departure from the normal approach of the criminal law, in that it effectively imposes a duty to act, going beyond the duty traditionally imposed on parents or those who assume responsibility for a child. It imposes, in some circumstances, criminal liability for negligence falling short of that sufficient to found a conviction for manslaughter.”*<sup>64</sup>

3.45 The requirement that the act causing death be in circumstances “of the kind” which the defendant foresaw or should have foreseen is a matter for the jury; the requirement is for similarity in kind, not that the circumstances be identical.<sup>65</sup>

3.46 Whilst the requirement of an “unlawful act” appears to require a positive act, section 5(6) stipulates that the term “act” also includes a course

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59 See Domestic Violence, Crime and Victims (Amendment) Act 2012, Explanatory Notes, at para 5.

60 *DPP v Smith* [1961] AC 290, [1960] 3 All ER 161.

61 *Brown v Stratton* [1998] Crim LR 485. Although serious harm can include serious psychiatric injury (*Ireland; Burstow* [1998] AC 147, [1997] 4 All ER 225), “the use of the term ‘physical harm’ might point to this being outside the scope of s 5. [In any event it is unlikely that psychiatric harm will of itself cause death.] It is, though, certainly within the bounds of possibility that psychiatric harm might form part of a course of mistreatment, physical or mental, that leads to death, and is not something which a court should be constrained from considering.” See Ward and Bird (2005), above, at para 3.17.

62 Ward and Bird (2005), above, at paras 3.16 to 3.17.

63 R Ward, “Protecting the Victims of Crime – Part 2” (2005) *New Law Journal*, at 1218 to 1219.

64 Same as above.

65 *Halsbury’s Laws of England* (2016), above, at para 123, footnote 14; and *Archbold UK* (2019), above, at para 19-170.

of conduct which includes omission. This caters for instances where the child's death was caused by a parent's failure or neglect to protect the child from being subjected to further acts of abuse. Ward and Bird observe:

*“Thus a systematic series of assaults which cumulatively cause death will be within s 5, as will a failure to feed, clothe or seek medical treatment. Omissions can, of course, constitute the offence of cruelty under s 1 of the Children and Young Persons Act 1933, and may constitute manslaughter, by virtue of gross negligence or because of an unlawful act. ... [C]learly omissions which constitute manslaughter or cruelty are unlawful ‘acts’ for this purpose.”<sup>66</sup>*

3.47 In making its related recommendation, the English Law Commission had proposed that a schedule of relevant offences should be listed as qualifying as an “*omission*” under section 5(6). However, this recommendation was not taken up.<sup>67</sup>

*“Significant risk” of serious physical harm*

3.48 *“Risk’ relates to the probability that a harmful event or behaviour will occur.”<sup>68</sup>* The risk that must have been perceived by the defendant must be the significant risk of serious physical harm caused to the victim by the *unlawful* act of a member of the household. This reaffirms the idea that the risk does not arise from an accident causing death.<sup>69</sup>

3.49 Pursuant to section 5(1)(c) of the Act, the level of risk, as noted earlier, is designated at “*significant*” (compared to risks that are trivial or remote) in a bid to avoid criminalising those who are careless with the safety of a child or vulnerable person killed or seriously harmed by an unlawful act.<sup>70</sup> The word “*significant*” should bear its normal, ordinary meaning,<sup>71</sup> and the decision as to whether the risk of serious physical harm was significant is one of fact for the jury applying their collective understanding of the word.<sup>72</sup> When directing the jury, a judge should not seek to define the word<sup>73</sup> (by saying that it means “*more than minimal*”); and, if they ask for a definition, they should be directed that the word should be given its ordinary meaning.<sup>74</sup>

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66 Ward and Bird (2005), above, at para 3.18.

67 Same as above, at para 3.17.

68 Same as above, at para 3.24.

69 Same as above, at para 3.25.

70 English Law Commission Report (2003), above, at para 6.20.

71 See *Brutus v Cozens* [1973] AC 854 (HL).

72 *Halsbury’s Laws of England* (2016), above, at para 123, footnote 7; and *Archbold UK* (2019), above, at para 19-170.

73 *Archbold UK* (2019), above, at para 19-170, citing *R v Stephens and Mujuru* [2007] 2 Cr App R 28 (CA), discussed below.

74 *Archbold UK* (2019), above, at para 19-170.

*“Ought to have been aware”*

3.50 The test for criminal liability under the section 5 offence involves both objective and subjective elements. The fact that the risk is one of which the defendant *“ought to have been aware”*<sup>75</sup> introduces an objective element. Accordingly, the defendant cannot escape criminal liability by being so careless of the safety of the victim that he did not think there was any risk when he ought to have done so.<sup>76</sup> Archbold notes:

*“On the other hand, the standard is not that of the reasonable person, but, rather, whether that particular individual ought to have been aware of the significant risk of serious physical harm. That will turn on the characteristics of the defendant, and the circumstances of the relationship of the defendant with others, including the victim.”*<sup>77</sup>

3.51 It bears noting that to be guilty of the offence under section 5, the defendant need not realise that the victim is a vulnerable adult, as it would appear that the vulnerable adult element of the offence is determined by strict liability, as opposed to the negligence standard placed on the offence as a whole. It would appear that the defendant is under a duty as soon as he or she ought to have realised that any member of the household is at a significant risk of grievous bodily harm from any other member of the household, whether the victim is a child or even a fit adult.<sup>78</sup>

*“Defendant's failure to take steps”*

3.52 Because section 5 is targeted at resolving the difficulties posed in a 'who did it' type of case, it is more likely that the prosecution will endeavour to show that the defendant failed to take such steps as he could reasonably have been expected to take to protect the victim from the risk. Ward and Bird observe:

*“What amount to the steps that D could have reasonably been expected to take will be a matter of fact, to be determined by the jury. The concept is partly objective. It will not be enough for the matter to be judged on what this defendant thought it was appropriate to do. ... [The judge and the jury] will then have to make a judgment about what was reasonable for this defendant to do. That does involve a subjective element... .”*<sup>79</sup>

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75 Section 5, DVCVA.

76 *Archbold News* 2005 (2), above, at 8.

77 Same as above.

78 Lauren Clayton-Helm, “To Punish Or Not To Punish? Dealing With Death Or Serious Injury Of A Child Or Vulnerable Adult”, [2014] *J Crim L* 477, at 482. See also, D Ormerod, “Domestic Violence: Domestic Violence, Crime and Victims Act 2004 s.5(1) - Allowing Death of a Vulnerable Adult” [2009] *Crim LR* 348, at 351.

79 Ward and Bird (2005), above, at para 3.27. See also *Archbold News* 2005 (2), above, at 8.

3.53 Relevant factors for consideration have been suggested to include the intelligence and personal qualities of the defendant, circumstances of the household and perhaps the nature of the relationship between the defendant and the victim.<sup>80</sup>

3.54 Archbold observes that a person who was not the mother or father of the child or vulnerable adult could not have been expected to take any such step before attaining the age of 16 years (section 5(3)(b)).

3.55 The requirement in section 5(1)(d)(ii) requires a close analysis of the defendant's personal position.<sup>81</sup> Without laying down principles of law, it may, in certain circumstances, be reasonable for a defendant not to have to take steps to protect the victim where the defendant was himself the subject of abuse from the victim's assailant. There is no general rule that a judge should, in his direction to the jury, identify the steps which a defendant could reasonably have been expected to take.<sup>82</sup>

#### *A specific "domestic violence defence"?*

3.56 In 2009, the Court of Appeal observed in the case of *R v Khan and Others*<sup>83</sup> (outlined in more detail later in this chapter) that, if the female appellants who were living together with the victim and the murderer had been subjected by the murderer to serious violence of the kind which had engulfed the victim, the jury might have concluded that it would not have been reasonable to expect them to take any reasonable or even any protective steps to prevent the victim from the infliction of violence.<sup>84</sup> This observation was supported by Morrison, writing in 2013, who argued that (contrary to some earlier academic opinions, including that of Herring), there was thus no need to amend the 2004 Act to include a specific "*domestic violence defence*".<sup>85</sup>

3.57 The Court of Appeal in *Khan* had specifically stated that an evaluation of whether a particular defendant failed to take steps "*requires close analysis of the defendant's personal position*" and this would primarily be a question of fact.<sup>86</sup> Morrison considered that the test is therefore not purely objective – the history of domestic violence, if any, and its impact on the defendant who was himself/herself a victim could accordingly be taken into account in the evaluation exercise.

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80 Ward and Bird (2005), above, at para 3.27.

81 *Halsbury's Laws of England* (2016), above, at para 123, footnote 13.

82 *Archbold UK* (2019), above, at para 19-170.

83 [2009] 4 All ER 544 (CA), at paras 33 to 35. See also discussion of this case later in this chapter.

84 See Jonathan Herring, "*Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?*" [2007] *Crim LR* 923, at 928 and 929, where it is suggested that "*Where the defendant has been the victim of domestic violence at the hands of the person who goes on to kill the child or vulnerable adult it is inappropriate to charge them with failing to protect their child or vulnerable adult. Indeed it should be a specific defence to a s.5 charge*".

85 Morrison, "*Should there be a Domestic Violence Defence to the Offence of Familial Homicide?*" [2013] *Crim LR* 826.

86 [2009] 4 All ER 544 (CA) at para 33.

3.58 Furthermore, Morrison considered that conversely, introducing a specific “*domestic violence defence*” into the 2004 Act may risk taking too simplistic an approach and assume all defendants who are victims of domestic violence themselves would necessarily be non-culpable in circumstances where their abuser also killed or seriously injured the child or vulnerable adult in the household.<sup>87</sup> Morrison noted that any such specific defence would also be discriminatory – if such defendants were singled out as deserving a distinct defence, then one may question why other defendants who may be equally vulnerable due to, for example, age or mental illness, do not deserve a distinct defence that caters specifically for them.<sup>88</sup>

3.59 Moreover, there are practical difficulties in attempting to define a concept of domestic violence of sufficient scope which is neither too harsh nor too lenient to defendants.<sup>89</sup> For these reasons, Morrison believed that the test currently provided under section 5 is the fairest and most appropriate and should not be disturbed.

#### *Examples of “reasonable steps”*

3.60 The UK Ministry of Justice has observed that as cases come before the courts, a body of case law will develop which will help in determining what may constitute “*reasonable steps*” which should have been taken in the circumstances. The Ministry notes the following possible examples of reasonable steps:

- reporting suspicions of abuse to the police;
- contacting social services (perhaps through websites and helplines which are available for those seeking further advice);
- making sure that the child or vulnerable person is treated promptly and appropriately for any injuries or illnesses which they may suffer;
- explaining concerns to their family medical practitioner or health visitor;
- contacting their teacher, head teacher or school nurse;
- contacting relevant child welfare organisations and/or NGOs;
- contacting grandparents, an aunt or uncle, or other responsible adult member of the family;
- exploring concerns with neighbours or others who may have contact with the person who is at risk;

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87 Morrison (2013), above, at 832 to 833.

88 Same as above, at 836 to 837.

89 Same as above, at 837 to 838.

- making sure that alcoholism or drug dependence in other members of the household are acknowledged and appropriately treated;
- attending anger management or parenting classes if appropriate, or ensuring other members of the household attend such classes.<sup>90</sup>

### *Proof*

3.61 Section 5 of the Act does not place any burden of proof on the defendant. Rather, it is for the prosecution to establish the elements of the offence before a conviction can be secured.<sup>91</sup> In putting forward proof, the prosecution may draw from a variety of sources:

*“... evidence of the conduct and injuries that led to the death of the victim; evidence of domestic relationships in the household, evidence as to the whereabouts of the defendant at critical times, statements of fact and admissions to the police, the evidence of neighbours, friends and other members of the family, the evidential value of evidence of bad character, or of lies.”<sup>92</sup>*

3.62 However, the prosecution may not adduce expert evidence as to what a reasonable person would do, as this is a matter for determination by the jury.<sup>93</sup>

### *Murder, manslaughter and section 5*

3.63 On this issue, Ward notes:

*“Clearly, if a s 5 offence is charged alongside a more serious charge of murder or manslaughter of which a defendant is convicted, a jury will not need to enter a verdict in respect of the s 5 offence.”<sup>94</sup>*

### *Maximum penalty*

3.64 The maximum penalty for the offence is 14 years' imprisonment where the victim dies and 10 years' imprisonment in a case of serious harm.<sup>95</sup> The offence is indictable only. The appropriate punishment on conviction may

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90 UK Ministry of Justice, Criminal Law & Legal Policy Unit, “Domestic Violence, Crime and Victims (Amendment) Act 2012” (Circular No 2012/03, June 2012), at para 25.

91 Ward and Bird (2005), above, at para 3.28.

92 Same as above.

93 Same as above; also *Turner* [1975] QB 834, CA; cf *Davis* [1962] 3 All ER 97, CA; *DPP v A & BC Chewing Gum Ltd* [1968] 1 QB 159, DC.

94 Ward (2005), above, at 1218.

95 Section 5(7) and (8), DVCVA.

vary considerably depending on whether D caused the death or serious harm, or alternatively, failed to take reasonable steps to prevent it.

3.65 As previously mentioned, the prosecution bears no duty to prove whether the defendant was the person whose act caused the victim's death<sup>96</sup> or was the person who failed to take such steps as he could reasonably have been expected to take to protect the victim from such risks.<sup>97</sup> Nevertheless, the prosecution should indicate to the judge and the jury the basis of the prosecution's case:

*“A prosecutor who wishes to allege that D caused the death should specifically say so on the indictment, although that may be implicit from charges of murder or manslaughter on the same indictment.”*<sup>98</sup>

3.66 Archbold observes that:

*“[T]he range of culpability for a fatal offence under section 5 is wide. Encompassing, as it does, circumstances which amount to murder through all levels of manslaughter, a conviction under section 5 nonetheless means that it has at least been established that the defendant failed to protect the victim and that he appreciated or ought to have appreciated that the victim would endure serious harm at the hands of the ultimate perpetrator in circumstances which he foresaw or ought to have foreseen. ... [T]he general approach to sentencing in manslaughter cases will provide useful assistance.”*<sup>99</sup>

3.67 Where the identity of the defendant responsible for causing the death cannot be established, the correct approach is not to sentence on the basis that since one or other of them had caused the fatal injury they should both be sentenced as if they had, but to sentence neither defendant as if they were the perpetrator. They should both be sentenced on the basis of allowing the perpetrator to act as he did.<sup>100</sup>

3.68 Indeed, in the case of *R v Hopkinson (Jessica Marie)*,<sup>101</sup> the Court of Appeal disapproved of the request of the trial judge, who, because of his perceived difficulty in sentencing, had asked the jury to return a special verdict on which of the two accused the jury considered had inflicted the harm. The Court of Appeal found such request to have been particularly

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96 Section 5(1)(d), DVCVA.

97 Section 5(1)(d), DVCVA.

98 Ward and Bird (2005), above, at para 3.15.

99 Archbold UK (2019), at para 19-166, citing as authority *R v Ikram and Parveen* [2008] 2 Cr App R 24 (CA), *R v Khan* [2009] 4 All ER 544 (CA), *R v Vestuto* [2010] 2 Cr App R (S) 108, and *Att-Gen's Reference (R v Mills)* [2017] 2 Cr App R(S) 7 (CA), discussed later below and in Appendix II. See also *Halsbury's Laws of England* (2016), above, at para 123, footnote 15.

100 Archbold UK (2019), same as above. See also *R v Vestuto* [2010] 2 Cr App R(S) 108 (CA), and *R v Hopkinson (Jessica Marie)* [2014] 1 Cr App R 3, both discussed later below, and in Appendix II.

101 [2014] 1 Cr App R 3 (CA).

inappropriate for the section 5 offence, bearing in mind the deliberate design of the section, under which the prosecution need not prove whether the defendant was the party who caused the death or serious physical harm to a child or vulnerable adult, or whether he or she failed to take reasonable steps to protect the victim from the risk of serious physical harm which the defendant should have been aware of.

3.69 The Sentencing Council for England and Wales issued a consultation guideline on causing or allowing a child to die or suffer serious physical harm in June 2017.<sup>102</sup> The Response to Consultation<sup>103</sup> was published in September 2018 and a Definitive Guideline<sup>104</sup> was issued which has effect for offenders aged 18 years or over, sentenced on or after 1 January 2019.<sup>105</sup> The scope of the draft guideline was limited to child victims only, as there are likely to be different culpability factors relevant to cases involving vulnerable adults that are not typical factors in cases involving children; for example there may be a financial motive in cases involving adult victims. Following support for the approach during consultation, the Council has decided to continue developing a guideline for the offence against child victims only, rather than including vulnerable adult victims. The Council will consider proposals to develop guidelines for offences committed against vulnerable adults as part of the regular review of its workplan.<sup>106</sup>

3.70 The first step of the guideline is to consider the culpability level of the offender by the assessment of a series of factors. Factors of high culpability include:

- prolonged and/or multiple incidents of serious cruelty, including serious neglect
- gratuitous degradation of victim and/or sadistic behaviour
- use of very significant force
- use of a weapon
- deliberate disregard for the welfare of the victim
- failure to take any steps to protect the victim from offences in which the above factors are present

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102 Sentencing Council for England and Wales, *Child Cruelty Consultation* (June 2017), at: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Child-cruelty-consultation\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Child-cruelty-consultation_FINAL_WEB.pdf)

103 Sentencing Council for England and Wales, *Child Cruelty Guideline - Response to consultation* (September 2018), at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Child-Cruelty-Consultation-Response-for-Web-1.pdf>

104 Sentencing Council for England and Wales, *Child Cruelty Definitive Guideline*, at: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Child-Cruelty\\_Definitive-guideline\\_FINAL-WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Child-Cruelty_Definitive-guideline_FINAL-WEB.pdf)

105 *Archbold UK* (2019), above, at para 19-166.

106 Sentencing Council for England and Wales, *Child Cruelty Guideline - Response to consultation* (September 2018), at paras 39 to 40.

- offender with professional responsibility for the victim (where linked to the commission of the offence).

3.71 Factors for lesser culpability include:

- offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity
- offender is victim of domestic abuse, including coercion and/or intimidation (when linked to the commission of the offence)
- steps taken to protect victim but fell just short of what could reasonably be expected
- momentary or brief lapse in judgment including in cases of neglect
- use of some force or failure to protect the victim from an incident involving some force
- low level of neglect.

3.72 Cases of medium culpability include:

- use of significant force
- prolonged and/or multiple incidents of cruelty, including neglect
- limited steps taken to protect victim in cases with high culpability factors present
- other cases that fall between the two categories because:
  - factors in both high and lesser categories are present which balance each other out; and/or
  - the offender's culpability falls between the factors as described in high and lesser culpability.

3.73 Once the court has determined the level of culpability, the next step is to consider the harm caused or intended to be caused by the offence. There are three categories of harm factors. The Category 1 harm factor is death. Category 2 harm factors include: serious physical harm which has a substantial and/or long term effect; serious psychological, developmental and/or emotional harm; significantly reduced life expectancy; and a progressive, permanent or irreversible condition. Category 3 captures serious physical harm that does not fall into Category 2.

3.74 Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point. The

starting points and ranges have been based on statistical data from the Court Proceedings Database; analysis of first instance transcripts; analysis of Court of Appeal sentencing remarks and reference to the ranges within the draft *Cruelty to a child* guideline. The offence of causing or allowing a child to die has some similarities to the offence of gross negligence manslaughter. The sentence levels were drafted with the proposed draft manslaughter guideline in mind.<sup>107</sup>

3.75 The court should then consider any additional factors, not identified at step one, which may aggravate or mitigate the offence. Statutory aggravating factors include:

- previous convictions, having regard to (a) the nature of the offence to which the conviction relates and its relevance to the current offence; and (b) the time that has elapsed since the conviction
- offence committed whilst on bail.

3.76 Other aggravating factors include:

- failure to seek medical help (where not taken into account at step one)
- prolonged suffering prior to death
- commission of offence whilst under the influence of alcohol or drugs
- deliberate concealment and/or covering up of the offence
- blame wrongly placed on others
- failure to respond to interventions or warnings about behaviour
- threats to prevent reporting of the offence
- failure to comply with current court orders
- offence committed on licence or post sentence supervision
- offences taken into consideration
- offence committed in the presence of another child.

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107 Sentencing Council for England and Wales, *Child Cruelty Consultation* (June 2017), at 25.

3.77 Factors reducing seriousness or reflecting personal mitigation include:

- no previous convictions or no relevant/recent convictions
- remorse
- determination and demonstration of steps having been taken to address addiction or offending behaviour, including co-operation with agencies working for the welfare of the victim
- sole or primary carer for dependent relatives (see the fifth step below for further guidance on parental responsibilities)
- good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate or conceal the offence, this should not normally constitute mitigation and such conduct may constitute aggravation)
- serious medical condition requiring urgent, intensive or long-term treatment
- mental disorder or learning disability or lack of maturity (where not taken into account at step one)
- co-operation with the investigation.

3.78 The fifth step is to take into consideration, as mitigation, when an offender is a sole or primary carer for dependent relatives. It is not implying that custody cannot be imposed on offenders with parental responsibilities but it is an extra consideration the court should take into account when considering whether the sentence is proportionate to the seriousness of the offence.<sup>108</sup>

### ***Reforms to the law of evidence and procedure***

3.79 As part of the reform package introduced in 2004, section 6 of the Domestic Violence, Crime and Victims Act effected special changes to the pre-existing evidential and procedural rules in order to support the application of the offence provisions in section 5 of the Act. (In 2012, section 6A was added to cover non-fatal cases, in line with the then newly-amended section 5.) These provisions are set out in Annex C of this paper.

3.80 Although the proposals by the Law Commission (that a person responsible for the welfare of a child should be subject to a statutory responsibility to give account for the death or injury of the child) were not taken up, the Act nevertheless made two significant changes to the rules of

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108 For Steps Six to Ten, see Sentencing Council for England and Wales, *Child Cruelty Definitive Guideline*, above, at 13 to 14.

evidence and procedure applicable in relation to charges of murder or manslaughter (and now grievous bodily harm offences and attempts to commit murder).<sup>109</sup> In short, where these charges accompany the charges under section 5, adverse inferences can be drawn from the defendant's silence in court and the decision of whether there is a case to answer on the charges may be postponed until the end of the defence case.

### *Adverse inferences*

3.81 The first significant change concerns adverse inferences which can be made against the accused in the instance of his failure to give evidence or refusal to answer questions:

*“Where the court or jury is permitted under section 35(3) of the Criminal Justice and Public Order Act 1994 to draw an adverse inference in respect of the offence under section 5 from the defendant's failure to give evidence or to answer questions, the subsection provides that an adverse inference may also be drawn in relation to the charge of murder or manslaughter.”<sup>110</sup>*

3.82 There are several safeguards in place to limit the use of such adverse inferences as provided in section 6(2). The first safeguard is that they can only be drawn *“if to do so would be proper given all the circumstances of the case.”*<sup>111</sup>

3.83 The second safeguard is that the entitlement to draw an adverse inference in respect of the murder or manslaughter charge is subject to the safeguard in section 38(3) of the Criminal Justice and Public Order Act 1994. This provision, coupled with the finding in the case of *Murray v UK*<sup>112</sup> in the European Court of Human Rights, is to ensure that the defendant may not be convicted solely or mainly on the basis of an inference drawn from his silence or refusal to answer questions.<sup>113</sup>

3.84 The significance of this change is that it *“forces”* the defendant to answer to a charge of murder or manslaughter before he is formally called upon to testify on those specific charges, in a bid to avoid an adverse inference being drawn against him.

### *Case to answer*

3.85 The second important change under section 6 to the rules of evidence and procedure is the establishment of a *“case to answer”* in relation to the murder or manslaughter charge. Section 6(4) provides that the prosecution's duty to answer the question of whether there is a case to

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109 Explanatory notes to DVCVA, at para 33. See section 6 and 6A of the Act respectively.

110 Same as above, at para 34.

111 Same as above, at para 35.

112 *Murray v UK* [1996] 22 EHRR 29.

113 Explanatory note to DVCVA, at para 35.

answer on the charge of murder or manslaughter is to be deferred until the conclusion of the defence case. (The relevant provision in relation to the serious harm offences is section 6A(5).) This is subject to the condition that the prosecution has already proven that there is a case to answer on the section 5 charge. This means in practice that the court will have the opportunity to hear all the evidence before being required to make a decision as to whether the charge of murder or manslaughter is to be left to the jury.

### ***Criticisms of the legislation***

3.86 The reform model comprised in sections 5, 6 and 6A of the Domestic Violence, Crime and Victims Act essentially operate together to “flush out the defendant in a ‘who did it?’ type of case.”<sup>114</sup> The desirable effect of these provisions is that they act as an incentive for the prosecutor to accompany charges of murder or manslaughter, or grievous bodily harm offences, with a section 5 charge.<sup>115</sup>

3.87 However, the legislation, particularly when it was first introduced, was strongly criticised as undermining the presumption of innocence to an unacceptable degree. The drawing of adverse inferences from silence or a failure to provide an account was considered particularly objectionable and contrary to human rights requirements; so too was the postponing of the no case to answer submission until after the conclusion of the defence case.<sup>116</sup>

3.88 More recently, the definition of “vulnerable adult” under section 5(6) has been criticised by one writer for appearing to be too broad and vague in its scope. The inclusion of the catch-all phrase “or otherwise” in the provision allows the judiciary a wide discretion to determine whether an individual may be deemed a vulnerable adult for the purposes of the offence (see, for example, the cases of *R v Su Hua Liu and Lun Xi Tan*<sup>117</sup> and *R v Khan and Others*,<sup>118</sup> discussed below). One commentator has noted that this prevents the list of adults deemed vulnerable from becoming exhaustive, and could be seen as placing a very high burden on household members to act in order to ensure that they avoid criminal prosecution.<sup>119</sup>

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114 Ward (2005), above, at 1220.

115 Ward and Bird (2005), above, at para 3.35.

116 See, for example, JUSTICE, “JUSTICE Response to the Law Commission Consultation ‘Children: Their Non-accidental Death or Serious Injury (Criminal Trials)’” and “JUSTICE Response to the Domestic Violence Crime and Victims Bill: sections 4 & 5” (both prepared by Anthony Jennings QC, Priya Khanna, Sally Mertens and David Trovato); and JUSTICE, “Briefing for Grand Committee of the House of Lords: Justice’s Response to the Domestic Violence, Crime and Victims Bill” (January 2004).

The objection to these evidential and procedural changes formed some of the main grounds of appeal in the recent case of *R v McCarney* [2015] NICA 27, discussed later, below, and in Appendix II.

117 [2006] EWCA Crim 3321 (CA).

118 [2009] 4 All ER 544 (CA).

119 Lauren Clayton-Helm (2014), above, at 481.

## Cases decided under section 5 of Domestic Violence, Crime and Victims Act 2004<sup>120</sup>

3.89 The cases set out below, and also those in Appendix II, illustrate how the section 5 “*causing or allowing*” offence and its related evidential and procedural reforms have been applied by the courts in the UK since the introduction of the Act.

### ***The victim – definition of “vulnerable adult”***

*R v Su Hua Liu and Lun Xi Tan*<sup>121</sup>

3.90 This was the first case to be tried under the “*vulnerable adult*” victim aspect of the section 5 offence and discussed the definition of that term. The Court of Appeal stated in its judgment:

*“[T]he facts of this case are especially distinctive and we hope no other case will come near to it: a vulnerable woman, kept as a slave by her husband for payment of what he sees as a debt, ill-treated, assaulted and abused until death by her husband's mistress while he stands idly by despite warnings and advice.”*<sup>122</sup>

3.91 In this case, the mistress had been charged and pleaded guilty to manslaughter of the victim and was sentenced to nine years’ imprisonment. The husband had pleaded guilty to causing or allowing the death of a vulnerable adult. He was sentenced to six years’ imprisonment. Both appealed against sentence.

3.92 The victim had married her husband in China (though he was already married to someone else) and came to England to live with him. He subsequently met his mistress who moved in with the couple. The facts indicated that the victim was treated as an unpaid servant and severely beaten, mostly by the mistress. The husband claimed the victim owed him 20,000 pounds, and that she had agreed to work for him unpaid for two years to pay this back. The victim was of low intelligence and suffered from depression. One of the employees at the husband’s takeaway business repeatedly warned the husband that the victim needed protection and medical treatment which the husband ignored.

3.93 On the morning of 23 March 2006, the victim’s body was found in the garden of the house. The autopsy revealed that there was extensive bruising to her head, arms, legs, torso and feet. Blunt instruments of different

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120 In 2016, there were 6 offenders sentenced for causing or allowing death and 23 offenders sentenced for causing or allowing serious physical harm: see Sentencing Council for England and Wales, Child Cruelty Consultation (2017), above, at 21.

121 [2006] EWCA Crim 3321 (CA).

122 Same as above, at para 21.

sizes had been used to cause many of the injuries. There were old knife wounds to the fingers which may have been defensive injuries. There was a deep stab to the left elbow which had never been treated and had become infected. The pathologist was of the opinion that the victim had been subjected to blows with blunt instruments, to kicking and to punching for number of weeks. The cause of death was established to be haemorrhaging and shock due to multiple injuries (although a defence pathologist had concluded that the cause of death was in fact hypothermia). On the night before the victim's death, the mistress had told her to leave and had packed a suitcase for her. The victim had been left outside all night. The temperature dropped to minus 4 degrees celsius. In dismissing the husband's appeal against sentence, the Court noted that the maximum sentence under the section 5 offence was 14 years. Laws LJ considered that the six-year sentence which the husband received was "*richly deserved*" in this case.

*R v Khan and Others*<sup>123</sup>

3.94 The facts in the case present an egregious picture of domestic abuse leading to homicide which took place in Leeds. The principal offender (K) was convicted of the murder of his 19 year-old wife, Sabia Rani, and was sentenced to life imprisonment. Two of K's sisters (U and N, who were also Sabia's cousins) and N's husband (M), who were convicted of allowing Sabia's death contrary to section 5(1), were respectively sentenced to one to three years' imprisonment. They appealed against conviction in the captioned case and K's two sisters, U and N, also appealed against sentence. It was found that Sabia, who had moved to England to marry K and lived a lonely life spending the majority of her time in the family home, with no friends in the country and little understanding of the English language, was severely beaten by her husband with fist or boot, which inflicted fatal injuries on her leading to her death in the garage outside the house, and her body was then soaked in cold water in the locked bathroom. Although there was no evidence that any of the Appellants (ie, U, N and M) had witnessed or been aware of the fatal beating or even come into contact with Sabia in the 12 hours immediately before her death, they were, however, all living together in the same household.

3.95 At trial Sabia was found to have sustained rib fractures and severe subcutaneous tissue damage over an extended period in the course of three distinct attacks, one of which happened some three weeks before her death. It was held that given Sabia's condition in the final three weeks of her life, with numerous injuries during the earlier attacks including fractured ribs, it must have been apparent to each of the Appellants that she had been and was being subjected to serious physical violence.

3.96 The Court of Appeal, dismissing the appeal, found that on all grounds the trial judge had correctly directed the jury on the elements of the offence. Lord Judge CJ made useful interpretative statements on various key terms found in section 5 including "*vulnerable*", "*frequent contact*", "*the kind*

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123 [2009] 4 All ER 544 (CA).

(of the unlawful act)” and “failing to take the steps which could reasonably have been expected”. In relation to who should be classified as vulnerable adult under section 5(1)(a), the court observed that the objective of the Act was “to protect those whose ability to protect themselves is impaired”, and would “not rule out the possibility that an adult who is utterly dependent on others, even if physically young and apparently fit, may fall within the protective ambit of the Act”.<sup>124</sup> It was emphasised by the court that:

*“Adults, or near adults who are over the age of 16, are vulnerable if their ability to protect themselves from ‘violence, abuse or neglect’ is significantly impaired. There was some discussion whether the words ‘or otherwise’ found in s 5(6) extended to an individual like this unfortunate deceased, lonely and friendless in this, to her, utterly strange country, and consequently, totally dependent on her husband and his family.”<sup>125</sup>*

*“The Act is not embarking on the impossible task of dissipating misery and unhappiness. Its objective is to protect those whose ability to protect themselves is impaired. In agreement with the judge, however, we do not rule out the possibility that an adult who is utterly dependent on others, even if physically young and apparently fit, may fall within the protective ambit of the Act. The case here proceeded on the basis that the protective provisions of the Act did not arise for consideration before the major attack on the deceased some three weeks before her death. The issue whether she was indeed vulnerable after that attack was rightly left to the jury, but if the facts had been different, we should not have ruled out the possibility that the jury might have inferred that she was already a vulnerable adult for the purposes of the Act before she sustained the violent injuries inflicted on her in the first violent attack three weeks before her death. However, in this particular case the prosecution would, on the evidence, have faced difficulty in establishing that the deceased was exposed to a significant risk of serious physical harm before that attack, and in demonstrating that any one of these Appellants fell within the ambit of awareness and foresight prescribed by s 5(1)(d). The case was exclusively concerned with direct physical violence sustained by the deceased. In another case, the question whether the victim could protect himself or herself from ‘abuse or neglect’ might well arise in relation to an individual in Sabia’s situation.”<sup>126</sup>*

*“...the state of vulnerability envisaged by the Act does not need to be long-standing. It may be short, or temporary. A fit adult may become vulnerable as a result of accident, or injury, or*

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124 *R v Khan and Others* [2009] 4 All ER 544 (CA), at para 26.

125 Same as above, at para 25.

126 Same as above, at para 26.

*illness. The anticipation of a full recovery may not diminish the individual's temporary vulnerability.*<sup>127</sup>

### **The kind (of unlawful act)**

3.97 One other important clarification by the Court of Appeal in the case of *R v Khan* was that the principal offender's conduct which resulted in the victim's death must occur in circumstances of "the kind" that was or ought to have been foreseen by the defendants. In this regard, there was no requirement for the conduct to be identical to that which the defendants ought to have foreseen for there to be culpability. In addition, the place of the fatal act and the non-presence at that point of the defendants may be irrelevant. The Court of Appeal observed that:

*"By this stage of their deliberations the jury would have been satisfied that at the time when the fatal act occurred each Appellant was or ought to have been aware that Sabia was at significant risk of serious physical harm from [her husband]. The jury were reminded that, in all the episodes of violence, the injuries suffered by Sabia were inflicted with [her husband]'s fist or boot, and that it was not suggested that the fatal incident involved the use of a gun or a knife ..."*

*"The violence to which Sabia was subjected on the night she was killed was of the same kind but it was violence of an even more extreme degree than the violence to which her husband had subjected her on earlier occasions. ... Although ultimately a jury question, the circumstances would probably have been the same kind, if not identical, if the fatal attack had occurred while the couple were on holiday, away from their home."*<sup>128</sup>

### **Significant risk of serious physical harm**

*R v Stephens and Mujuru*<sup>129</sup>

3.98 The victim in this case was a four and a half month-old baby girl, killed by the mother's boyfriend who lived with them while the mother was out at work. The boyfriend had committed a serious assault on the baby girl some weeks previously (a spiral fracture to her arm) which neither he nor the mother had sought treatment for, though medical evidence indicated the baby would have been in considerable pain. There was also evidence of an older head and spinal injury. The ultimate cause of death was a severe blow to the head, consistent with the baby having been picked up and swung against a hard flat surface.

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127 Same as above, at para 27.

128 Same as above, at paras 38 to 39.

129 [2007] EWCA Crim 1249 (CA).

3.99 Both adults were charged on an indictment containing 15 counts. The boyfriend (who had a history of acts of domestic violence against his previous partner and his own child) had pleaded guilty to the various counts. On the murder charge, he was convicted and sentenced to life imprisonment and ordered to serve a minimum period of 20 years. (He subsequently appealed against sentence.)

3.100 The mother was charged, amongst other things, with causing or allowing the death of a child and wilful neglect arising out of her failure to obtain treatment for the baby. She was found guilty at trial of both charges and sentenced to a community service order for 24 months on both counts. She appealed against her conviction for causing or allowing the death of a child.

3.101 During the trial, the prosecution had alleged that the mother was aware that the boyfriend posed a “*significant risk of serious physical harm*” to the victim and failed to take such steps as she could reasonably have been expected to take to protect the victim from the risk. At the end of the prosecution case, the mother had submitted that there was no case to answer because there was no evidence of a significant risk of serious physical harm and no evidence that she was, or ought to have been, aware of any such risk for the purposes of this section 5 offence. She had further submitted that the word “*significant*” in the context bore its ordinary meaning. The trial judge had rejected the no case to answer submission and directed the jury that the word “*significant*” within the meaning of section 5 meant simply “*more than minimal*”. The mother appealed against conviction on the ground that the judge had erred in his interpretation of section 5 of the Act.

3.102 The Court of Appeal, dismissing the appeal, held that where the jury was considering whether a person was guilty of an offence under section 5, the term “*significant*” within section 5(1)(c) bore its ordinary, normal meaning and the judge had erred in seeking to define it when instructing the jury. On the no case to answer submission, however, the Court of Appeal said that there was powerful evidence that the boyfriend represented a considerable risk to the victim, so the judge had been correct in rejecting that submission and leaving the case to the jury. The Court of Appeal found that the judge’s misdirection had not created a real danger of the jury convicting the mother when they might not otherwise have done so.

## **Sentencing**

*R v Ikram and Parveen*<sup>130</sup>

3.103 The judgment in this case considers the issue of sentencing the parties where it cannot be proven beyond reasonable doubt which one of them committed the unlawful act which killed the child.<sup>131</sup> The judgment also

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130 [2008] EWCA Crim 586; [2008] 2 Cr App R 24 (CA).

131 Same as above, see esp paras 66 to 71.

features a useful analysis by the Court of Appeal of the effect of the procedural changes brought about by section 6 of the Act, in particular, the postponing of the decision on whether there is a case to answer on murder or manslaughter charges until after the defence case has been completed.<sup>132</sup> The facts of this case are therefore set out in detail below.

3.104 This case concerned the death of a 16 month-old toddler, Talha, who died of injuries when in the care of his father and the father's live-in lover (who had given birth to their first child some three months before). When Talha's body was examined, he was found to have suffered 21 injuries to various parts of his face and body within 48 hours of death, including abrasions and bruising, and three fractured ribs and a broken femur. The latter had resulted in a pulmonary embolism which was the immediate cause of death. He had also suffered a broken tibia earlier, for which he had been receiving medical treatment. When the cast was removed, it was found that there was a deep laceration behind the knee and a blackened lesion consistent with a burn from a lighted cigarette. The conclusion was that *“there was compelling evidence that Talha's multiple injuries were the result of deliberate and repeated violence.”*<sup>133</sup> Both defendants maintained that they knew nothing about how the child had died. During the period in question, it was established that Parveen had been present the whole time, while Ikram, the boy's father, had been away from the home for part of the time.

3.105 The defendants had been charged jointly with one count of murder and each separately with one count of causing or allowing the death of a child. The Crown's primary case at trial was that Parveen was directly responsible for the fatal injury to Talha's leg *“because she wanted him out of the house,”*<sup>134</sup> but that she and Ikram were jointly involved.

*“In any event, Ikram did not do enough to stop her when he realised what could happen, and he allowed the death to occur. Alternatively, the death was caused by the direct action of one or other of them. Whoever it was, the other should have appreciated the danger to which Talha was exposed at the hands of the other, and should have done something about it. The various accounts of Talha falling downstairs or falling from a chair were deliberate lies. Something much worse had happened.”*<sup>135</sup>

3.106 At the close of the evidence, rather than at the end of the case for the prosecution,<sup>136</sup> the Crown decided not to proceed with the murder/ manslaughter charge against Ikram, although the murder/ manslaughter charges continued against Parveen. At the end of the trial, she was acquitted of murder and manslaughter, however both were convicted of causing or

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132 Same as above, see esp paras 45 to 56.

133 Same as above, at para 31.

134 Same as above, at para 40.

135 Same as above.

136 In accordance with section 6(4) of the DVCVA.

allowing the child's death. They were each sentenced to nine years' imprisonment.<sup>137</sup> Both appealed against sentence.

3.107 On appeal, it was held that the sentence of nine years' imprisonment on conviction was severe, but not manifestly excessive nor wrong in principle, as the judge had sentenced the defendants on the basis that neither was the perpetrator who had caused the child's death, but that they had allowed the perpetrator to act as he or she did.<sup>138</sup>

3.108 It was held that the range of culpability for a fatal offence under section 5 is wide. Encompassing, as it does, circumstances which amount to murder through all levels of manslaughter, a conviction under section 5 nonetheless means that it has at the least been established that the defendant failed to protect the victim and that he appreciated or ought to have appreciated that the victim would endure serious harm at the hands of the ultimate perpetrator in circumstances which he foresaw or ought to have foreseen. It was said that the general approach to sentencing in manslaughter cases will provide useful assistance.<sup>139</sup>

3.109 The appeal judgment in this case provided a useful analysis of how the procedural changes introduced in section 6 of the Domestic Violence, Crime and Victims Act 2004 were intended to operate. The court referred to the purpose of section 6(4) of the Act being to address the problem in cases such as *R v Lane and Lane*,<sup>140</sup> where it could not be proven which of two defendants was directly responsible for an offence, nor that the other was guilty as an accomplice. Thus there was no *prima facie* case against either defendant so they both had to be acquitted at the close of the prosecution case. The Court of Appeal in *Ikram* observed:

*“Section 6(4) addressed this problem by providing that in cases like Lane, where murder/manslaughter was charged, any submission of ‘no case to answer’ must be postponed until the close of all of the evidence. The object was to improve the prospect of discovering the truth which was almost certainly known by both or all of the defendants, but which so frequently remained concealed on forensic grounds.”*<sup>141</sup> ...

*Section 6(4) does not prohibit a submission of no case to answer where this is appropriate; it merely postpones it. If successfully made on behalf of one defendant it will inevitably mean that the view of the judge, or the Crown, will prevent the jury from considering the case of that particular individual. In short, the provision simply changes the stage in the process at*

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137 *R v Ikram and Parveen* [2008] EWCA Crim 586, at para 5.

138 *R v Ikram and Parveen* [2008] 2 Cr App R 24 (CA), at paras 67 to 69, discussed in *Archbold UK* (2019), at para 19-166.

139 *Archbold UK* (2019), at para 19-166.

140 (1986) 82 Cr App R 5 (CA).

141 *R v Ikram and Parveen* [2008] 2 Cr App R 24 (CA), at para 47.

*which it is appropriate to make this submission and for the judge to decide it. No other change is made. On the whole of the evidence, including that of both defendants, the prosecution reflected whether there was a case for either defendant to answer. Once it concluded that the case should be withdrawn against one or other defendant, it was obliged to say so. This was not an abuse of process rather it was the process working as it should, with the prosecution acting responsibly. ... The result was that the case against Ikram of causing or allowing Talha's death and the allegation against Parveen and the murder/manslaughter count would continue.*"<sup>142</sup>

3.110 Significantly, towards the end of the evidence, Parveen began to have second thoughts about her testimony and sought to be recalled to provide *"a complete change of story."*<sup>143</sup> The judge was informed that Parveen's new instructions asserted that she was *"an abused partner of Ikram, subjected to violence herself, and a witness to incidents of violent ill-treatment perpetrated by him on the child"*,<sup>144</sup> who on the night in question, had heard a violent incident involving Ikram and the child, and had been so alarmed that she had taken her new baby out of the flat for 20 minutes, leaving Ikram alone with Talha. The application for her to be recalled to give further evidence (which had been opposed by Ikram's counsel and the Crown) was rejected by the trial judge.<sup>145</sup> The Court of Appeal agreed with the trial judge's approach, stating:

*"Although the defendant cannot be deprived of the opportunity to give evidence in her own defence, and to advance whatever case she wishes, the opportunity to give her full and complete account of relevant events is only available once. It is difficult to imagine circumstances - unless bizarre in the extreme - in which the defendant should be granted the privilege of giving evidence twice in order to advance contradictory defences at the same trial. ... That would normally constitute an abuse of process."*<sup>146</sup>

*R v Owen (Jason)*<sup>147</sup> (The "Baby Peter" case)

3.111 The horrific death of 17 month-old baby Peter Connolly at the hands of those who were supposed to care for him prompted a massive outcry of concern in Britain, reaching all the way to Parliament. Not only was it caused by the extreme extent of his more than 50 injuries inflicted over an eight-month period (including a broken spine, head injuries, tops of fingers cut off, his fingernails pulled out and a missing toe), but it was the fact that during

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142 Same as above, at para 49.

143 Same as above, at para 50.

144 Same as above.

145 Same as above, at para 51.

146 Same as above, at para 52.

147 [2009] EWCA Crim 2259 (CA).

that time he had been seen repeatedly by social services.<sup>148</sup> In the Sentencing Remarks in this case, Judge Stephen Kramer was so moved as to state:

*“Any decent person who heard the catalogue medical conditions and non-accidental injuries, steadily mounting into seriousness, suffered by Peter between December 2006, when he was only 9 months old, and his death on 3rd August 2007, when he was only 17 months old, cannot fail to have been appalled.”*<sup>149</sup>

3.112 The victim’s mother (Tracey Connolly), her boyfriend (Steven Barker) and their lodger (Jason Owen, who was also her boyfriend’s brother) were all convicted of causing or allowing the death of a child, the mother having earlier pleaded guilty to the offence (on the basis of allowing, not causing, the death<sup>150</sup>). The two men denied having caused, or even knowing about, the victim’s injuries and their seriousness.<sup>151</sup> Connolly and Owen had been cleared of murder earlier in the trial due to insufficient evidence and Barker was found not guilty of murder by a jury. On the section 5 offence, Connolly and Owen were sentenced to, respectively, an indeterminate sentence of imprisonment for public protection with a minimum term of five years and to an indeterminate sentence of imprisonment for public protection with a minimum term of three years. Barker, who in a separate trial was also convicted of the rape of a two year-old girl, was sentenced to 12 years’ imprisonment for the section 5 offence involving Baby Peter, to be served concurrently with a sentence of life imprisonment, with a minimum term of 20 years, for the rape conviction.

*R v Wiltshire (Jeffrey)*<sup>152</sup>

3.113 Imani was very nearly 17 weeks old but her development age was in the order of 4 or 5 weeks when she died. Her mother, Baker boarded a bus with Imani and was waved off by her father, Wiltshire who gave her a “thumb up” as the bus moved away. At 28 minutes into the journey Baker sought help from passengers on the bus, claiming that Imani had stopped breathing. At least one passenger attempted CPR and paramedics were soon at the scene. Upon identifying evidence of injury, the police were contacted. Imani and Baker were taken to hospital where further attempts were made at resuscitation and Imani died later. The medical evidence established that there were at least three separate events causing injury. First, in chronological order, a shaking event which caused a number of rib fractures. Secondly, an event which entailed Imani sustaining skull fractures,

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148 Indeed, in the same London Borough where eight years before, Victoria Climbié, aged eight and also known to social services, had died after months of abuse and torture by her guardians.

149 See *The Queen v (B) (The boyfriend of Baby Peter’s mother), (C) (Baby Peter’s mother) and Jason Owen*, Sentencing Remarks, 22 May 2009, per Judge Kramer, at para 1, available at: [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/22\\_05\\_09\\_sentencing\\_remarks\\_baby\\_p.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/22_05_09_sentencing_remarks_baby_p.pdf)

150 Sentencing Remarks (2009), above, at para 4.

151 Same as above, at para 6. Judge Kramer’s comment in response to this was, “Your alleged ignorance of what was happening to Peter in that small house in Tottenham defies belief.”

152 [2017] EWCA Crim 1686 (CA); [2018] 4 WLR 15.

underlying head injury, a number of rib fractures and wrist fracture. Thirdly, and much closer in time to Imani's death, she suffered further fractures and/or re-fractures to the ribs.

3.114 Baker and Wiltshire were convicted of the offence of causing or allowing the death of a child contrary to section 5 of the Act. They were acquitted of the offence of murder. Each was sentenced to terms of 11 years' imprisonment. The Recorder placed particular weight on the conduct of both appellants after Imani had died and stated that this death occurred in circumstances of murder or very close to it. The appellants appealed against the sentence.

3.115 The Court of Appeal allowed the appeals, quashing the sentences of 11 years' imprisonment and substituted sentences of 10 years' imprisonment. The court accepted the submission that there is a difference for the purposes of sentence, but not conviction, between cases of actual and constructive knowledge. In the court's judgement, the Recorder gave insufficient weight to his finding that this was a case of constructive knowledge, as each applicant ought to have been aware of the significant risk of serious harm being caused to Imani, as opposed to being subjectively aware of it, albeit one which was at the upper end of the spectrum of gravity applicable to such cases. The court's overall approach is not to apply previous authority of the Court of Appeal as if it were a guideline case. Instead, it had had regard to all the relevant circumstances, including the nature of the relationship between the appellants and the victim, and the nature of the breach of duty, as well as the aggravating and mitigating factors the court have identified.

3.116 The court noted that the Recorder never lost sight of the fact that he was sentencing each Appellant on the basis that she or he allowed the death of Imani rather than caused it. In a case where the culpability of the perpetrator was high (*"close to murder, or manslaughter of the most serious kind"*), the culpability of the individual who allowed this to take place was likely to be higher because there was a failure to accord the child *"appropriate protection from awful, foreseeable violence"*.

3.117 In relation to the submission that insufficient regard was paid to the impact of length of sentence on Wiltshire's 23 surviving children, the court was of the view that this was such a serious case, inevitably requiring a lengthy prison sentence, that any reduction to reflect the position of Wiltshire's children could not be warranted.

3.118 The court noted that this was a case with numerous aggravating features. Imani was defenceless and extremely vulnerable. Both appellants were in a position of trust towards her which they grossly abused. Imani's injuries were sustained on at least three occasions. The family members were all sleeping in one double bed, and Imani's condition at all material times must have been patent to both appellants. No action was taken to obtain medical help. The appellants must have colluded with each other to deceive social services, and the *"cynical parade"* on the bus aggravated the offence to

a substantial extent. It amounted to clear evidence of attempted cover-up and caused distress and panic to a number of members of the public who must have been shocked and appalled by what was unfolding, or apparently unfolding, before them.

### ***Right to fair trial***

*R v McCarney (Barry)*<sup>153</sup>

3.119 This appeal shed some important light on the nature of the section 5 offence as well as the compatibility with human rights of the corresponding evidential and procedural changes brought by the 2004 Act. It concerned the prosecution of McCarney and Rachel Martin in relation to the death of Millie Martin who was 15 months of age. Baby Millie was the daughter of Rachel, who was in a relationship with McCarney at the material time. It is not disputed that the three of them were then residing in the same household. Baby Millie was taken to the hospital by McCarney one day, where she was found unconscious, unresponsive, and her pupils dilated indicating trauma to her head. She tragically died the next day. Her head injury aside, the post-mortem also revealed that her genitalia was injured suggestive of some form of sexual assault. Multiple counts were brought against the two accused, but relevantly, McCarney was charged with murder and “*causing the death of a child*” purportedly contrary to section 5 of the 2004 Act. Among other counts, Rachel was charged with “*allowing the death of a child*” also purportedly contrary to section 5 of the 2004 Act. McCarney was found guilty of murder and hence no verdict was entered on the count of “*causing the death of a child*”; Rachel was acquitted of “*allowing the death of a child*”.

3.120 McCarney appealed on various grounds. Significantly, it was argued on his behalf that “*causing the death of a child*” as drafted in the indictment was not an offence known to law – that section 5 created only one offence of “*causing or allowing the death of a child*”, available in cases where the prosecution was unable to prove which of the persons in a household was responsible for the death of the child in the household; and that section 5 did not create two separate offences of “*causing the death of a child*” and “*allowing the death of a child*”.<sup>154</sup>

3.121 McCarney’s argument was that the wrongful inclusion in the indictment of the purported count of “*causing the death of a child*” wrongfully triggered the application of section 7 of the 2004 Act (ie, “*Evidence and procedure in cases of death: Northern Ireland*”), meaning that McCarney was precluded, in breach of the presumption of innocence, from applying for a direction of no case to answer in respect of the murder count at the close of the prosecution case. The present case was not contended by the prosecution to be a “*which of you did it?*” (McCarney and Rachel were

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153 [2015] NICA 27.

154 Same as above, at para 15.

respectively specifically (although later found to be erroneously) charged with the “*causing of*” and “*allowing*” the death of baby Millie) and so the wrongful inclusion of the purported section 5 count allowed the prosecution a procedural advantage resulting in an unfair trial for McCarney.<sup>155</sup>

3.122 The prosecution observed that the present case was the first case in Northern Ireland in which a person was indicted under section 5. While the same offence was relied upon in a number of cases in England and Wales, it was not always clear from the reports of these cases as to how exactly a charge under section 5 had been framed. Nonetheless, the prosecution contended the count in question was properly included in the indictment.<sup>156</sup>

3.123 After reviewing the various English authorities which had been consistent all along, the Court of Appeal of Northern Ireland confirmed that section 5 indeed created only a single offence, namely, the “*causing or allowing*” the death of child or vulnerable adult, although this single offence had been recognised to span a wide range of misconduct.<sup>157</sup> The court stated that “[t]here is nothing in the language of s. 5 to suggest the creation of a new offence of ‘*causing the death of a child*’”,<sup>158</sup> and considered there was no need to decide in the instant case “*whether it also created an offence of ‘allowing the death of a child’*. If it did, it does not follow that it also created an offence of ‘*causing the death of a child*’”.<sup>159</sup> It therefore concluded that the trial judge should have withdrawn the “*causing the death of a child*” count against McCarney at the end of the prosecution case. In the event, the trial judge directed the jury that if they found McCarney guilty of murder, then they did not need to consider the “*causing the death of a child*” count; this was what they did. The Court of Appeal therefore did not concern itself with any finding in respect of the “*causing the death of a child*” count, but went on to consider the effect its inclusion in the indictment had on the conduct and progress of the trial.<sup>160</sup>

3.124 The application of section 7 (the evidence and procedural provisions) triggered by the wrongful inclusion of section 5 as drafted was challenged to be inconsistent with Art 6 of the European Convention on Human Rights (ECHR) guaranteeing fair trial on two fronts. At the first level, it was argued that the procedural effects section 7 entailed *per se* were incompatible with and infringed Art 6 ECHR in various ways. For instance, it was argued that in postponing the time at which an application that the accused does not have a case to answer until after all the evidence has been given leaves open the possibility that the accused, if he does not give evidence, will be convicted solely or mainly because he exercised his right to silence. The postponement has the further effect of shifting the burden of

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155 Same as above, at para 8(1).

156 Same as above, at paras 16-17.

157 Same as above, at paras 18-33.

158 Same as above, at para 37.

159 Same as above, at para 38.

160 Same as above, at para 39.

proof away from the prosecution and on to the defence; section 7 permits account to be taken of evidence called by the defence in order to determine whether a defendant has a case to answer on the murder/manslaughter charge. Moreover, that there is a case to answer on the section 5 offence should not preclude a submission of no case to answer on other different offences, namely, murder and manslaughter. In view of these various objectionable features, at a second level, it was argued that the application of section 7 meant that McCarney's trial was rendered unfair.<sup>161</sup>

3.125 In relation to criticisms at the first level, the court observed that Art 6 did not create a right to make a submission of no case to answer whether at the close of prosecution case or any other time in a criminal trial. Moreover, nor had the European Court of Human Rights disapproved of the drawing of inferences from silences in situations in which a defendant's explanation was called for. On the other hand, Art 2 of the ECHR guarantees the right to life and this requires member states to have in place laws to protect every person's right to life suitably; such positive obligation extends to an appropriate investigation into a person's death.

3.126 Section 7 was enacted specifically to address a particular difficulty arising from the death of vulnerable persons, often children, in a domestic setting and its applicability was dependent on the existence of a section 5 charge; that is, circumstances under which it applies are limited. It must also be emphasized that the relevant sections including section 7 do not *prevent* an application of no case to answer but merely *postpone* the consideration of this question until a later stage in the trial process. The court was therefore not satisfied that section 7 of the 2004 Act was incompatible with Art 6 ECHR, nor was it satisfied that it was inconsistent with the burden of proof remaining with the prosecution, the presumption of innocence, or the defendant's right to remain silent.<sup>162</sup>

3.127 The court similarly rejected the second level of criticisms contending that McCarney's trial was rendered unfair. It noted that it was Parliament's decision that there should be a minimal alteration in the trial process where vulnerable persons die in a domestic setting and those living in the same household who either caused the death or allowed it to occur are on trial, in order to assist in establishing the truth of what occurred. It therefore did not consider the alteration "*intrinsically unfair*", especially where it still requires a *prima facie* case that the defendant either caused or allowed the death of the child/vulnerable person. In the present case, had the purported charge under section 5 been correctly framed, there was still clearly a case to answer in respect of it. On the other hand, if it had not been included in the indictment, the court was of the view that there was equally a case to answer in respect of the murder count. The court therefore did not consider the way the purported section 5 count was drafted gave rise to any issue of unfairness; meanwhile, section 7 did not in any way alter the nature and strength of the

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161 Same as above, at paras 78 to 81.

162 Same as above, at paras 84 to 86.

evidence before the trial court.<sup>163</sup> The trial McCarney received was not unfair and his appeal was accordingly dismissed.

*R v Price (Angela)*<sup>164</sup>

3.128 In this case, P and J, respectively the grandmother and mother of the deceased child who was aged seven months when he died, appealed against their convictions under section 5 of the Domestic Violence, Crime and Victims Act 2004. The two appellants were also convicted of various counts of child cruelty contrary to section 1 of the Children and Young Persons Act 1933 for their failures to provide the child adequate food, drink, and to obtain medical aid. J had pleaded guilty to a further charge of child cruelty involving neglect by failure to obtain adequate medical treatment for the child's extensive nappy rash, whilst P was charged and convicted of a further section 5 charge for causing or allowing the child to suffer serious physical harm in the form of severe nappy rash. P also sought leave to appeal against her sentence of 8 years' imprisonment which was the same as that of J.

3.129 Essentially, the prosecution's case was that the child, who was found dead in the home he had been living with P and J, had lost 17% of his body weight in the nine days before his death, with the weight loss attributable to insufficient nourishment and hydration. Three medical experts, namely two pathologists and one neonatologist, were called on its behalf and they concluded that dehydration was the major physical cause, if not the sole cause, of death. The trial judge therefore rejected a submission of no case to answer, observing that there was evidence on which a jury could safely conclude that dehydration by neglect was at least a significant contributory cause of death.

3.130 On appeal, the appellants challenged this decision, and argued there was no case to answer because there was insufficient evidence that the failures to hydrate and obtain medical aid were the cause of death. This was because initially the two pathologists had described the cause of death as being "*unascertained*", and had only concluded that dehydration through neglect was at least a significant contributory cause of death after becoming aware of the neonatologist's analysis. J also argued the trial judge's summing up was inadequate in addressing her argument that the child's death could have been caused by a combination of a long-term malabsorption condition and a crisis brought on by a non-neglectful reduction in food intake.

3.131 The Court of Appeal was of the view that the way the pathologists reached their conclusion had been explored in cross examination, and the trial judge's summing up was sufficient to remind the jury of how this conclusion came to be developed. The pathologists' evidence was thus not "*tenuous*" and the rejection of the submission of no case to answer was not unsafe.

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163 Same as above, at paras 87 to 88.

164 [2016] EWCA Crim 1751.

3.132 The Court of Appeal was further satisfied that the trial judge’s summing up was fair and sufficiently dealt with matters which had arisen during the trial. The appeal against conviction was thus dismissed. It further found that the judge had correctly applied the sentencing guidance from the case of *Ikram and Parveen* (referred to above).

## Postscript

3.133 The discussion above has sought to explain the detailed workings of the original “*causing or allowing*” offence model introduced in the UK in the Domestic Violence, Crime and Victims Act 2004. This reform model, and the unique approach it has taken to imposing liability in circumstances which affect the most vulnerable in society, marked a major innovation in the criminal law.

3.134 In the next two chapters, we examine how this original offence model has been taken up and adapted in two other jurisdictions, namely South Australia and New Zealand, where, although many of the underlying concepts of the UK model have been adopted, there are also significant areas of divergence.

3.135 On wider issues of domestic violence, the UK Government launched a consultation in March 2018 on the Government’s approach to tackling domestic abuse. The aim of the proposals in the consultation, which asked questions around four main themes “*with the central aim of prevention running through each*”, was “*to prevent domestic abuse by challenging the acceptability of abuse and addressing the underlying attitudes and norms that perpetuate it.*”<sup>165</sup>

3.136 Following the consultation (during which over 3,200 responses were received<sup>166</sup>), the Government issued its response in January 2019, which included draft legislation.<sup>167</sup> The draft Domestic Abuse Bill covers nine legislative measures that were identified, to: “*raise awareness and understanding of domestic abuse and its impact on victims, to further improve the effectiveness of the justice system in providing protection for victims of domestic abuse and bringing perpetrators to justice, and to strengthen the support for victims of abuse provided by other statutory agencies.*”<sup>168</sup> Some of the nine measures provided in the Bill include: a statutory definition of

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165 See HM Government, *Transforming the Response to Domestic Abuse Consultation Response and Draft Bill* (January 2019), at Annex E, “Overview of the Draft Bill”, para 11, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/772202/CCS1218158068-Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf)

166 “Domestic abuse consultation response and draft bill”, at: <https://www.gov.uk/government/publications/domestic-abuse-consultation-response-and-draft-bill>

167 See: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/772202/CCS1218158068-Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf)

See also “Draft Domestic Abuse Bill: overarching documents”, at: <https://www.gov.uk/government/publications/draft-domestic-abuse-bill-overarching-documents>

168 See HM Government (January 2019), above, at Annex E, “Overview of the Draft Bill”, para 2.

domestic abuse; the establishment of the office of Domestic Abuse Commissioner; a new Domestic Abuse Protection Notice and Domestic Abuse Protection Order; prohibition on perpetrators of domestic and other forms of abuse from cross-examining their victims in person in the family courts; enabling high-risk domestic abuse offenders to be subject to polygraph testing as a condition of their licence following their release from custody; and creating a legislative assumption that domestic abuse victims are to be treated as eligible for special measures in criminal proceedings. The UK Government has advised that all nine measures “*will now be taken forward in the draft Domestic Abuse Bill and be subject to pre-legislative scrutiny.*”<sup>169</sup>

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169 See “Domestic abuse consultation response and draft bill”, above.

## Chapter 4

# Overseas legislative model for a new statutory offence - South Australia

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### Introduction

4.1 In April 2005, the offence of “*criminal neglect*” was introduced in South Australia by section 4 of the Criminal Law Consolidation (Criminal Neglect) Amendment Act 2005. This provision inserted a new Division 1A, section 14, into South Australia’s Criminal Law Consolidation Act 1935. The text of the (original) section 14 offence is set out in Annex B(1) of this paper.

4.2 The offence of criminal neglect in section 14 of the Act, which has been described as “*an important piece of legislation*” and “*novel in the way it deals with difficult questions in our criminal law*”,<sup>1</sup> is essentially a ‘bystander’ offence that does not depend on proof of the identity of the main offender. It is aimed at cases where the accused is someone who owes a duty of care to a child or vulnerable adult who, while in their care, dies or is seriously harmed as a result of an unlawful act. Instead of focusing on the perpetrator of the unlawful act, however, the offence is designed to attribute criminal liability to the carer (either as a parent/guardian, or someone who has assumed a duty of care) who has failed to protect the victim from harm that he or she should have anticipated.<sup>2</sup> The offence will apply even if the carer may be in fact the person who committed the unlawful act which killed or seriously harmed the child.<sup>3</sup> The criminal neglect offence can be charged as an alternative to, or in addition to, a murder or manslaughter charge, or a charge of causing serious harm, or on its own.<sup>4</sup>

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1 See South Australian Hansard debates, Legislative Council, 7 February 2005, at 888, *per* Hon R D Lawson.

2 See South Australian Hansard debates, House of Assembly, 30 June 2004, at 2624, *per* Hon M J Atkinson (Attorney General).

3 Though the version of section 14 operative until 5 September 2018 referred to the terms “*unlawful act*” and “*serious harm*”, a major amendment of the legislation which came into operation on 6 September 2018 has deleted the words “*unlawful*” and “*serious*” in the section, amongst other changes (pursuant to the Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018 (No 6 of 2018), which received assent on 2 August 2018) (“the 2018 Amendment Act”). See discussion of the new legislation later in this chapter.

For the text of the original version of section 14 (also at Annex B(1)) see:

<https://www.legislation.sa.gov.au/LZ/C/A/CRIMINAL%20LAW%20CONSOLIDATION%20ACT%201935.aspx>

For the text of the 2018 Amendment Act (also at Annex B(2)) see:

[https://www.legislation.sa.gov.au/LZ/V/A/2018/CRIMINAL%20LAW%20CONSOLIDATION%20\(CHILDREN%20AND%20VULNERABLE%20ADULTS\)%20AMENDMENT%20ACT%202018\\_6.aspx](https://www.legislation.sa.gov.au/LZ/V/A/2018/CRIMINAL%20LAW%20CONSOLIDATION%20(CHILDREN%20AND%20VULNERABLE%20ADULTS)%20AMENDMENT%20ACT%202018_6.aspx)

4 See South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625, *per* Hon M J Atkinson (Attorney General).

4.3 In 2018, the original offence provisions enacted in 2005 underwent significant reform. The reasons for this, and its implications, are discussed later in this chapter. (The texts of the relevant 2018 Amendment Act and (now) current version of the legislation appear in Annexes B(2) and B(3) respectively.) As these changes came into operation only on 6 September 2018, however, the discussion below focuses on the provisions as originally cast.

## Background

4.4 Although the enactment of this legislation post-dated that in the UK in section 5 of the Domestic Violence, Crime and Victims Act 2004 (discussed in the previous chapter), it had actually been under development since 2002.<sup>5</sup> The reform was initiated as a result of the acquittal of the defendant in the *Macaskill* case,<sup>6</sup> in which, in 1999, a three month-old baby girl had died from a non-accidental injury.

4.5 The baby, Crystal, was at the time of her death in the care of her mother, and her mother's partner who was the baby's father. The cause of death was brain damage due to an inflicted head injury, either from shaking or shaking coupled with some form of impact.<sup>7</sup> Crystal's mother was charged with manslaughter to which she pleaded not guilty. At her original trial, she was found guilty by a jury but her conviction was quashed on appeal in 2001 and a retrial ordered.<sup>8</sup> She elected to be re-tried by a judge alone.

4.6 At the retrial, the court found that she had been convicted on the basis of conflicting and unreliable testimony.<sup>9</sup> The prosecution had only been able to make inferences of guilt from circumstantial/medical evidence because there was a lack of direct evidence concerning who had inflicted the fatal injury. Neither parent admitted to the act. The mother's defence was that it was reasonably possible for the father to have caused the death. She did not give evidence at trial, although she had made a statement to the police indicating that both she and the father were present at the time of the act. The father was a witness for the prosecution and gave evidence that solely incriminated the mother (a 'cut throat' defence). However, his evidence was later found to be dubious.<sup>10</sup>

4.7 Although the court inferred that one or other of the parents had committed the fatal act, the mother was acquitted at the retrial, as the court could not be satisfied beyond reasonable doubt who did it.<sup>11</sup> Nyland J's

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5 See South Australian Hansard debates, House of Assembly, 30 June 2004, at 2624, *per* Hon M J Atkinson (Attorney General).

6 *R v Macaskill* (No 2) (2001) 81 SASR 155; *R v Macaskill* [2003] SASC 61.

7 *R v Macaskill* [2003] SASC 61, at para 9.

8 *R v Macaskill* (No 2) (2001) 81 SASR 155.

9 Same as above. See also discussion in South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625, *per* Hon M J Atkinson (Attorney General).

10 *R v Macaskill* [2003] SASC 61, at paras 58 to 94.

11 Same as above.

concluding remarks explained the difficulty in convicting on a manslaughter charge when there is a lack of evidence required to prove the charge beyond reasonable doubt:

*“It is unnecessary for me to consider this matter, however [whether at the time of the infliction of that injury the accused appreciated that she was exposing Crystal to the risk of serious injury], as the prosecution has failed to exclude as a reasonable possibility that Hayes was the person to have inflicted the injury upon Crystal. There is therefore a rational hypothesis consistent with innocence. The first element of the crime of manslaughter has not been proved beyond reasonable doubt. I therefore return a verdict of not guilty.”<sup>12</sup>*

4.8 Following the *Macaskill* case, the South Australian Government issued a consultation draft Bill in 2003 which made reference to the English Law Commission's then newly-released consultative report<sup>13</sup> and proposed an initial version of the section 14 offence. This was sent to interest groups and experts in South Australia and other Australian States and Territories, including Directors of Public Prosecutions. In the light of the responses received, the Bill was broadened to include coverage of vulnerable adults.<sup>14</sup> It was enacted in April 2005.

4.9 While the section 14 offence represented an important innovation in child protection legislation when it was introduced, in the years that followed, certain aspects of it were found by the police and the Director of Public Prosecutions to cause difficulties in bringing and sustaining prosecutions in some cases.<sup>15</sup> (In particular, as will be seen later in this chapter, the reference to “*protracted impairment*” within the definition of “*serious harm*” under the original section 14 – and the lack of a general child ill-treatment offence in South Australia (unlike the position in Hong Kong<sup>16</sup>) – meant that the rapid healing abilities of young children sometimes precluded effective prosecution in cases of serious but non-fatal child abuse.) These difficulties lead to a significant reform of section 14 in August 2018, which came into operation on 6 September 2018.<sup>17</sup>

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12 Same as above, at para 166.

13 *Children: Their Non-accidental Death or Serious Injury (Criminal Trials): A Consultative Report* (Apr 2003, Law Com 279), discussed above in Chapter 3.

14 South Australian Hansard debates, House of Assembly, 30 June 2004, at 2624, *per* Hon M J Atkinson (Attorney General).

15 See South Australian Hansard debates, Legislative Council, on 7 June 2018, at 466, *per* Hon. R. I Lucas (Treasurer). Available at: <https://www.parliament.sa.gov.au/permalink/?id=HANSARD-10-23187>

16 *le*, in section 27 of the Offences against the Person Ordinance (Cap 212), discussed above, in Chapter 2.

17 *le*, pursuant to the 2018 Amendment Act, above, which received assent on 2 August 2018 and came into operation on 6 September 2018. See the text of the legislation, and relevant commencement proclamation, at: [https://www.legislation.sa.gov.au/LZ/V/A/2018/CRIMINAL%20LAW%20CONSOLIDATION%20\(CHILDREN%20AND%20VULNERABLE%20ADULTS\)%20AMENDMENT%20ACT%202018\\_6.aspx](https://www.legislation.sa.gov.au/LZ/V/A/2018/CRIMINAL%20LAW%20CONSOLIDATION%20(CHILDREN%20AND%20VULNERABLE%20ADULTS)%20AMENDMENT%20ACT%202018_6.aspx);

4.10 Section 14 had also been the subject of some amendment in June 2016, when the term “*mental disability*” was replaced by the term “*cognitive impairment*” within the definition of “*vulnerable adult*” in section 14(4).<sup>18</sup> (It should be noted, however, that this reform applied to a range of statutory provisions in South Australia, not just to the section 14 offence.) Further details on this 2016 amendment are set out later in the discussion below.

4.11 Given that the newly-reformed 2018 version of section 14 discussed later in this chapter (and as set out in Annex B(3)) came into force only on 6 September 2018, the following analysis of the provisions of section 14, and the discussion of relevant cases, are based on the original 2005 Act as amended in 2016.

## Overview of the offence of “*criminal neglect*”

4.12 Prior to the 2018 reforms, the offence of “*criminal neglect*” under section 14 of the Criminal Law Consolidation Act 1935 applied where:

- a child under the age of 16 or a vulnerable adult (which is defined as a person of or over 16 years of age whose ability to protect himself or herself is significantly impaired through physical disability, cognitive impairment, illness or infirmity) suffers serious harm<sup>19</sup> as a result of an unlawful act<sup>20</sup>; and
- the defendant had a duty of care to the victim (ie, was the victim's parent or guardian or had assumed responsibility for the victim's care); and
- the defendant was (or should have been) aware that there was an appreciable risk of serious harm to the victim by the unlawful act; and
- the defendant failed to take steps that could reasonably have been expected to protect the victim, and that failure was, in the circumstances, so serious that a criminal penalty is warranted.<sup>21</sup>

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[https://www.legislation.sa.gov.au/LZ/V/P/2018/CRIMINAL%20LAW%20CONSOLIDATION%20\(CHILDREN%20AND%20VULNERABLE%20ADULTS\)%20AMENDMENT%20ACT%20\(COMMENCEMENT\)%20PROCLAMATION%202018\\_30.8.2018%20P%203253/30.8.2018%20P%203253.UN.PDF](https://www.legislation.sa.gov.au/LZ/V/P/2018/CRIMINAL%20LAW%20CONSOLIDATION%20(CHILDREN%20AND%20VULNERABLE%20ADULTS)%20AMENDMENT%20ACT%20(COMMENCEMENT)%20PROCLAMATION%202018_30.8.2018%20P%203253/30.8.2018%20P%203253.UN.PDF)

18 See section 6, Statutes Amendment (Attorney-General's Portfolio) Act 2016, available at: [https://www.legislation.sa.gov.au/LZ/V/A/2016/STATUTES%20AMENDMENT%20\(ATTORNEY-GENERALS%20PORTFOLIO\)%20ACT%202016\\_28/2016.28.UN.PDF](https://www.legislation.sa.gov.au/LZ/V/A/2016/STATUTES%20AMENDMENT%20(ATTORNEY-GENERALS%20PORTFOLIO)%20ACT%202016_28/2016.28.UN.PDF)

19 See footnote 3 above and discussion later in this chapter.

20 Same as above.

21 See the original section 14(1) of the Criminal Law Consolidation Act 1935 (“the Act”) set out in Annex B(1) to this paper. See also discussion in South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625, *per* Hon M J Atkinson (Attorney General).

4.13 The maximum penalty for the offence under the version of the legislation as enacted in 2005 was imprisonment for 15 years if the victim dies, or 5 years in any other case<sup>22</sup> (though under the 2018 Amendment Act, the maximum penalties have been increased to life imprisonment and 15 years' imprisonment respectively<sup>23</sup>).

4.14 The South Australian model is careful to distinguish the offences of homicide, or of causing serious harm, from death or serious injury brought about primarily by criminal neglect. The heart of the offence is that it is negligence-based and specifically designed to deal with duty of care situations. The offence "*is not concerned with cases where the accused can be shown to have committed the act that killed or seriously harmed the victim or can be shown to have been complicit in that act.*"<sup>24</sup>

4.15 Under the offence of criminal neglect, the prosecution has several charging options depending on the facts of the case. If death occurs, the accused may be charged with either murder/manslaughter or criminal neglect or both. The offence may also be charged as an alternative to an offence of causing serious harm. In some cases, only one suspect will be charged.<sup>25</sup>

4.16 The offence was designed to catch two types of situations:

- (1) where there is no direct evidence indicating that the accused actually killed or seriously injured the victim;
- (2) where the accused is amongst a number of people who had "*exclusive opportunity*" to kill or seriously injure the victim, and the principal offender and/or accomplice cannot be identified by a process of elimination.<sup>26</sup>

4.17 In both cases, without the section 14 offence the parties might be acquitted because those who have crucial knowledge of what happened at the time the victim was killed or seriously injured may maintain their silence or give contradictory evidence. The prosecution then cannot make out a strong case required to prove beyond reasonable doubt that the defendant is guilty. The section 14 offence closes this evidential loophole (exploited by the defendant in the *Macaskill* case) by its focus on the duty of care.<sup>27</sup> Defendants have a lesser incentive to give vague evidence or false incriminations or resort to mutual denial when they must provide an answer to the question of why they neglected their duty of care. Where one accused asserts his right to silence, the other accused has an incentive to tell the

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22 See section 14(1) of the original version of the Act.

23 See section 14(1) of the Act (current version). See discussion later in this chapter.

24 South Australian Hansard debates, House of Assembly, 30 June 2004, at 2624, *per* Hon M J Atkinson (Attorney General).

25 Same as above, at 2626, *per* Hon M J Atkinson (Attorney General).

26 Same as above, at 2624.

27 South Australian Hansard debates, Legislative Council, 7 February 2005, at 886, *per* Hon P Holloway.

whole truth and apportion liability accordingly, or face taking the full force of the law.<sup>28</sup> Thus, even if the prosecution cannot prove beyond reasonable doubt who is the principal offender, either or both of the accused could still be convicted on the basis of criminal neglect.

## The elements of the offence of criminal neglect

4.18 Before a person may be found guilty of the offence of criminal neglect (as constituted prior to its reform in 2018), there are four elements that must be established, each beyond reasonable doubt.

### *The first element*

4.19 The first element is that a child or vulnerable adult has died or suffered serious harm as a result of an unlawful act.<sup>29</sup>

#### *Child or vulnerable adult*

4.20 A child is a person under 16 years of age for the purposes of the offence.<sup>30</sup> As in other aspects of the law, section 14 assumes that children under the age of 16 years are less able to protect themselves from harm than adults.<sup>31</sup>

4.21 A vulnerable adult under the legislation is a person 16 years of age or more, whose ability to protect him or herself from an unlawful act “is significantly impaired through physical disability, cognitive impairment, illness or infirmity.”<sup>32</sup> “Cognitive impairment” is in turn defined to include:

- (a) a developmental disability (including, for example, an intellectual disability, Down syndrome, cerebral palsy or an autistic spectrum disorder);

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28 See South Australian Hansard debates, House of Assembly, 30 June 2004, at 2624, per Hon M J Atkinson (Attorney General).

29 Section 14(1)(a) in the original version of the Act. The full text of the original section 14 is set out in Annex B(1) to this paper. Note that a major reform of the legislation, which came into operation on 6 September 2018, has deleted the word “unlawful” in the section, amongst other changes (pursuant to the 2018 Amendment Act). See discussion of the new legislation later in this chapter.

30 See definition of “child” in section 14(4) of the original version of the Act.

31 The relevant Hansard debate on the Bill noted that: “Other laws make the same assumption - for example criminal laws prohibiting sexual activity with children under 16, child protection laws saying a child under 16 may not give consent to a voluntary custody arrangement, and compensation laws exempting a child under 16 who is injured in a car accident from the presumption that, as a passenger, the child contributed to the injury by agreeing to travel in the car with an intoxicated driver.” See South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625, per Hon M J Atkinson (Attorney General).

32 See definition of “vulnerable adult” in section 14(4) of the original version of the Act, as amended in 2016 (see above). The original 2005 provision referred to “mental disability” in place of “cognitive impairment.”

- (b) an acquired disability as a result of illness or injury (including, for example, dementia, a traumatic brain injury or a neurological disorder);
- (c) a mental illness.<sup>33</sup>

4.22 As we have noted previously, unlike the position in the United Kingdom under their “*causing or allowing*” offence, the application of section 14 of the Act is not confined to domestic situations and can be used in institutional settings, as it is based on where there is an assumption of a duty of care – such as in elder care homes, for example.<sup>34</sup> In relation to other types of institutions, because the definition of “*vulnerable adult*” refers to physical disability, cognitive impairment, illness or infirmity, it appears that a prison, for example, would not generally be covered, though it is possible that a prison hospital may be covered where the “*vulnerable adult*” definition, for medical reasons, might apply.<sup>35</sup>

*Dies or suffers serious harm*<sup>36</sup>

4.23 In the context of the offence, “*serious harm*” means:

- (a) harm that endangers, or is likely to endanger, a person's life; or
- (b) harm that consists of, or is likely to result in, loss of, or serious and protracted impairment of, a part of the body or a physical or mental function; or
- (c) harm that consists of, or is likely to result in, serious disfigurement.

4.24 There was some debate during the passage of the Bill on whether the offence was intended to cover only serious *physical* harm to the victim. The Attorney General clarified that this was not the case. He commented during the Second Reading debate:

*“The bill should continue to cover harm that consists of, or results in, serious or protracted impairment of physical or mental function. The person who allows another to inflict harm of this kind on a child or vulnerable adult in his or her care should be as liable to a charge of criminal neglect as one who allows the*

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33 See discussion in para 4.10 above.

34 See, eg, the case of *H Ltd v J and Another* [2010] SASC 176, discussed in Appendix III.

35 These assumptions about the scope of section 14 of the Act have been confirmed in our discussions with the South Australian Attorney-General's Department.

36 See definition of “*serious harm*” in section 14(4) in the original version of the Act – though see also discussion of the 2018 Amendment Act later in this chapter. This major reform of the legislation, which came into operation on 6 September 2018, has deleted the word “*serious*” in the section, amongst other changes (pursuant to the 2018 Amendment Act). See discussion of the new legislation later in this chapter.

*infliction of physical harm. We all know criminal statutes are interpreted very strictly by the courts.*<sup>37</sup>

4.25 On being asked for further clarification about where on the continuum between “*an actual injury to the axons that hold the brain in place*” and “*an impairment of mental function at a very light level because someone is upset*,”<sup>38</sup> the Attorney General said, “[t]he intention is one of serious harm. The court will know what it is looking for along [that] continuum.”<sup>39</sup>

4.26 On the issue of whether the “*serious disfigurement*” mentioned in the legislation meant “*permanent disfigurement*,”<sup>40</sup> the Attorney General clarified that “*serious disfigurement*’ would mean ‘*enduring disfigurement*’.”<sup>41</sup>

*As a result of an unlawful act*<sup>42</sup>

4.27 Section 14(4) states that the term “*act*” includes “*an omission*” and “*a course of conduct*”. It goes on to state that an act is unlawful if it: (a) constitutes an offence; or (b) would constitute an offence if committed by an adult of full legal capacity.

4.28 The death or serious harm would be considered to be the result of an unlawful act where it cannot be attributed to natural causes or accident. The prosecution does not have to prove who committed that unlawful act however, as the responsibility for the unlawful act is not relevant to this offence.<sup>43</sup>

### ***The second element***

4.29 The second element is that the defendant had, at the time of the unlawful act, a duty of care to the victim.<sup>44</sup>

#### *Duty of care*

4.30 Under section 14(3) of the Act a person has a duty of care to a victim if the person is a parent or guardian of the victim or has assumed responsibility for the victim's care. Only a parent or guardian of the victim is deemed to have assumed a duty of care. The Attorney General stated during

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37 See South Australian Hansard debates, House of Assembly, 9 December 2004, at 1309, *per* Hon M J Atkinson (Attorney General).

38 Same as above, *per* Mrs Redmond.

39 Same as above, *per* Hon M J Atkinson (Attorney General).

40 Same as above, at 1312 *per* Mrs Redmond.

41 Same as above, at 1312, *per* Hon M J Atkinson (Attorney General).

42 See also footnote 3 above and the discussion later in this chapter regarding the implications of the 2018 Amendment Act for the term “*unlawful act*”.

43 South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625.

44 See section 14(1)(b) of the Act. The full text of the original section 14 is set out in Annex B(1) to this paper. See discussion of the element in South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625, *per* Hon M J Atkinson (Attorney General).

the passage of the Bill:

*“In cases where the accused is not a parent or guardian, it must be proved beyond reasonable doubt that he or she actually assumed responsibility for the care of the victim.”<sup>45</sup>*

4.31 Parents and carers who are children themselves can be liable under the criminal neglect offence. The Attorney General stated:

*“Parents are not absolved of responsibility for the care of their children just because they are children themselves. Even if a guardian is appointed, we still expect a child-parent to assume the day-to-day care and protection of the child. Equally, it does not matter that the person who has assumed responsibility for the care of a child or a vulnerable adult is a child.”<sup>46</sup>*

The Attorney General went on to note the following crucial point, however:

*“In either case, establishing a duty of care to the victim is only the first step in establishing liability, and, as will be explained, this offence has other elements that allow a court to recognise the difference in awareness and power between children and adults.”<sup>47</sup>*

4.32 In determining whether the defendant owed a duty of care to the victim, the court will look at any responsibility assumed in the past and the circumstances in the household at the time of the victim's death. Whether the accused is a member of the same household as the victim or lives in the same house is not of legal significance, however, under the South Australian offence. It recognises that it is possible to share a household with a child or vulnerable adult, especially for short periods of time or limited purposes, without actually assuming any responsibility for that child or adult. It can also include duty of care relationships that are not confined to the same household (*“as when two adults assume responsibility for the care of their child's school friend for the day, and that friend dies or suffers serious harm while in their care”*).<sup>48</sup>

4.33 Where there are multiple defendants, and a duty of care is established for one of them but he did not kill or injure the victim, then he has every incentive to give a truthful account of the preceding events in order to have the chance of being acquitted from the charge of criminal neglect, and ensure that the right person is penalised for the crime.

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45 South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625.

46 Same as above.

47 Same as above.

48 Same as above, at 2627, *per* Hon M J Atkinson (Attorney General).

### **The third element**

4.34 The third element is that the accused was or ought to have been aware that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act.<sup>49</sup>

*Was or ought to have been aware of appreciable risk*

4.35 The Attorney General observed that the jury need not find that the accused foresaw the particular unlawful act that killed or harmed the victim. He stated:

*“The charge of criminal neglect will stand even though the death was caused by an unlawful act of a different kind from any that had occurred before of which the accused should have been aware. The charge will stand even though there is no evidence of previous unlawful acts, if it is clear that the act that killed or harmed the victim was one that the accused appreciated or should have appreciated, posed an objective risk of serious harm and was an act from which the accused could and should have tried to protect the victim. The prosecution must prove that the defendant was aware of that risk or ought to have been so aware.”<sup>50</sup>*

The Attorney General went on to note:

*“To the extent that an accused person's ability to appreciate that risk is diminished by, say, disability or youth, it is less likely that he or she will be convicted.”<sup>51</sup>*

### **The fourth element**

4.36 The final element, *“inextricably linked with the previous element,”<sup>52</sup>* is that the accused failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the accused's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.<sup>53</sup>

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49 See section 14(1)(c) of the Act. The full text of the original section 14 is set out in Annex B(1) to this paper. See discussion of the element in South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625, *per* Hon M J Atkinson (Attorney General).

50 See South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625.

51 See South Australian Hansard debates, House of Assembly, 12 October 2004, at 334.

52 See South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625, *per* Hon M J Atkinson (Attorney General).

53 See section 14(1)(d) of the Act. The full text of the original section 14 is set out in Annex B(1) to this paper. See discussion of the element in South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625, *per* Hon M J Atkinson (Attorney General).

## *Failed to take steps*

4.37 It was observed during the passage of the Bill that unless there is credible evidence to contradict it, a jury may infer inaction *“in a situation where a reasonable person would anticipate that, without intervention, the victim was at risk of harm, and may infer that the accused's inaction contributed to the harm inflicted on this occasion.”*<sup>54</sup> An excuse that an accused did not realise that, by intervening, he or she could have averted the danger is unlikely to succeed, as a person can fall short of the standard of care required by the criminal law by not perceiving the need to take action to avert the danger to others.<sup>55</sup>

## **Maximum penalty for the offence**

### ***Cases involving the death of the victim***

4.38 As originally enacted in 2005, the maximum penalty for the offence of criminal neglect where the victim dies is imprisonment for 15 years.<sup>56</sup> The Attorney General observed that this is the same as the maximum penalty for recklessly endangering life under South Australian law. He stated:

*“The equivalence is due to the fact that advertent recklessness is an aggravating feature - but life is only endangered, not lost, in the former offence, whereas in the latter offence, there is lesser fault (criminal negligence) - but life is actually lost.”*<sup>57</sup>

### ***Cases involving serious harm***

4.39 Where the victim in a criminal neglect case suffers serious harm but does not die, the original 2005 maximum penalty is five years' imprisonment.<sup>58</sup> On this maximum penalty, the Attorney General commented:

*“This is the same as the maximum penalty proposed for the new offence of causing serious harm by criminal negligence in the Statutes Amendment and Repeal (Aggravated Offences) Bill 2004, now before Parliament - an offence introduced to bring*

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54 See South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625, *per* Hon M J Atkinson (Attorney General).

55 Same as above.

56 See section 14(1) of the original version of the Act. Note that this maximum penalty has been increased to life imprisonment under the 2018 Amendment Act, which came into operation on 6 September 2018. See discussion later in this chapter.

57 See South Australian Hansard debates, House of Assembly, 30 June 2004, at 2626.

58 See section 14(1) of the original version of the Act. Note that this maximum penalty has been increased to 15 years' imprisonment under the 2018 Amendment Act, which came into operation on 6 September 2018. See discussion later in this chapter.

*South Australia into line with the Model Criminal Code and the criminal law in most other Australian States and Territories.*<sup>59</sup>

## **Evidential matters**

### ***Assumption that the unlawful act committed by another***

4.40 Section 14(2) of the Act states:

*“(2) If a jury considering a charge of criminal neglect against a defendant finds that—*

*(a) there is reasonable doubt as to the identity of the person who committed the unlawful act that caused the victim's death or serious harm; but*

*(b) the unlawful act can only have been the act of the defendant or some other person who, on the evidence, may have committed the unlawful act,*

*the jury may find the defendant guilty of the charge of criminal neglect even though of the opinion that the unlawful act may have been the act of the defendant.” [Emphasis added.]*

4.41 The offence of criminal neglect under section 14 is predicated on the assumption that the unlawful act that killed or harmed the victim was committed by someone else. The Attorney General observed that, as a corollary to this:

*“In cases where it is impossible to tell which of two or more people killed or harmed the victim, but it is clear that one of them did, it would be possible for both people to escape conviction for criminal neglect by repudiating that assumption. The accused could simply point to the reasonable possibility that it was he or she, and not someone else, who killed or harmed the victim.”<sup>60</sup>*

4.42 For this reason, and “to prevent this perverse outcome,” section 14(2) clarifies that a person accused of criminal neglect “cannot escape conviction by saying there was a reasonable possibility that he or she was the author of the unlawful act.”<sup>61</sup>

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59 See South Australian Hansard debates, House of Assembly, 30 June 2004, at 2626.

60 Same as above, at 2625.

61 Same as above, at 2626.

## **Impact on the presumption of innocence**

4.43 It was reported during the passage of the Bill that the Criminal Law Committee of the Law Society for South Australia, while indicating its support for the objectives of the Bill, had expressed disquiet and concern about the particular model proposed. In particular, the Committee was of the opinion that the Bill would “create an unreasonable incentive to fabricate evidence about a co-accused.”<sup>62</sup> It was also reported to be concerned that “this legislation would encourage inadequate investigation by police and forensic experts; the presentation of weak prosecution cases; the criminalisation of innocent people; and the failure properly to prosecute an offender for the substantive offence for which they are truly guilty.”<sup>63</sup>

4.44 In reply to these concerns, the Government stated:

*“Any change to the law requires a fine balance between the presumption of innocence for each of the accused and the public interest in holding one or both of them criminally liable to the extent that they were responsible for what happened. At present, the balance is tipped too far one way and can allow both to escape criminal liability altogether. The right balance can be achieved only by a law constructed with great attention to technical legal detail. That is why the government has consulted widely - indeed, nationwide - with experts in the criminal law in drafting this bill. During that consultation, the need to protect the rights of people accused of crime was continually asserted, and the bill carefully drafted to preserve those rights. ...*

*The bill says that carers who fail to take reasonable steps available to them in the circumstances to protect the child or vulnerable adult in their care from harm, in certain circumstances are not innocent and may be guilty of the offence of criminal neglect. ... Of course, one of them must have done the unlawful act that killed or harmed the victim, but this law is not concerned with that. It allows each of these people to be convicted of a new offence that is different from the offence of committing the unlawful act itself. No injustice is done to the suspect who did not commit the unlawful act if the elements of the offence of criminal neglect are established beyond reasonable doubt against him or her. No injustice is done to the person who did commit the unlawful act. There is no criminalisation of innocent people. There is no shifting of any onus of proof.”<sup>64</sup>*

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62 See South Australian Hansard debates, Legislative Council, 15 February 2005, at 1034, per Hon I Gilfillan.

63 See South Australian Hansard debates, Legislative Council, 7 February 2005, at 889, per Hon R D Lawson.

64 See South Australian Hansard debates, Legislative Council, 17 February 2005, at 1156 to 1157, per P Holloway.

## Possible defences to a charge of criminal neglect

4.45 A number of possible grounds for defence were put forward during the passage of the Bill.<sup>65</sup>

### **No duty of care**

4.46 One defence might be that the accused did not owe the victim the requisite duty of care. It was pointed out that this will depend on the circumstances in each case. However, *“[i]t will not be available to a parent or guardian of a child or vulnerable adult, because that person is deemed to owe the victim a duty of care.”*<sup>66</sup>

### **Defendant not aware of risk (in circumstances where this was reasonable)**

4.47 The Attorney General observed that a defence that may be used by a child-defendant is that although a duty of care to the victim existed, the defendant was not aware of an appreciable risk of serious harm to the victim, and ought not to have been so aware.<sup>67</sup>

### **Reasonable steps taken**

4.48 Another potential defence that might be asserted by defendants is that although aware of the risk to the victim, the accused did take steps to protect the victim that were reasonable in the circumstances. It was noted that *“[a] defence like this for a child-accused may be that although the steps taken by the accused might not seem appropriate by adult standards, they are perfectly reasonable for a child of the accused's age and circumstances.”*<sup>68</sup>

### **Unreasonable to expect steps to be taken**

4.49 Another specific defence might be that, although the defendant was aware of the risk, it would have been unreasonable in the circumstances to expect the defendant to take any steps to protect the victim. The Attorney General stated:

*“This might be because the accused was under duress, for example in circumstances of extreme domestic violence. It*

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65 See South Australian Hansard debates, House of Assembly, 30 June 2004, at 2626, per Hon M J Atkinson (Attorney General).

66 Same as above.

67 Same as above.

68 Same as above.

*might be because the accused is a child and the other suspect an adult who exerted authority over that child.*<sup>69</sup>

## **How the South Australian “*criminal neglect*” model compares to the UK enacted model**

4.50 As noted earlier, the parliamentary debates on the South Australian criminal neglect offence made reference to the UK offence in section 5 of the Domestic Violence, Crime and Victims Act 2004, which at that time was still in passage through Parliament in the UK.

4.51 The Attorney General for South Australia contrasted the features of the two offence models. He observed that:

- The UK offence is limited to domestic relationships, however the section 14 offence goes further in that it includes relationships that are not confined to households.
- As noted earlier, section 14 contemplates also situations “*where a duty of care is created by an assumption of responsibility between people who do not share a household (as when two adults assume responsibility for the care of their child's school friend for the day, and that friend dies or suffers serious harm while in their care).*”<sup>70</sup>
- The UK offence does not refer overtly to a duty of care, “*but implies it between a person who is [a] member of the victim's household and had frequent contact with the victim if that victim is a child or vulnerable adult.*”<sup>71</sup> The section 14 offence, by comparison, “*spells out when a duty of care exists, but does not deem a duty of care to exist in a person who is not a parent or guardian of the victim.*”<sup>72</sup> For such a person it must be proved beyond reasonable doubt that they have assumed a duty of care. The section 14 offence “*recognises that it is possible to share a household with a child or vulnerable adult, especially for short periods of time or limited purposes, without actually assuming any responsibility for that child or adult.*”<sup>73</sup>
- The section 14 offence covers both unlawful death and serious harm, while the UK offence as originally enacted (prior to its amendment in 2012)<sup>74</sup> was confined to unlawful death.

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69 Same as above.

70 Same as above, at 2627, *per* Hon M J Atkinson (Attorney General).

71 Same as above.

72 Same as above.

73 Same as above.

74 See the discussion earlier in Chapter 3 of this paper, at para 3.37.

4.52 An extremely important point of contrast between the UK enacted offence and the section 14 criminal neglect offence is that the former incorporates evidential and procedural reforms which have not been adopted in the South Australian model. These reforms include allowing adverse inferences to be drawn from a failure to testify and postponing the no case to answer submission to the end of the defence case.<sup>75</sup> These significant changes to trial procedure have drawn fire in the UK as compromising the presumption of innocence.<sup>76</sup> For the section 14 offence on the other hand, it was strongly asserted by the promoters of the Bill that the offence “does not change the current law about the right to silence” and “[t]here is no shifting of any onus of proof.”<sup>77</sup>

## **Situations where the criminal neglect offence may or may not apply**

4.53 Given the unique nature of the section 14 offence within the general criminal law, the South Australian Government prepared a set of case examples on how the offence would apply, which were included within the Second Reading of the Bill.<sup>78</sup> The Attorney General stated:

*“These examples may help explain how this law is intended to work. ... Bear in mind that this law will allow the prosecution several charging options in cases like these. The choice will depend on the facts of each case. One or both suspects may be charged with both the causative offence and the offence of criminal neglect in the alternative, or either offence on its own. In some cases, only one suspect may be charged.”*<sup>79</sup>

### **Example 1**

4.54 In this case:

A six-year-old girl dies at home late one evening. The medical evidence shows that she died as a result of a severe beating to the head and torso. Post-mortem examination shows signs of past physical abuse.

The only two people with the opportunity to kill the child are her mother and her mother’s current boyfriend, who is not her father. He does not live at the house, but was staying overnight when

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75 Same as above, at paras 3.55 to 3.63.

76 Same as above, at para 3.63.

77 See South Australian Hansard debates, Legislative Council, 17 February 2005, at 1156 to 1157, *per* P Holloway.

78 South Australian Hansard debates, House of Assembly, 30 June 2004, at 2626 to 2627, *per* Hon M J Atkinson (Attorney General).

79 Same as above, at 2626.

the child died. He has stayed overnight about 20 times in the past six months.

The mother and the boyfriend both say the death resulted from injuries the child suffered when she fell down the stairs. Each denies witnessing the fall and says the other brought the child's injuries to his or her attention. The boyfriend says he has never assumed responsibility for the care of the child and the evidence about this is ambiguous.<sup>80</sup>

4.55 In explaining the first example, the Attorney General commented:

*"There is no evidence to show whether the boyfriend, the mother or both of them administered the beating that killed the child. The only people who can say what happened are the mother and her boyfriend, but each has denied involvement while implicating the other.*

*This example is one in which it is not clear whether one of the suspects owes the requisite duty of care to the victim. In most cases, each suspect owes the victim a duty of care by a direct relationship of parent or guardian, or by a clear, if temporary, assumption of responsibility for the care of the victim.*

*In this example, both suspects have every chance of being acquitted of homicide, because neither can be shown to be the principal offender. Knowing this, there is no incentive for either suspect to tell what happened.*

*But the mother is more vulnerable to a charge of criminal neglect than the boyfriend, because there is no doubt that she owed the victim a duty of care. The boyfriend has a greater chance of acquittal because of the difficulty in establishing a duty of care. Knowing this, it is in his interests to say nothing about what happened and to let the mother take the rap. The mother has every incentive to tell what happened if the boyfriend actually killed the child, once she appreciates that she is likely to take the blame for the child's death with a conviction for criminal neglect while he gets off scot-free."<sup>81</sup>*

## **Example 2**

4.56 In this example, the same fact situation applies except the accused persons are the child's mother and father. As each suspect is a

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80 Same as above.

81 Same as above.

parent of the child, each therefore has the necessary duty of care.<sup>82</sup> The Attorney General stated:

*“Again, a conviction for homicide is unlikely because it can’t be established who was the principal offender. But this time each suspect has an equal chance of being convicted of criminal neglect.*

*Assuming the act was not committed by them both, the one who did not commit the act has an incentive to say what really happened (if he or she knows it) to reduce the chance of a conviction, but only if the truth would show that he or she could not have been aware of the risk to the child or could not have protected her even if aware of the risk.”<sup>83</sup>*

### **Example 3**

4.57 In this case:

The wheelchair-bound victim dies as a result of injuries received when she was tipped from her wheelchair down the stairs in her home. Apart from being wheelchair-bound, the victim had severe Alzheimers.

The suspects are a brother and sister, grandchildren of the victim, who live in the victim’s house with her. The grandson is a 20-year-old junkie who spends much of the day at home. The granddaughter is a 15 year-old schoolgirl who is away from home during the day but generally home after school hours.

The story given by each suspect is that the other found her at the bottom of the stairs. Both deny any assumption of responsibility for their grandmother. Each says that responsibility was assumed by the other, to the extent that it was not also assumed by their aunt, who lived nearby, visited regularly and organised the victim’s home nursing and medical care, or by their parents, who live at the family farm.<sup>84</sup>

4.58 In explaining the third example, the Attorney General stated:

*“Both suspects are likely to be acquitted of homicide, because it will be difficult to prove beyond reasonable doubt who tipped the victim down the stairs.*

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82 Same as above, at 2626 to 2627.

83 Same as above, at 2626, per Hon M J Atkinson (Attorney General).

84 Same as above.

*Neither suspect being a parent nor guardian of the victim, their respective liability for criminal neglect will depend on whether they owed a duty of care to the victim. The court will look at any responsibility assumed in the past and the circumstances in the household at the time of the victim's death.*

*If a duty of care is established for one of them, and that person did not kill the victim, there is every incentive for him or her to say what happened to increase the chance of an acquittal for criminal neglect and, possibly, to make the charge of homicide stick to the other.<sup>85</sup>*

#### **Example 4**

4.59 The fourth example referred to in relation to the draft Bill was as follows:

The victims are young children, a boy and a girl. They are passengers in a four-wheel drive vehicle being driven along a remote highway at dusk. The only other occupants are their parents. Neither child is restrained by a seatbelt. The car swerves, overruns an embankment at the side of the road and rolls. Both children are thrown from it. The boy dies when crushed by the car and the girl is severely physically and intellectually disabled from her injuries. The parents receive minor cuts and bruises and the mother is so severely concussed that she has no memory of the accident or the journey.

The father won't say what happened or who was driving. The only other eyewitness is the little girl, but she is no longer able to speak or understand questions. There is independent evidence that the car was being driven at a high speed just before the accident happened.<sup>86</sup>

4.60 In explaining this example, the Attorney General stated:

*“Both parents could be charged with dangerous driving causing death, dangerous driving causing serious harm and criminal neglect. The dangerous driving charges are unlikely to stick in the absence of proof of the identity of the driver. The only other possible causative offence is manslaughter by unlawful and dangerous act, that act being a failure to restrain the boy by a seatbelt. The charge is also unlikely to stick, if brought at all, unless it can be shown who failed to restrain the children.*

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85 Same as above, at 2626, *per* Hon M J Atkinson (Attorney General).

86 Same as above, at 2626 to 2627.

*If the father maintains his silence (and only the father can say what happened, because the mother has no memory of the journey or the accident), both parents risk being convicted of criminal neglect. They each have the relevant duty of care, would be expected to be aware of the high risk of serious harm that a lack of seatbelt restraint poses, and have apparently not taken steps that might reasonably have been taken to protect each child from harm.*

*The incentive in this case is for the father to concoct a story that places one parent in the driver's seat and the other asleep throughout the journey, including that the driver stopped the car to let the children stretch their legs and did not put their seatbelts on when they got back in. If believed, this will place only one parent, instead of two, at risk of a criminal conviction and imprisonment, leaving the other to look after the surviving child. But that incentive is so obvious that the prosecutor is likely to alert the jury to it and ask them to take the father's initial refusal to say what happened into account when testing his evidence. There is no real risk of a miscarriage of justice in these circumstances.<sup>87</sup>*

## **Cases decided since the introduction of the offence**

4.61 Set out below are examples of cases where the courts in South Australia have considered the application of the criminal neglect offence under section 14 of the Act.<sup>88</sup> A discussion of further relevant cases is included in Appendix III.

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87 Same as above, at 2627, *per* Hon M J Atkinson (Attorney General).

88 These cases were decided on the basis of section 14 of the Criminal Law Consolidation Act 1935, as introduced in 2005. However, as discussed elsewhere in this chapter, in August 2018, the 2018 Amendment Act was enacted, which made significant changes to section 14 of the Act. These amendments came into force on 6 September 2018: See: [https://www.legislation.sa.gov.au/LZ/V/A/2018/CRIMINAL%20LAW%20CONSOLIDATION%20CHILDREN%20AND%20VULNERABLE%20ADULTS\)%20AMENDMENT%20ACT%202018\\_6/2018.6.UN.PDF](https://www.legislation.sa.gov.au/LZ/V/A/2018/CRIMINAL%20LAW%20CONSOLIDATION%20CHILDREN%20AND%20VULNERABLE%20ADULTS)%20AMENDMENT%20ACT%202018_6/2018.6.UN.PDF)  
<https://www.legislation.sa.gov.au/LZ/C/A/CRIMINAL%20LAW%20CONSOLIDATION%20ACT%201935/CURRENT/1935.2252.AUTH.PDF>  
[https://www.legislation.sa.gov.au/LZ/V/P/2018/CRIMINAL%20LAW%20CONSOLIDATION%20CHILDREN%20AND%20VULNERABLE%20ADULTS\)%20AMENDMENT%20ACT%20\(COMMENCEMENT\)%20PROCLAMATION%202018\\_30.8.2018%20P%203253/30.8.2018%20P%203253.UN.PDF](https://www.legislation.sa.gov.au/LZ/V/P/2018/CRIMINAL%20LAW%20CONSOLIDATION%20CHILDREN%20AND%20VULNERABLE%20ADULTS)%20AMENDMENT%20ACT%20(COMMENCEMENT)%20PROCLAMATION%202018_30.8.2018%20P%203253/30.8.2018%20P%203253.UN.PDF)

## **Sentencing**

### *R v Field; R v Partridge (David Mamo's case)*

4.62 The prosecution of Melissa Field and David Partridge<sup>89</sup> in relation to David Mamo's death, provides an example of how the section 14 offence has been interpreted to operate to achieve a more just result in these cases.

4.63 Partridge was Field's boyfriend. David Mamo was Field's three year-old son who died from a severed bowel caused by a blow or blows to the stomach. The pathologist who performed the post-mortem thought the injuries were caused by blunt force to the abdominal area, either by an object, a fist or by a foot stomping on this part of the body. The boy had also suffered injuries to his pancreas and very extensive bruising to his back, head, neck and limbs. Older bruising to much of his body was also evident, as well as scarring. The pathologist stated that the bruises and scars were more extensive than would be expected as a result of "*normal wear and tear*", and that "*multiple blows would have been required to sustain these injuries*".<sup>90</sup>

4.64 The evidence indicated that the fatal injury must have been inflicted sometime in the night, when David was in the care of both Partridge and Field, so he would have been critically ill for some hours before he died. The child vomited in his bed and both parties helped to clean him and remake the bed. The following day, Field went to the doctor herself for tonsillitis, having been dissuaded by Partridge from taking David to see the doctor as well. He subsequently filmed the child, conscious but limp, while making insulting and disparaging comments about him.<sup>91</sup> Late in the afternoon the boy fell unconscious, was taken to hospital and died.

4.65 At trial, Partridge was charged with murder and both Field and Partridge were charged with the section 14 offence of criminal neglect. Partridge was not Mamo's father but was Field's partner and there was evidence he frequently stayed at the victim's house. Although there was no evidence linking Field to the act that caused David's death, she pleaded guilty to the charge of criminal neglect on the basis that she owed a duty to care for her son and had neglected that duty by failing to protect him from the act that caused his death. Field had known that Partridge consumed drugs and was violent towards David.

4.66 Field was sentenced to 6 years' imprisonment with a non-parole period of four years and six months. The sentencing judge stated that this was "*on the basis that you knew that Partridge was habitually abusing the child, that you failed to take steps, which you could reasonably be expected to have taken, to protect the child from harm, that he had clearly suffered harm*

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89 See: *R v Field* – Sentencing remarks, SASC, 30 Mar 2007; *R v Partridge* – Sentencing remarks, SASC, 10 July 2008; and *R v Partridge* [2008] SASC 323 (CCA).

90 *R v Partridge* – Sentencing remarks, SASC, 10 July 2008.

91 Same as above.

from the assault which caused the injuries now in question... .<sup>92</sup> In passing sentence on Field, the judge also highlighted the importance of a social conscience geared towards protection of vulnerable members of society:

*“It is important that members of the community who have the responsibility for the care of young children are aware of the extent of those responsibilities and the serious view that the court takes when there is a failure to answer to that duty in circumstances such as those which are present here. It is my duty to impose a sentence which takes into account the necessity for general deterrence against offences of this kind.”*<sup>93</sup>

4.67 Due to restrictions imposed by evidential procedures, the prosecution was unable to continue with the charge of murder against Partridge, despite obtaining evidence suggesting that Partridge had “kneed” the child in a manner that would explain the critical nature of his injuries. Partridge denied that he was aware of the child’s injuries and also denied knowing who was responsible. Partridge pleaded guilty to criminal neglect on the basis that he owed Mamo a duty of care and failed to exercise it properly, by: (a) failing to seek medical attention, and (b) dissuading Field from seeking medical help for Mamo. His actions were described as “reckless and callous.”<sup>94</sup> The sentencing judge noted that whilst he could not identify who caused the fatal injury to the child, it must have been either Partridge or Field as either or both were supervising him in the hours prior to his death.

4.68 Partridge was sentenced to 10 years’ imprisonment with a non-parole period of six years and six months. In committing the offence, Partridge had also breached a suspended sentence good behaviour bond of 15 months’ imprisonment. The trial judge had revoked the bond and ordered that the suspended sentence be brought into effect. Partridge was therefore sentenced at trial to a cumulative term of imprisonment of 11 years and three months with a non-parole period of seven years and three months.<sup>95</sup>

4.69 Partridge subsequently appealed against sentence.<sup>96</sup> The appeal turned on whether Partridge’s head sentence was manifestly excessive and whether his sentence was disproportionate to the sentence imposed upon Field. The appeal finding was that the head sentence and non-parole period imposed by the trial judge were within discretion and appropriate, and that Partridge had been sentenced on the correct factual basis with the disparity between his and Field’s sentences being justified on the facts of the case.<sup>97</sup>

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92 *R v Field* – Sentencing remarks, SASC, 30 Mar 2007.

93 Same as above.

94 *R v Partridge* – Sentencing remarks, SASC, 10 July 2008.

95 *R v Field* – Sentencing remarks, SASC, 30 Mar 2007.

96 *R v Partridge* [2008] SASC 323 (CCA).

97 Same as above, at paras 25 to 56.

## ***Demonstration of a trial for criminal neglect***

### ***R v T & H***<sup>98</sup>

4.70 The case of *R v T & H* provides a useful step-by-step demonstration of how section 14 applies during a trial.

#### *Charges*

4.71 T and her partner H were charged jointly with criminal neglect of T's two year-old daughter under section 14 of the Act (and for an alternative count pursuant to section 29(2) of the Act for "*aggravated act endangering life or creating risk of serious harm*"), under which T and H were alleged to have failed to obtain proper medical attention for TW. The trial was by judge alone.

#### *Elements of offence*

4.72 The court set out the elements of the section 14 offence which the prosecution must prove beyond reasonable doubt:

- (1) TW, a child (then aged two years and nine months) suffered serious harm as a result of an unlawful act;
- (2) the unlawful act was an act which constituted an offence;
- (3) T and H each had, at the time of the unlawful act, a duty of care to TW;
- (4) each of them was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to TW by the unlawful act;
- (5) each of them failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect TW from harm; and
- (6) the failure to take proper steps was, in the circumstances, so serious that a criminal penalty was warranted.<sup>99</sup>

#### *The prosecution case in overview*

4.73 T, H and TW were living together as a family unit. C (step-father of T) and Y (mother of T) visited them at their house on 26 May 2013, a Sunday, and found TW to be happy and healthy. On Wednesday evening, T visited C and Y who were living nearby and she told them that TW had been unwell and that she had been vomiting. On Thursday evening, Dr R visited TW at her home following a call made by T who reported symptoms on TW of

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98 [2016] SADC 32.

99 Same as above, at para 7.

vomiting and diarrhoea. At the time, Dr R noted TW had some general bruising and her symptoms were consistent with dehydration. He recommended TW be taken immediately to hospital and offered to arrange an ambulance transfer. This was declined by T who said they would take her to hospital. TW was not taken to hospital, and no further medical treatment for her was sought by either of the defendants.

4.74 On 31 May 2013 (Friday), C received a call from T who told him that TW was still unwell. When he asked why TW had not been taken to the doctor, T replied that it was because TW had bruises on her. C and Y then drove over to the house, where they found TW was obviously unwell. At the time they decided to take her back to their own house to treat her, but TW's condition quickly deteriorated and so they changed their minds and took her immediately to a local GP, and then to hospital.<sup>100</sup>

4.75 On admission to hospital, it was found that TW had multiple bone, soft tissue, and internal organ injuries. She had internal bleeding, as a result of her mesentery<sup>101</sup> having been torn away from her small intestine. This injury had resulted in the death of a section of her intestine which had to be surgically removed. The doctors commented that the perforation of this tissue was "*imminent*", and, had it occurred, might have led to fatal consequences. There were also two lacerations on TW's liver, and the blood supply to her left kidney had ceased. Fractures to her pubic bone, wrists and a left rib were also found. These injuries aside, there were extensive bruises and abrasions on TW, which the prosecution said would have been obvious to T and H in the days leading up to her hospital admission.<sup>102</sup>

4.76 The prosecution case was that TW was physically assaulted on one or more occasions in the week leading to her admission to hospital on 31 May 2013. It contended that both defendants were under a duty of care to TW and either one or both of them were responsible for the assaults. Regardless of which defendant inflicted the injuries the infliction was intentional.<sup>103</sup>

#### *Witnesses*

4.77 The prosecution called various witnesses to support its case. This included C, Y, and J (H's mother), all of whom gave some general background evidence and, specifically, their individual account of what had happened in the days leading to TW's eventual admission to hospital on 31 May 2013. Ms R (T's friend) also testified, and her evidence included that sometimes T did not want anything to do with TW, and that there had been a specific phone call from T to her in around June 2013 in which T told her that TW had been vomiting and yet T did not want to take her to hospital because

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100 Same as above, at paras 13 to 19.

101 A "*mesentery*" is a fold of membrane that attaches the intestine to the abdominal wall and holds it in place.

102 Same as above, at paras 20 to 21.

103 Same as above, at paras 23 to 24.

she had bruising. The judge found these witnesses generally truthful and reliable and accepted their evidence.<sup>104</sup>

4.78 Neither defendants elected to give evidence. The trial judge indicated that was their legal right and no inference adverse to either of them for exercising that right had been drawn.<sup>105</sup>

*T's interview*

4.79 Before the court were also the Records of Interview of T and H given to the police. In her interview, T, amongst other things, had said:

- (1) she thought TW had sustained 'gastro'<sup>106</sup> after eating a burger at McDonalds. She tried to keep TW hydrated and gave her panadol but TW's condition deteriorated by Wednesday or Thursday;
- (2) H put TW in the bath on Wednesday because she had vomited on herself but she slipped in the bath and hit her face;
- (3) the bruises on TW's arm were caused by her grabbing of TW's arm to put TW in the corner when she was having a tantrum; the bruise on TW's chest was caused by her swinging TW over to the toilet when TW was sick and she was trying to hold her over the toilet because TW was throwing up everywhere; the bruise on TW's back was caused by her attempt to smack TW on her bottom but she missed and so hit TW's back;
- (4) H never smacked TW and she had never seen H smack her;
- (5) she booked a doctor's appointment for Friday at 4 pm because she thought TW was having gastro. If indeed 'gastro' was what TW was suffering from, she thought what she had done, ie, keeping TW hydrated and giving her panadol, were the right things to do.<sup>107</sup>

4.80 The trial judge remarked that he gained the impression that T was trying to "*downplay*" the extent of her role in any injuries caused to TW. He also noted the admissions T made. The judge was of the view that when T said she made a medical appointment for Friday afternoon, that could not be accurate.<sup>108</sup>

*H's interview*

4.81 In his interview, H, amongst other things, said:

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104 Same as above, at paras 35 to 76.

105 Same as above, at para 131.

106 A colloquial expression referring to gastroenteritis, possibly caused by food poisoning.

107 Same as above, at paras 80 to 88.

108 Same as above, at para 89.

- (1) he and T thought TW had gastro or something and that they were worried. He also noted that on Friday T's father took TW to the local GP;
- (2) every child gets a smack and nobody intentionally ever hurt TW. TW did not feel pain and if she got a smack on her hand or on her bottom or on her back, she never cried. The only time she ever cried was when she was put in the corner;
- (3) TW bruised really easily;
- (4) the bruises on TW's arm were from T grabbing TW's arm; another bruise on TW was from leaning against the toilet.<sup>109</sup>

4.82 The trial judge noted that H was highly agitated during the interview and his responses needed to be viewed with that in mind. He viewed H's answers as the "*responses of a person trying to 'paint himself' in a favourable light.*"<sup>110</sup>

#### *Medical evidence*

4.83 Dr R, the locum doctor who visited TW at her home in the evening of 30 May 2013 (Thursday) also gave evidence. The trial judge found him to be truthful and reliable and accepted his evidence, in particular, that:

- (1) multiple bruises were observed on TW at the time;
- (2) he thought TW might have had gastroenteritis based in part on the history he obtained;
- (3) he recommended TW be taken to hospital immediately;
- (4) TW showed no sign of guarding in her abdomen, suggesting that any serious internal injury could either only just have occurred or happened after Dr R's visit.<sup>111</sup>

4.84 Dr T who examined TW in hospital gave detailed medical evidence. The trial judge considered her to be a fair and balanced witness and had no hesitation in accepting her evidence not only in general but also in some particular aspects, including:

- (1) TW was a person whose response to bruising or bone breakage was normal;

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109 Same as above, at paras 90 to 91.

110 Same as above, at paras 92 to 93.

111 Same as above, at paras 101 to 102.

- (2) TW presented with bruising and abrasions to her face, limbs and body; lacerations to her liver; bruising to large bowel; tearing of her mesentery; damage to her renal artery and fractures to pubic bone, rib and arms/wrists;
- (3) all of TW's injuries, apart from the one to her left wrist, occurred within a matter of days of her admission to hospital;
- (4) all of her injuries resulted from impacts involving significant levels of force;
- (5) a number of the injuries could have arisen from a child such as TW being swung in the air and while airborne coming into contact forcefully with a toilet bowl;
- (6) the possibility that the fracture to her left arm, when viewed in isolation, occurring as a result of normal childhood activities could not be discounted;
- (7) the injuries to her large bowel and rib were sustained as a result of a separate mechanism to that which caused the mesentery tear and fractured pubic bone;
- (8) all the injuries sustained would cause TW varying degrees of pain and distress which would have been obvious to a care-giver;
- (9) more than one application of force was required to cause these injuries.<sup>112</sup>

#### *Defence counsel's argument*

4.85 At the trial, counsel for H argued that if the court was satisfied beyond reasonable doubt that only one of the defendants committed the unlawful act, then section 14 would have no application because its main focus was concerned with a failure to mitigate harm or mitigate unlawful acts.<sup>113</sup> The trial judge rejected this argument. Citing the Attorney General's speech in the Second Reading of the Bill which introduced section 14 (referred to earlier in this chapter), the trial judge noted that this made it clear that the fact that a court was able to conclude that one particular accused perpetrated the unlawful act(s) was no impediment to a conviction for section 14. The judge also referred to the case *R v N-T and C* (see discussion of this case in Appendix III) and noted that, despite the fact that the focus of section 14 is on omission not commission, it is nevertheless necessary to identify an unlawful act or acts upon which the contravention of section 14 depends.<sup>114</sup>

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112 Same as above, at paras 103 to 124 and 125.

113 Same as above, at para 142.

114 Same as above, at para 143.

### *Judge's findings*

4.86 Prior to analyzing whether the charges were proved against T and H, the trial judge made findings on some threshold issues.

- (1) Based on Dr T's evidence, he was satisfied that the various injuries suffered by TW amounted to "*serious harm*" within the meaning of section 14(4), either because they "*resulted in serious and protracted impairment of [TW's] physical function*"<sup>115</sup> or because they were "*likely to endanger her life*".<sup>116</sup>
- (2) Based on Dr T's evidence, including her opinion that many of TW's injuries could not be accounted for by normal childhood activities, he was satisfied that the serious harm to TW was caused as a result of an unlawful act or acts, being an assault or series of assaults.<sup>117</sup>
- (3) On the evidence before the court, he was also satisfied that TW's injuries (with the exception of the one to TW's left wrist), which were serious harm, must have occurred after Dr R's visit and prior to C and Y's visit.<sup>118</sup>

### *Judge's findings against T*

4.87 Turning onto the other elements under section 14, as against T, the judge was satisfied of the following points.

- (1) As TW's mother, T had duty of care to TW.<sup>119</sup>
- (2) In view of the evidence before the court, including T's admissions, T was the person who assaulted TW and that she did so with sufficient force to cause TW's internal injuries. Moreover, the level of force used was such that T was aware, or ought to have been aware, that there was an appreciable risk that serious harm would be caused to TW by her assaults.<sup>120</sup>
- (3) In view of the above findings, it was incumbent upon T to take steps to obtain appropriate medical attention for TW. The judge found that apart from calling Dr R, whose advice she rejected, T took no steps to obtain appropriate medical assistance for TW. The judge rejected the suggestion that the subsequent call to her parents satisfied the requirement to take steps to protect TW from harm, as such call amounted to "*nothing more than a*

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115 Though note the changes to the definition of "*serious harm*" in section 14 introduced in the 2018 Amendment Act, in force from 6 September 2018, discussed later in this chapter.

116 Same as above, at paras 147 to 149.

117 Same as above, at paras 151 to 158.

118 Same as above, at paras 160 to 177.

119 Same as above, at para 179.

120 Same as above, at paras 180 to 188.

*request for [C] to come around and 'have a look at [TW].'*” Furthermore, C was only told that TW had been sick, vomiting and experiencing diarrhea. T’s “*silence, secrecy, misleading statements and inaction*” resulted in C and Y proposing to take TW to their house rather than to hospital. It was a “*perverse twist of fate*” that TW’s conditions deteriorated resulting in her passing out, rather than any intervention by T, which made C and Y change their mind to bring TW to hospital, thereby saving her life. With these points in mind, the judge found that T had failed to take steps which she could reasonably be expected to have taken to protect TW from harm.<sup>121</sup>

- (4) In the circumstances, T’s misleading conduct and inaction were very serious and that a criminal penalty was warranted.<sup>122</sup>

#### *Judge’s findings against H*

4.88 As to the other elements under section 14 as against H, the judge found or was otherwise satisfied as follows.

- (1) Although H was not a “*guardian*” under section 14(3), on the evidence of J and T as to H and TW’s relationship, as well as H’s own description thereof (“*she’s my little girl*”), the judge found H had assumed responsibility for TW and therefore he had a duty of care for her.<sup>123</sup>
- (2) In view of the evidence before the court, the judge found H ought to have been aware that there was an appreciable risk that serious harm would be caused by T’s unlawful treatment of TW.<sup>124</sup>
- (3) The judge found that one step required of H was to alert responsible authorities as to T’s behavior. Another step would have been to take TW to hospital in accordance with the advice of Dr R. On the evidence, however, apart from consulting his own mother J and ringing a “*helpline*” seeking information about how to treat TW (from J’s evidence), H did nothing to access necessary and ultimately urgent medical treatment for TW. The judge therefore found H had failed to take steps that he could reasonably have been expected to have taken to protect TW from harm.<sup>125</sup>

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121 Same as above, at paras 189 to 194.

122 Same as above, at para 195.

123 Same as above, at paras 196 to 199.

124 Same as above, at paras 200 to 216.

125 Same as above, at paras 217 to 224.

- (4) In view of the fact that T's unlawful acts were such as to have caused TW obvious pain and discomfort and serious harm, H's failure to take such steps warranted criminal penalty.<sup>126</sup>

### *Sentence*

4.89 Accordingly, the judge found both T and H guilty of criminal neglect under section 14. Given these findings, it was not necessary to consider count two (aggravated act endangering life or creating risk of serious harm under section 29(2)) charged in the alternative. However, if it had been necessary, the judge made clear that he would also have found both defendants guilty on count two.<sup>127</sup>

4.90 The press reported that T was sentenced to imprisonment for three years and four months with a non-parole period of one year and nine months. H, in contrast, was sentenced to a term of one year and three months, which the judge was "*narrowly persuaded*" to suspend.<sup>128</sup>

## **Recent developments**

### ***Introduction***

4.91 As noted earlier in this chapter, August 2018 saw the enactment in South Australia of the Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act ("the 2018 Amendment Act"). This reform was to amend section 14 so as to address difficulties experienced in prosecuting offenders for the offence of criminal neglect, particularly in cases involving young children. The 2018 Amendment Act also, in effect, creates a general offence of child ill-treatment and neglect, previously absent in South Australia's child protection legislation.<sup>129</sup> The 2018 Amendment Act, which was assented to on 2 August 2018, came into operation on 6 September 2018.<sup>130</sup>

4.92 The reform to section 14 in the 2018 Amendment Act was supported by, or received no opposition from,<sup>131</sup> the police, the prosecution, defence counsel, the Law Society, the Bar Association and the Legal Services Commission in South Australia, as well as both the Liberal and Labour Governments (which was important, as consideration of the reform straddled

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126 Same as above, at para 225.

127 Same as above, at paras 226 to 237, and in particular, para 239.

128 See: <https://www.sbs.com.au/news/sa-mum-jailed-over-attack-on-2yo-daughter>

129 See South Australian Hansard debates, Legislative Council, on 7 June 2018, at 466, *per* Hon. R I Lucas. Available at: <https://www.parliament.sa.gov.au/permalink/?id=HANSARD-10-23187>

130 See relevant proclamation at: [https://www.legislation.sa.gov.au/LZ/V/P/2018/CRIMINAL%20LAW%20CONSOLIDATION%20CHILDREN%20AND%20VULNERABLE%20ADULTS\)%20AMENDMENT%20ACT%20\(COMMENCEMENT\)%20PROCLAMATION%202018\\_30.8.2018%20P%203253/30.8.2018%20P%203253.UN.PDF](https://www.legislation.sa.gov.au/LZ/V/P/2018/CRIMINAL%20LAW%20CONSOLIDATION%20CHILDREN%20AND%20VULNERABLE%20ADULTS)%20AMENDMENT%20ACT%20(COMMENCEMENT)%20PROCLAMATION%202018_30.8.2018%20P%203253/30.8.2018%20P%203253.UN.PDF)

131 As confirmed by our discussions with the South Australia Attorney-General's Department.

a change of government). During the passage of the legislation, members of Parliament referred to appalling abuse cases in South Australia such as the “*house of horror*” case,<sup>132</sup> the Oakden inquiry,<sup>133</sup> the Baby Ebony case<sup>134</sup> and the case of Chloe Valentine.<sup>135</sup>

4.93 The major changes brought about by the 2018 Amendment Act are the removal of references to “*unlawful*” acts and “*serious*” harm in section 14 of the Act, which significantly broadens the scope of the offence. The maximum penalty has also been increased to imprisonment for life where the victim dies (originally 15 years) and imprisonment for 15 years in other case (originally 5 years for causing serious harm).

### ***The term “serious harm” replaced with “harm”***

#### *Significance of capacity of children to heal*

4.94 The 2018 Amendment Act seeks to address the shortcomings experienced in practice by the police and the Director of Public Prosecutions in bringing cases under section 14 of the Act. These difficulties appear to have arisen principally from the original definition of “*serious harm*” in section 14 insofar as it applies to child victims.

4.95 The South Australian Parliament noted that children generally have a superior ability to heal from injury compared to adults. Major injuries that would amount to “*serious harm*” when sustained by an adult may not have this result when sustained by a child. This is because, although suffering much pain and distress from serious injuries, children possess a natural ability to recover quickly and fully that adults do not possess.<sup>136</sup> In

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132 See South Australian Hansard debates, House of Assembly, on 16 May 2018, at 442 *per* Hon V A Chapman (Deputy Premier, Attorney-General): “*Members will remember the shocking images of the ‘house of horror’, for example, as probably one of the worst cases of child neglect and consequential abuse of a whole household of children.*”

133 Same as above, at 444: “*I think members are familiar with the Oakden inquiry and the exposure of the vulnerability, in that case, of our mature-age mental health adults in our community. This only adds to the urgency for us to ensure that we protect our vulnerable adults. If I were to use any other example outside of institutional care, obviously, the community is becoming more and more aware and enlightened about the opportunity for neglect and abuse of our frail aged members of the community.*”

134 See South Australian Hansard debates, House of Assembly, on 5 June 2018, at 882, *per* Hon R Sanderson (Minister for Child Protection): “*There was also the case of baby Ebony, who presented with a broken femur and was sent home with her family and later died from further injuries.*” (See discussion of this case, *R v N-T and C* [2013] SASC 200 (19 Dec 2013) in Appendix III.)

135 See South Australian Hansard debates, Legislative Council, 24 July 2018, at 850, *per* Hon D G E Hood: “*We are also never likely to forget the tragic case of little Chloe Valentine, who died of horrific injuries in 2012 from repeatedly falling off a motorcycle she was forced to ride by her mother and her mother’s partner, who failed to seek timely medical attention when Chloe was knocked unconscious through these activities.*”

136 Same as above: for example, a baby of three months of age who sustains multiple leg fractures or multiple serious injuries causing pain and suffering will, however, most likely recover quickly with little impact on his or her development because of the infant's capacity to repair and their young age. The injury is not therefore likely to be considered a “*serious and protracted impairment*”.

particular, children of different ages have different healing capacities.

4.96 Where the victim of an alleged offence under section 14 is a child, it may therefore be difficult to establish the elements of the offence, particularly that the child has suffered “*serious harm*” as defined as a “*serious and protracted impairment*”. Consequently, the definition of “*serious harm*” for the purposes of the offence created by section 14 has been found not to cover many serious, non-fatal injuries to children, and is more apt to address serious injuries to adults (for if an adult suffered the same injury, there would most likely be a permanent impairment as a result).

4.97 The South Australian Government, law enforcement agencies and members of Parliament were concerned that people who inflict such injuries on children may therefore escape criminal prosecution, and that these anomalies needed to be corrected. The 2018 Amendment Act is therefore to ensure that the offence in section 14 is capable of extending to injuries inflicted on children notwithstanding their greater capacity to heal.

4.98 Further, under the 2018 Amendment Act, “*harm*” is now defined broadly for the purposes of the expanded section 14 offence to mean physical or mental harm and includes detriment caused to the physical, mental or emotional wellbeing or development of a child or vulnerable adult (whether temporary or permanent).

### ***Deletion of “unlawful” act***

#### *General offence of child neglect*

4.99 The shortcomings of the definition of “*serious harm*” also highlighted that the (then present) law in South Australia was such that an abusive parent or carer could only be prosecuted if there was either criminal neglect leading to death or serious harm, or there was clear proof of an actual assault or a definite act giving rise to a real risk of harm or serious harm. There was no general offence of child abuse, cruelty or neglect in South Australia as there is in some other jurisdictions, including the United Kingdom, New Zealand, Queensland and the Australian Capital Territory (and in Hong Kong<sup>137</sup>).

4.100 The only relevant local South Australian offences were the offence in section 14 and the limited and rarely used minor indictable offence under section 30 of the Criminal Law Consolidation Act (which the Amendment Act renumbers as section 14A) of failing to provide a child or other vulnerable person with necessary food, clothing or shelter when one is liable to do so.

4.101 This meant that in South Australia the situation must have reached the point where there was clear proof of some specific offence, rather

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137 Under section 27 of the Offences against the Person Ordinance (Cap 212). See the earlier discussion in Chapter 2.

than proof of cruelty or a sustained course of abuse or neglect, before an abusive or neglectful parent or carer could be prosecuted. This arguably undermined the protection that the criminal law should extend to children and other vulnerable persons and the ability of the state to punish abusive parents and carers.

4.102 When the Amendment Bill was first introduced in the South Australian House of Assembly on 28 September 2017, it was proposed to insert a new section 14A offence on ill-treatment which was to have created a new offence of ill treatment of a child or vulnerable adult who dies or suffers harm and to whom the defendant had a duty of care. While it had been proposed that this new offence would have the same basic elements as the section 14 criminal neglect offence, the terms “*unlawful act*” and “*serious harm*” would be replaced with “*act*” and “*harm*” in section 14A. This proposed new ill-treatment offence was not included in the later version of the Bill, however. Instead, it was proposed to remove from the existing criminal neglect offence in section 14 the references to “*unlawful*” acts and “*serious harm*” and the associated definitions of those terms.<sup>138</sup>

4.103 The 2018 Amendment Act therefore amends section 14 so that it applies to any act, whether lawful or unlawful, and where the relevant acts, omissions or course of conduct have caused either death or harm to a child or vulnerable adult. By taking this approach, the originally proposed section 14A offence on ill-treatment is rolled into the redraft of the section 14 offence on criminal neglect, to create a general offence of child neglect with wide ambit, ranging from more general child abuse, cruelty or neglect cases to the most serious cases of criminal neglect envisaged under the original section 14.

4.104 The removal of the word “*unlawful*” from the criminal neglect offence means the offence can apply to death or harm arising from acts, omissions or courses of conduct that, in themselves, fall short of being unlawful. It will not be necessary to prove that the relevant act, omission or course of conduct (see discussion below) was unlawful, such as an assault inflicted on the child or vulnerable adult leading to death or harm. The individual act, omission or course of conduct could be lawful. Also, the new section 14 would not apply to accidental death cases, because section 14(1)(d) of the original legislation, which requires the case to be so serious that a criminal penalty is warranted, would not be amended.

### **Course of conduct**

4.105 Under the Amendment Act, if a defendant is charged with the

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138 Section 14A would have also had the following range of penalties: “(a) where the victim dies — imprisonment for 15 years; or (b) where the victim suffers serious harm — imprisonment for 10 years; or (c) in any other case — imprisonment for 3 years”. The text of the 2017 SA Amendment Bill (showing the different versions of the Bill as introduced in House of Assembly, as passed in House of Assembly and as received in Legislative Council) is available at: [https://www.legislation.sa.gov.au/LZ/B/ARCHIVE/CRIMINAL%20LAW%20CONSOLIDATION%20\(CHILDREN%20AND%20VULNERABLE%20ADULTS\)%20AMENDMENT%20BILL%202017.aspx](https://www.legislation.sa.gov.au/LZ/B/ARCHIVE/CRIMINAL%20LAW%20CONSOLIDATION%20(CHILDREN%20AND%20VULNERABLE%20ADULTS)%20AMENDMENT%20BILL%202017.aspx)

offence in respect of a course of conduct, it is not necessary to prove that the defendant was, or ought to have been, aware that there was an appreciable risk that harm would be caused to the victim by each act making up the course of conduct. The information need not allege or identify particulars of each act or the occasions on which such act occurred, or identify particular acts as causing wholly or partly the harm. This could apply, for example, in the scenario of squalor-type cases, where the children are being raised with gross negligence in conditions where there is an on-going neglect covering weeks or months, but the abusive acts fall short of individual unlawful acts. Also, a defendant may be charged with the offence in respect of a course of conduct even if some of the acts making up the course of conduct occurred before the commencement of the 2018 Amendment Act on 6 September 2018.<sup>139</sup>

### **Penalties**

4.106 As noted earlier, the penalties for the expanded section 14 offence have been significantly increased. The South Australian Parliament considered that it was appropriate that the maximum penalties on conviction are substantial to reflect the gravity of offending against children and vulnerable adults.

4.107 A person convicted of neglect causing death to a child or vulnerable adult would face a maximum sentence of life imprisonment. This reflects the penalties in the Criminal Law Consolidation Act for murder, manslaughter, and aggravated causing death by use of a motor vehicle. A person convicted under section 14 of neglect causing harm to a child or vulnerable adult would face a maximum sentence of 15 years' imprisonment. This places the maximum penalty at around the mid-point of the spectrum of penalties for other analogous harm-based offences in the Criminal Law Consolidation Act.<sup>140</sup>

4.108 In each case under the expanded section 14 offence, whether the offender caused death or harm, it would be for the sentencing court to determine the appropriate sentence on a conviction having regard to all the circumstances of the offence, victim and offender. As a result, it is no longer necessary to attempt to define "*serious harm*" in a way that reflects the different physiological responses to injury of children and adults, as the court should take into account when sentencing the offender the severity, duration and impact of the injuries inflicted on the child or vulnerable adult, and the lawfulness or unlawfulness of the underlying acts or omissions.

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139 The transitional provision would allow the course of conduct (such as in squalor-type cases) to straddle before and after the commencement of the 2018 Amendment Act on 6 September 2018.

140 See South Australian Hansard debates, Legislative Council, on 7 June 2018, at 467. For example, aggravated recklessly causing serious harm, aggravated intentionally causing serious harm and aggravated serious harm by use of a motor vehicle carry maximum sentences of 19 years, 25 years and life imprisonment, respectively. Aggravated recklessly causing harm, aggravated intentionally causing harm and aggravated harm by use of a motor vehicle carry maximum sentences of 7, 13 and 7 years' imprisonment, respectively.

## Postscript

4.109 As can be seen from the discussion above, the reforms comprised in the 2018 Amendment Act were seen as necessary to improve the effectiveness of the child neglect offence in section 14 to bring to justice perpetrators of harm to the most vulnerable.

4.110 With regard to child protection more generally in South Australia, the Child Protection Systems Royal Commission conducted a comprehensive investigation into the laws, policies, practices and structures in place for children at risk of harm, including those who are under guardianship of the Minister for Child Protection, and released a report, *The Life They Deserve*, in August 2016. Royal Commissioner Nyland described “a system in urgent need of reform, pushed beyond capacity and with critical matters slipping through the cracks” and made 260 recommendations for improvements to South Australia’s child protection system.<sup>141</sup>

4.111 The enactment of the 2018 Amendment Act is consistent with the South Australian Government’s response to the Child Protection Systems Royal Commission to review “*the suite of legislation concerning child protection, to ensure that children are comprehensively protected under the law.*”<sup>142</sup> The Government has advised that a number of legislative reforms have been developed to reflect the recommendations in the report, including the Children and Young People (Safety) Act 2017, which replaces the Children’s Protection Act 1993 “*and will significantly shift the way the sector works together to support families, children in care and carers.*”<sup>143</sup>

4.112 At the national level, the Royal Commission into Institutional Responses to Child Sexual Abuse, chaired by Justice Peter McClellan, issued its final report in December 2017, following a five year inquiry into child sexual abuse in institutional settings including government departments, religious organisations, charities, schools, out-of-home care, juvenile justice setting, sporting and other clubs, and businesses. The report made 189 recommendations for change.<sup>144</sup> The Government of South Australia (along with other state and territory governments in Australia) is responsible for following up on 104 of the recommendations, and is in the process of doing so.<sup>145</sup>

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141 See South Australia Department for Child Protection web-site at:

<https://www.childprotection.sa.gov.au/department/child-protection-systems-royal-commission>

142 *Child Protection - A Fresh Start: Government of South Australia’s response to the Child Protection Systems Royal Commission report: The life they deserve*, at 18.

143 See South Australia Department for Child Protection web-site at:

<https://www.childprotection.sa.gov.au/department/a-fresh-start>

Other recent legislative reforms in this context include the Child Safety (Prohibited Persons) Act 2016, and the Children and Young People (Oversight and Advocacy Bodies) Act 2016.

144 See: <https://www.childabuseroyalcommission.gov.au/final-report>

145 See: <https://www.childprotection.sa.gov.au/department/royal-commissions-and-reviews/royal-commission/south-australia-response>

## Chapter 5

# Overseas legislative model for a new statutory offence – New Zealand

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### Introduction

5.1 New Zealand has one of the highest rates of child abuse in the developed world,<sup>1</sup> with, on average, one child killed every 5 weeks.<sup>2</sup> Most of these children are under five years of age (the majority being under 12 months old)<sup>3</sup> and, in 90% of cases, are killed by someone they know,<sup>4</sup> usually one of their parents<sup>5</sup> or a family member.<sup>6</sup>

5.2 In response to a series of especially harrowing cases involving the deaths of young children in New Zealand, the Crimes Amendment Act (No 3) was enacted in September 2011 to introduce “*a whole new regime of criminal liability for persons caring for and working with vulnerable adults and children.*”<sup>7</sup> This legislation, which was primarily based on recommendations of

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1 Based on research on child maltreatment deaths from 1994 to 1998, New Zealand was ranked as having the fifth worst child abuse record out of 31 OECD countries: see UNICEF, “A League Table of Child Maltreatment Deaths in Rich Nations”, *Innocenti Report Card Issue No 5* (Sept 2003, UNICEF Innocenti Research Centre, Florence), at 8, at: <https://www.unicef-irc.org/publications/353-a-league-table-of-child-maltreatment-deaths-in-rich-nations.html>

More recent research “*found no clear evidence of a decrease in child maltreatment in New Zealand over the past two decades*”: see “The Determinations of Health for Children and Young People in New Zealand” - Injuries Arising from the Assault, Neglect, or Maltreatment of Children, at 267, at: <https://ourarchive.otago.ac.nz/bitstream/handle/10523/6127/The%20Determinants%20of%20Health%20for%20Children%20and%20Young%20People%20in%20New%20Zealand%202012.pdf?sequence=1&isAllowed=y> which made reference to: R Gilbert, J Fluke, M O'Donnell, *et al*, “Child Maltreatment: Variation in Trends and Policies in Six Developed Countries”, *The Lancet* (2012) 379 (9817), at 758 to 772.

For recent statistics, see Family Violence Death Review Committee. 2017. *Fifth Report Data: January 2009 to December 2015*, available at: [https://www.hqsc.govt.nz/assets/FVDR/Reports/Publications/FVDR\\_2017\\_10\\_final\\_web.pdf](https://www.hqsc.govt.nz/assets/FVDR/Reports/Publications/FVDR_2017_10_final_web.pdf)

2 See Child Matters CPS, “Facts about Child Abuse”, at: <http://www.childmatters.org.nz/55/learn-about-child-abuse/facts>

3 See UNICEF New Zealand website at: <https://www.unicef.org.nz/in-new-zealand/child-abuse>

4 See Child Matters CPS, “Facts about Child Abuse”, at: <http://www.childmatters.org.nz/55/learn-about-child-abuse/facts>

5 Every Child Counts, *The Nature of Economic Costs from Child Abuse and Neglect in New Zealand: a Report prepared by Infometrics Ltd for Every Child Counts* (ECC Discussion Paper Number 1, June 2010), at 6., at: <https://yesvote.org.nz/files/2009/08/the-nature-of-economic-costs-of-child-abuse-and-neglect-in-new-zealand.pdf>

6 See UNICEF New Zealand website at: <https://www.unicef.org.nz/in-new-zealand/child-abuse>

7 H Abeygoonesekera, “Standing up for those who are vulnerable”, *NZ Lawyer* (Issue 179, 9 March 2012).

the New Zealand Law Commission,<sup>8</sup> came into effect on 19 March 2012<sup>9</sup> and amended the Crimes Act 1961.<sup>10</sup> In this chapter we examine the background to and scope of these reforms, and consider later in Chapter 7 their possible implications for a reform model for Hong Kong.

## Background

5.3 Prior to the enactment of the Crimes Amendment Act (No 3) 2011, there was no legal duty in New Zealand for adults to intervene to protect a child in their home,<sup>11</sup> except in narrowly-defined circumstances.<sup>12</sup> What this meant in practice was that members of a household who could not be proven to be either the perpetrators of or parties to ill-treatment or neglect could not be held liable for their failure to intervene, “*no matter how outrageous or how obvious the ill treatment or neglect of the child may be.*”<sup>13</sup> Furthermore, it appeared that criminal investigations into child deaths were being seriously hampered not only by the chief suspects choosing to remain silent, but by whole extended families ‘closing ranks’ and refusing to co-operate with the police to shed light on how the child had been harmed and who did it. In 2006 and 2007, a series of high-profile cases which involved fatal abuse injuries of very young children brought these limitations of the law into stark relief.

### Cases leading up to the reforms

#### *The Staranise Waru case*

5.4 Seven months-old Staranise Waru died in February 2006 of serious head injuries after violent shaking. Both her parents repeatedly refused to answer questions on the grounds of self-incrimination and no one was charged over her death.<sup>14</sup>

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8 New Zealand Law Commission, *Review of Part 8 of the Crimes Act 1961: Crimes against the Person* (Report 111, Nov 2009). Available online at:

<http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R111.pdf>

9 Section 2 of the Crimes Amendment Act (No 3) 2011 (NZ) states that the Act came into force six months after the date on which it received Royal assent, which was 19 September 2011.

10 Available at:

[http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html?search=qs\\_act%40bill%40regulation%40deemedreg\\_crimes+amendment+\(no+3\)+act\\_resel\\_25\\_h&p=1](http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html?search=qs_act%40bill%40regulation%40deemedreg_crimes+amendment+(no+3)+act_resel_25_h&p=1)

11 New Zealand Law Commission report (Nov 2009), above, at para 5.26.

12 As in the cases of *R v Witika* [1993] 2 NZLR 424 (CA) and *R v Lunt* [2004] 1 NZLR 498 (CA). In *Witika*, a little girl died following months of brutal assaults. The New Zealand Court of Appeal held that even where it may not be possible to prove if the mother or her partner were responsible for the unlawful acts, there was by reason of the special relationship (of care and control over the child) a positive duty to intervene to take reasonable steps to protect the victim from a known risk of harm, and a failure to do so could constitute encouragement of an offence. In *Lunt*, the Court of Appeal held that there was a common law duty for a parent to protect his or her child from the illegal violence of another person in the event that the violence was foreseen or reasonably foreseeable. (See discussion of *Lunt* further below.)

13 New Zealand Law Commission report (Nov 2009), above, at para 5.26.

14 See J Booker, “Law could force adults to talk in abuse cases,” *New Zealand Herald* (21 Nov 2009), at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10610710](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10610710) and

## *The Kahui twins case*

5.5 Chris and Cru Kahui were born prematurely on 20 March 2006 and spent their first six weeks in hospital in neo-natal intensive care. On 13 June 2006, just six weeks after being allowed to go home, the twins were rushed back to hospital where they died five days later. Both babies had suffered fractured skulls from blunt force trauma, fractured ribs, extensive bruising and one had a broken femur. In addition to the shocking injuries, the case became notorious because (as claimed by the police) the group of family members who had access to the twins in the few days before they died (referred to in the media as *“the tight twelve”*), effectively 'stonewalled' the first few months of the investigation *“by maintaining a pact of silence over who was responsible for assaulting the babies.”*<sup>15</sup>

5.6 The twins' father, 21 year-old Chris Kahui, was eventually charged with their murder but pleaded not guilty. His defence claimed that someone else was responsible for the children's deaths, probably the twins' mother, Macsyna King, who had not been charged with any offence. After a six-week trial ending in May 2008, Chris Kahui was found not guilty after only ten minutes of deliberation by the jury.<sup>16</sup>

5.7 While no one has been charged subsequently over the twins' deaths,<sup>17</sup> in July 2012 a coroner's inquiry concluded that the fatal injuries to the twins *“occurred during the afternoon/early evening of 12 June 2006, whilst [they] were in the sole custody, care and control of their father, Christopher Kahui.”*<sup>18</sup>

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V Tapaleao, “Police review babies death after coroner's findings,” *New Zealand Herald* (21 Oct 2010), at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10681957&ref=rss](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10681957&ref=rss)  
B Ensor, “Staranise War: The cause of a baby's death unresolved for 10 years” *Stuff.co.nz* (21 Nov 2015), at: <https://www.stuff.co.nz/national/crime/72157112/null>

15 See S Cook, “Kahui kids to return to family”, *New Zealand Herald* (10 Sept 2006), at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10400606](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10400606)

Commenting some time later on the problems faced by the police in this case, the then New Zealand Prime Minister, Helen Clarke stated, *“It was an incredibly difficult investigation for them because a veil of silence came down over the entire family and everyone who knew them.”* See J Savage, “Coroner points at Chris Kahui”, *New Zealand Herald* (25 July 2012), at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10821857](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10821857)

16 See E Gay, “No charges against Kahui twins' mother - police”, *New Zealand Herald* (22 May 2008), at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10511099](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10511099)

17 It has been noted that, even following the acquittal verdict, the *“police said they believed they had arrested the right person and would not be charging anyone else over the boys' deaths”*: see “Kahui case will remain closed 'at this point””, *New Zealand Herald* (26 May 2008), at: [http://www.nzherald.co.nz/nz-government/news/article.cfm?c\\_id=144&objectid=10512509](http://www.nzherald.co.nz/nz-government/news/article.cfm?c_id=144&objectid=10512509)

18 See Coroner Garry Evan's report, *In the Matter of Inquests into the Deaths of Christopher Arepa Kahui and Cru Omeka Kahui, Infants: Reserved Findings of the Coroner* (Decision No 89/12, 2 July 2012), at 59, at: <http://media.nzherald.co.nz/webcontent/document/pdf/201230/Christopher%20and%20Cru%20Kahui%20Embargoed%205am%20-%2025%20July%202012.pdf>

It should be noted that a coroner's inquest is an inquisitorial hearing to determine facts, not a criminal trial. Accordingly, in making this finding against Chris Kahui, the standard of proof applied by the Coroner was the civil standard of *“on the balance of probabilities,”* not the criminal standard of *“beyond reasonable doubt.”* See commentary on this point in J Savage, “Coroner points at Chris Kahui”, *New Zealand Herald* (25 July 2012), at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10821857](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10821857)

## *The Nia Glassie case*

5.8 Another case which caused enormous outrage in New Zealand concerned three year-old toddler Nia Glassie, who died in hospital of severe brain injuries a year after the deaths of the Kahui twins. The little girl had suffered fatal kicks to the head two weeks prior to her death, but these injuries had followed weeks of horrific abuse, including:

- being kicked, beaten, slapped, jumped on and held over a burning fire;
- being put into a clothes dryer spinning at top heat for up to half an hour;
- having wrestling moves copied from a computer game practised on her;
- being folded into a sofa and sat on, shoved into piles of rubbish, dragged through a sandpit half naked, flung against a wall and dropped from a height onto the floor; and
- being whirled rapidly on an outdoor rotary clothes line until she was thrown off.<sup>19</sup>

5.9 At the time of Nia's admission, her 34 year-old mother Lisa Kuka told the hospital that the injuries were due to Nia falling off her 17 year-old partner, Wiremu Curtis' shoulders.<sup>20</sup> It later emerged that the family, which had been celebrating a birthday party, waited 36 hours after the toddler lapsed into a coma on the floor before taking her to hospital.<sup>21</sup> A doctor told the court at the trial that if Nia had been taken to hospital as soon as she was unconscious, she would have likely survived.<sup>22</sup>

5.10 The verdicts arising from the case were as follows:

- Wiremu Curtis and his brother Michael, 22, were each found guilty of murder and sentenced to life imprisonment with a minimum non-parole period of 17 and a half years;<sup>23</sup>

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19 See "Child murder case shocks NZ court", *BBC Online* (18 Nov 2008), at: <http://news.bbc.co.uk/2/hi/asia-pacific/7734932.stm> and S Cook, "Tot's injuries due to a fall, says mother", *New Zealand Herald* (29 July 2007), at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10454501](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10454501)

20 S Cook, "Tot's injuries due to a fall, says mother", *New Zealand Herald* (29 July 2007), at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10454501](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10454501)

21 Same as footnote 20.

22 "Two guilty of horrifically murdering NZ toddler", *The Sydney Morning Herald* (18 Nov 2008), at: <https://www.smh.com.au/world/two-guilty-of-horrifically-murdering-nz-toddler-20081118-69w4.html>

23 See sentencing, *R v Curtis and Others*, [2009] NZHC 53 (4 February 2009). See also A Eriksen, "Nia Glassie murderers jailed for minimum 17.5 years", *New Zealand Herald* (4 Feb 2009), at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10555092](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10555092)

- Lisa Kuka was found guilty of two counts of manslaughter: one for failing to obtain medical treatment for the toddler before her death and one for failing to protect her;<sup>24</sup>
- Michael Curtis' partner Oriwa Kemp, 18, and Nia's cousin Michael Pearson, 20, were found not guilty on manslaughter charges but were convicted of child cruelty and sentenced to, respectively, three years and four months' and three years' imprisonment;<sup>25</sup> and
- William Curtis, the father of the Curtis brothers, was convicted of seriously assaulting Nia and served four years in prison.<sup>26</sup>

*List of further cases*

5.11 Tragically, the spate of such cases has continued, with one commentator referring the list of young children who have died through abuse in recent years as New Zealand's "*Roll of shame*"<sup>27</sup>:

<i>"May 2006</i>	<i>Chris and Cru Kahui, 3 months. Both boys died of head injuries.</i>
<i>August 2007</i>	<i>Nia Glassie, 3. Brain injuries after a lifetime of horrific abuse.</i>
<i>January 2008</i>	<i>Tahani Mahomed, 11 weeks. Severe head injuries.</i>
<i>August 2009</i>	<i>Kash McKinnon, 3. Head injuries.</i>
<i>September 2009</i>	<i>Hail-Sage McClutchie; 22 months. Serious head injuries.</i>
<i>July 2010</i>	<i>Cezar Taylor, 6 months. Shaking and a blow to the head.</i>
<i>December 2010</i>	<i>Sahara Baker-Koro, 6 years old. Found dead in her bed after alleged sexual assault.</i>

24 *R v Kuka* [2009] NZCA 572 (CA) (8 December 2009). See also commentary at Y Tahana and B Vass, "Nia Glassie case: 'We've got to learn to mark'", *New Zealand Herald* (19 Nov 2008), at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10543816](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10543816)

25 See sentencing, *R v Curtis and Others*, above. See also A Eriksen, "Nia Glassie murderers jailed for minimum 17.5 years", *New Zealand Herald* (4 Feb 2009), at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10555092](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10555092)

26 See C Taylor, "Nia Glassie's abuser set to go free", *The Daily Post* (13 Oct 2012), at: [https://www.nzherald.co.nz/rotorua-daily-%20post/news/article.cfm?c\\_id=1503438&objectid=11078196](https://www.nzherald.co.nz/rotorua-daily-%20post/news/article.cfm?c_id=1503438&objectid=11078196)

27 See A Leask, "NZ's 'shocking' child abuse record" (10 Dec 2011) and "61 little names on New Zealand's roll of dishonour" (21 Mar 2016), *New Zealand Herald*, available online at, respectively: <https://www.nzfvc.org.nz/news/nz-herald-reports-%E2%80%9Cnz%E2%80%99s-shocking-child-abuse-record%E2%80%9D> [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11607959](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11607959)

For a list of earlier cases involving non-accidental deaths of children (which includes an analysis of relevant sentences for manslaughter), see Appendix A in the New Zealand Court of Appeal judgment of *Woodcock v R* [2010] NZCA 4 89.

January 2011 Mikara Reti, 5 months. Severe blunt-force blow to his liver.

April 2011 Serenity Scott, 5 months old. Severe, non-accidental brain injuries.

June 2011 Baby Afoa, 1 week old. Found buried in a makeshift grave.

November 2011 James 'JJ' Lawrence, 2. Blunt-force trauma to abdomen so severe an internal organ split in half.

January 2012 Hinekawa Topia, 2 months old. Skull fracture.

June 2012 Leilane Mary Jane Lotonu'u-Lorigan, 2. Infection caused by splitted organ in abdomen.

May 2013 Raynar-Lee Soljar Thompson-Hatley. Head injuries.

June 2013 Cassius Takiari, 8 months old. Significant swelling and bleeding on brain, bruising, detached retinas caused by blunt force trauma.

July 2013 Atreyu Taylor-Matene, 1. Significant head injuries.

August 2013 Soul Mathew Turany, 3 months. Fatal head injury.

September 2013 baby girl, 5 months. Head injury.

December 2013 baby boy, 7-week-old. Non-accidental injuries.

January 2015 Aaliyah Ashlyn Chand, 1. Major head injury.

April 2015 Leith Allen Hutchison, 1. Bleeding on the brain.

May 2015 Leon Jayet-Cole, 5. Head injuries.

June 2015 Esme Kinraid, 2. Killed.

July 2015 Gracie-May McSorley, 6 months. Injuries from high-speed crash.

July 2015 Ihaka Paora Braxton Stokes, 22 months. Multiple blunt force trauma injuries.

August 2015 Maggie Renee Watson, 4. Non-accidental death.

August 2015 Moko Sayviah Rangitoheriri, 3. Critical injuries.

October 2015 Matiu Wereta, 2. Fatal assault."

5.12 In 2015, there were 14 victims of homicide aged under 14 years in New Zealand. Eleven of those victims were aged under five years old.

There were also 6,491 recorded instances of common and serious assaults on a child and 1,982 for sexual assaults on a child.<sup>28</sup>

## The New Zealand Law Commission's proposals

5.13 In late 2008, in response to the high level of public outrage over the deaths of young children, such as in the Nia Glassie and the Kahui twins' cases, the New Zealand Government invited the New Zealand Law Commission to expedite the review it was then undertaking into Part 8 of the Crimes Act 1961. This part of the Act deals with crimes against the person, including homicide, assault and injury offences. The Minister of Justice invited the Commission *"to have particular regard to the offences aimed at the protection of children from ill treatment and neglect, and the adequacy of their maximum penalties."*<sup>29</sup>

5.14 The Law Commission issued its report on the Part 8 offences in November 2009.<sup>30</sup> Among the report's proposals were important recommendations relating to assault and ill-treatment of children and vulnerable adults. Under these reforms, parents, caregivers and others would be liable if they failed to protect from injury children or vulnerable adults in their care, or failed to intervene when a child or vulnerable adult was at risk. The Law Commission commented in relation to their overall proposals:

*"Many of the changes that we recommend have, as the principal objective, codification or clarification of the existing law."<sup>31</sup> However, particularly in the area of child ill-treatment and neglect, we are proposing significant substantive changes."<sup>32</sup>*

5.15 Prior to the proposed reforms, the law to address child neglect and ill-treatment was found in two statutory provisions, namely section 195 of the Crimes Act 1961 and section 10A of the Summary Offences Act 1981. The Crimes Act also contained two relevant *"duties"* provisions: sections 151 and 152, imposing a duty on a parent or guardian of a child and on a caregiver of a vulnerable dependent, respectively, to provide *"necessaries"* or *"necessaries of life"* to the child or vulnerable dependent.<sup>33</sup> These provisions,

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28 See UNICEF New Zealand website at: <https://www.unicef.org.nz/in-new-zealand/child-abuse>

29 New Zealand Law Commission report (Nov 2009), above, at para 5.1.

30 Same as above.

31 The press release issued on publication of the New Zealand Law Commission's report comments: *"The Commission reviewed the 'core' assault and injury offences in the Crimes Act 1961, as well as the 'specific' assault offences (such as assault on a child, and male assaults female). 'We recommend that all of these offences be simplified,' ... 'Although a few specific offences need to be retained, the majority should be repealed and replaced by three new sections containing six new offences, to cover the whole range of assaults and injuries short of death.' The Commission also examined the offences which deal with 'endangering' or criminally negligent activity. The report recommended a hierarchy of offences depending on whether death, injury, or risk of injury resulted."* (18 Dec 2009), at: [https://www.lawcom.govt.nz/sites/default/files/mediaReleaseAttachments/Publication\\_147\\_451\\_PR%20and%20Summary%20Part%208%2018122009.pdf](https://www.lawcom.govt.nz/sites/default/files/mediaReleaseAttachments/Publication_147_451_PR%20and%20Summary%20Part%208%2018122009.pdf)

32 New Zealand Law Commission report (Nov 2009), above, at Summary, para 4.

33 Same as above, at paras 5.32 to 5.33.

amongst others, became targeted areas for reform by the Law Commission, which adopted a three-pronged approach to its proposed reforms under this head:

*In respect of parents and immediate care-givers:*

- (i) the re-drafting of the “*cruelty to a child*” offence under section 195 of the Crimes Act 1961, addressing ill treatment and neglect by those with care or charge of a child or vulnerable adult, with a substantially increased maximum penalty of 10 years;
- (ii) the extension of the scope of the duties provisions under sections 151 and 152 of the Crimes Act 1961, by introducing an additional requirement in each provision for the carer to take reasonable steps to protect a child (section 152) or vulnerable person (section 151) from injury; and

*In respect of others having frequent contact with a child:*

- (iii) the introduction of a new offence (in proposed section 195A of the Act) for those living with a child or vulnerable adult, of “*failing to take reasonable steps to protect such a victim from any known risk of death, serious injury or sexual assault.*”<sup>34</sup> The Commission stated that this new offence was modelled on the “*causing or allowing the death of a child*” offence under section 5 of the Domestic Violence, Crime and Victims Act 2004 (UK).<sup>35</sup>

5.16 A year and a half after the publication of the Law Commission's report, a Bill was introduced into parliament which focused on implementing the Law Commission's recommendations on the protection of children and vulnerable adults from violence.<sup>36</sup> This was enacted in September 2011,<sup>37</sup> largely in its original form, and came into force on 19 March 2012.<sup>38</sup> The three separate aspects of these reforms, and the thinking behind each, are discussed in detail below.

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34 Same as above, at para 5.4.

35 Same as above, at para 5.25. The UK model is discussed in detail in Chapter 3 of this paper.

36 The Crimes Amendment Bill (No 2) was introduced on 12 April 2011. Given the perceived urgency, the Government had decided to prioritise the introduction of these reforms and to leave the wider aspects of the recommendations in the Law Commission's report (which dealt generally with crimes against the person, including homicide, assault and injury offences) to a later time. See New Zealand Ministry of Justice, *Crimes Amendment Bill (No 2): Report of the Ministry of Justice* (July 2011), at 13, at: [https://www.parliament.nz/resource/en-nz/49SCSS\\_ADV\\_00DBHOH\\_BILL10599\\_1\\_A195677/5df9fef0c1d97406d8230e9cda8d6628a608fa4f](https://www.parliament.nz/resource/en-nz/49SCSS_ADV_00DBHOH_BILL10599_1_A195677/5df9fef0c1d97406d8230e9cda8d6628a608fa4f)

37 Crimes Amendment Act (No 3) 2011 (11/79).

38 Under section 2 of the Crimes Amendment Act (No 3) 2011, the Act was to come into force six months after receiving Royal assent (which was granted on 19 September 2011).

## The reforms enacted in the Crimes Amendment Act (No 3) 2011

### (i) *The re-drafting of section 195 of the Crimes Act 1961 and corresponding repeal of section 10A of the Summary Offences Act 1981*

5.17 The first area recommended for reform by the Law Commission, and which was later carried into effect by the Crimes Amendment Act (No 3) 2011, related to the two provisions on the statute book that established offences of child neglect and ill-treatment under New Zealand law: section 195 of the Crimes Act 1961 and section 10A of the Summary Offences Act 1981. The Law Commission recommended the re-drafting of section 195 of the Act (formerly entitled “*cruelty to a child*”) to strengthen its provisions relating to ill-treatment and neglect by those with care or charge of a child, and to extend these provisions to cover vulnerable adults,<sup>39</sup> “*such as the elderly or the impaired.*”<sup>40</sup>

5.18 Section 195, prior to reform, stated:

*“Every one is liable to imprisonment for a term not exceeding 5 years who, having the custody, control, or charge of any child under the age of 16 years, wilfully ill-treats or neglects the child, or wilfully causes or permits the child to be ill-treated, in a manner likely to cause him unnecessary suffering, actual bodily harm, injury to health, or any mental disorder or disability.”*<sup>41</sup>

5.19 Section 10A of the Summary Offences Act 1981, now repealed as a result of the reforms, provided:

*“Every person is liable to imprisonment for a term not exceeding 6 months or to a fine not exceeding \$4000 who,-*

*(a) Being a paid or unpaid staff member of a residence under the Children, Young Persons, and Their Families Act 1989, ill-treats or wilfully neglects any child under the age of 17 years who resides in that residence; or*

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39 New Zealand Law Commission report (Nov 2009), above, at Summary, para 26.

40 New Zealand Law Commission press release (18 Dec 2009), above.

41 See New Zealand Law Commission report (Nov 2009), above, at para 5.9. The Commission noted, at para 5.12, that this provision was similar to the English equivalent in section 1 of the Children and Young Persons Act 1933 (UK), particularly as to the inclusion of the expression “*wilfully ill-treats or neglects the child ... in a manner likely to cause him unnecessary suffering.*” (The text of the English provision is set out in this consultation paper at Annex D).

See also the equivalent Hong Kong provision in section 27 of the Offences against the Person Ordinance (Cap 212), discussed in Chapter 2 of this paper, which adopts a similar expression.

For a wider discussion of “*ill-treatment and neglect*” offences under the common law, see: L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries* (2007, Oxford University Press), at 178 to 180.

- (b) *Being a person to whom the care or custody of a child under the age of 17 years has been lawfully entrusted, ill-treats or wilfully neglects that child.*"

5.20 The Law Commission commented that section 10A was essentially the same in scope as section 195, though "*extremely rarely charged,*"<sup>42</sup> and recommended that the section should be repealed, as the re-drafted section 195 had been framed so as to encompass the scope of section 10A, "*so that there is a single offence capable of addressing the whole range of conduct.*"<sup>43</sup> Specifically, the protection then provided under section 10A is now subsumed into, and given effect by, the redrafted section 195, which has also expanded on its reach (see further below). The reformed section 195 now reads:-

*"195 Ill-treatment or neglect of child or vulnerable adult*

(1) *Every one is liable to imprisonment for a term not exceeding 10 years who, being a person described in subsection (2), intentionally engages in conduct that, or omits to discharge or perform any legal duty the omission of which, is likely to cause suffering, injury, adverse effects to health, or any mental disorder or disability to a child or vulnerable adult (the victim) if the conduct engaged in, or the omission to perform the legal duty, is a major departure from the standard of care to be expected of a reasonable person.*

(2) *The persons are—*

(a) *a person who has actual care or charge of the victim;*  
*or*

(b) *a person who is a staff member of any hospital, institution, or residence where the victim resides.*

(3) *For the purposes of this section and section 195A, a child is a person under the age of 18 years."*

*The victim – raising the age of "child" and the inclusion of "vulnerable adult"*

5.21 Section 195 and section 10A applied only to child victims under 16 years and 17 years of age, respectively. The Law Commission recommended that the scope of the re-drafted composite offence should be extended to cover those in charge of children under 18 years of age as well

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42 New Zealand Law Commission report (Nov 2009), above, at para 5.10, where the Commission stated that in the 10 years from 1999 to 2008 only 30 charges were laid under this section.

43 New Zealand Law Commission report (Nov 2009), above, at Summary, para 40. The Commission further recommended the repeal of the "*assault on a child*" offence comprised in section 194(a) of the Crimes Act 1961 as a consequence of the re-drafting of section 195: see New Zealand Law Commission report (Nov 2009), above, at Summary, para 21, and the more detailed discussion in the report at paras 3.9 to 3.22 and 5.5.

as vulnerable adults. The extension of the scope to the former was to bring the offence into line with New Zealand's obligations under the United Nations Convention on the Rights of the Child (as the Law Commission had recommended in relation to the other offences in Part 8 of the Crimes Act which made reference to children<sup>44</sup>).

5.22 On the extension of section 195 to cover vulnerable adults ("eg, *the elderly or impaired*"<sup>45</sup>), the Law Commission reasoned that, in addition to children, "*other vulnerable victims are entitled to the same level of protection.*"<sup>46</sup> They concluded, in fact, that there was "*no defensible rationale ... for distinguishing between the two categories of victim.*"<sup>47</sup>

5.23 A "*vulnerable adult*" is defined under the Act to mean a person who is "*unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person.*"<sup>48</sup> During the passage of the Bill, it was noted that it is not a person's age, for example, that resulted in him or her being vulnerable:

*"The key test relates to whether a person is able to withdraw him or herself from the care or charge of another person as a consequence of that person's age or any other cause. ... [I]t is that loss of independence, of freedom, that makes someone more vulnerable."*<sup>49</sup>

#### *Scope of those who may commit the offence (as extended)*

5.24 The scope of those who may be liable for an offence under the re-drafted section 195 now includes:

*"(a) a person who has actual care or charge of the victim; or*

*"(b) a person who is a staff member of any hospital, institution, or residence where the victim resides."*<sup>50</sup>

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44 See New Zealand Law Commission report (Nov 2009), above, at paras 5.17 and 5.43.

45 Same as above, at para 5.3.

46 Same as above, at para 5.17.

47 Same as above, at para 5.3.

48 Enacted by section 4(1), Crimes Amendment Act (No 3) 2011, and now contained in section 2 of the Crimes Act 1961.

49 New Zealand Parliamentary Debates (Hansard), Crimes Amendment Bill (No 2) - In Committee (Wed, 14 Sept 2011) [Volume:675; Page : 21324], speech by Katrina Shanks, at: [https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD\\_20110914\\_00001031/crimes-amendment-bill-no-2-in-committee](https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20110914_00001031/crimes-amendment-bill-no-2-in-committee)

(This approach echoes the relatively expansive view taken by the English Court of Appeal in interpreting the equivalent English provision. In *R v Khan and Others* [2009] 4 All ER 544 (discussed earlier in Chapter 3), the CA observed (at para 27) that: "*the state of vulnerability ... does not need to be long-standing. It may be short, or temporary. A fit adult may become vulnerable as a result of accident, or injury, or illness. The anticipation of a full recovery may not diminish the individual's temporary vulnerability.*")

50 Re-drafted section 195(2), as set out in section 7, Crimes Amendment Act (No 3) 2011.

5.25 In proposing the repeal of section 10A of the Summary Offences Act discussed above, the Law Commission proposed to include within the scope of the re-drafted section 195 not only the staff members of the Child Youth and Family residences (who had been specifically referred to in section 10A), but also more broadly to include any *“person who is a staff member of any hospital, institution, or residence where the victim resides.”*<sup>51</sup> This explains the broader formulation of the current section 195(2)(b). The Law Commission stated of this proposal:

*“We consider that a specific provision of this kind is necessary, because arguably not all such staff members can be said to have ‘actual care or charge’ of the children in residential care. The precise legal status of some staff members (perhaps kitchen, cleaning or grounds staff, for example) is unclear. We consider it desirable to put the matter beyond doubt; given that the state has a special relationship to the children under its care, who are among our most vulnerable children, it is important to ensure that they are comprehensively protected.”*<sup>52</sup>

The Law Commission added:

*“In our view, the policy reasons for ensuring that all Child Youth and Family staff members are subject to section 195 logically apply equally to staff of any hospital, institution or residential care facility in which a vulnerable victim resides – for instance, elderly people in residential care, people with intellectual disabilities who are in care, prisoners, or patients in hospitals.”*<sup>53</sup>

5.26 In terms of the scope of *“staff members”* under the reformed section 195, it has been suggested that this should encompass all staff members, including full-time, part-time, temporary or casual staff, managers of the care staff who directly care for the victim and even the owner of the institution, regardless of whether the owner is a natural person or body corporate.<sup>54</sup>

5.27 During the passage of the reform legislation through the New Zealand Parliament, concerns were expressed by the New Zealand Law Society that the inclusion of *“a staff member of any hospital, institution, or residence where the victim resides”* in the offence provisions in section 195 (and 195A, discussed below) would have implications for the Police and prison services. This was because prisoners held in custody may fall within the scope of *“vulnerable adults”* for the purposes of the New Zealand

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51 New Zealand Law Commission report (Nov 2009), above, at para 5.19.

52 Same as above.

53 Same as above.

54 See Wendy Aldred, “The Crimes Act and Duties to Vulnerable Adults – Implications for the Sector”, published in New Zealand Aged Care Association’s journal *Excellence in Care* (Issue 2, July 2013), at 22 and 23.

legislation. In its submission on the Bill, the New Zealand Law Society had stated:

*“2. This clause introduces the definition of “vulnerable adult” incorporated in the new ss195 and 195A offences. The definition of “vulnerable adult” includes those who are unable to withdraw themselves from the care [or] charge of another by reason of “detention”.*

*3. This has the potential to draw those responsible for persons held in Police or Corrections Service custody within the scope of the offence. If a prison officer or police officer commits a serious breach of duty, or fails to take reasonable steps to prevent harm, he or she may be criminally liable. It is not clear if this is intended.*

*4. This issue may also have implications for the definition of the s195A offence, as discussed below. For example, the argument can be made that any prison facility, particularly any maximum security facility, is an environment in which all inmates are to a greater or lesser extent at risk of grievous bodily harm.*

*5. If prison officers and Police are intended to be within the scope of the offence with respect to detainees, then consideration should be given to the appropriate level of knowledge, and degree of risk of harm, necessary to complete the offence.*

#### *Recommendation*

*6. That the Committee clarify the circumstances in which detention will render an adult a “vulnerable adult” for the purposes of the proposed ss195 and 195A.<sup>55</sup>*

5.28 In response to this, the Ministry of Justice commented:

*“The reference to ‘vulnerable adults’ and its definition has come from existing law and as such does not change existing liability. Persons in the custody of Police or the Corrections Service are already recipients of an appropriate standard of care as set down in legislation. Criminal responsibility is only likely to occur where a vulnerable adult who is detained is injured and the standard of care he received is less than the standard of care that a reasonable Police or Corrections Officer would be expected to provide.”<sup>56</sup>*

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55 New Zealand Law Society submission to Social Services Committee of New Zealand Parliament on Crimes Amendment Bill (No 2) 2011 (2 June 2011), at 1, at: [https://www.parliament.nz/resource/en-NZ/49SCSS\\_EVI\\_00DBHOH\\_BILL10599\\_1\\_A191089/5e30239e1846bf97b482bc6653d9e9916fc360de](https://www.parliament.nz/resource/en-NZ/49SCSS_EVI_00DBHOH_BILL10599_1_A191089/5e30239e1846bf97b482bc6653d9e9916fc360de)

56 See New Zealand Ministry of Justice report (July 2011), above, at 17.

*The actus reus of the offence – preserving the scope but changing the formulation*

5.29 The Law Commission had also observed that the then existing section 195 ill-treatment or neglect (“*cruelty to a child*”) offence, which was framed in terms of “*engaging in conduct*” was sufficiently open-ended and already covered a wide range of conduct, including many cases involving violence “*and sometimes quite serious injuring charges.*”<sup>57</sup> (The Commission noted that examples from decided cases included: shaking an infant, causing brain damage; scalding a child in the bath due to insufficient supervision, and waiting an unreasonable time before seeking urgent medical attention; physical and mental abuse including excessive and menial domestic chores, deprivation of food, cold baths, verbal abuse, force-feeding of cold rotten food and hitting; hosing children down with cold water during winter; leaving children alone unsupervised for several days with resulting hygiene and health issues (dirty and smelly house, children developing infected sores and eczema, children wearing the same unlaundered clothes for many days) and safety issues (such as oven left on by children); and assaults on children with hands and implements such as spoons, belts, vacuum cleaner pipes and sticks, or inciting another adult to do so and watching.<sup>58</sup>)

5.30 Furthermore, although the offence tended to be charged in situations where there was a pattern of such behaviour over a period of time, this was not always the case.<sup>59</sup> The Law Commission appreciated the broad scope of section 195, stating:

*“There are some aspects of the current function and purpose of section 195 we explicitly do not wish to change: in particular, the notion of ill treatment being sufficiently open-ended to accommodate some instances of assault; and the ability of a jury to assess in the round, having regard to the totality of the evidence, whether a course of conduct constitutes ill treatment or neglect.”*<sup>60</sup>

5.31 While not intending to “*signal any change in approach*”<sup>61</sup> under the proposed reform, the Law Commission recommended that the language used in section 195 of “*ill-treats or neglects*” should be amended to “*engages in conduct or omits to perform any statutory duty.*” The Commission noted that this would bring within the scope of this offence the extended statutory duties (discussed below), and also assist “*in making it clear on the face of the statute what constitutes neglect.*”<sup>62</sup> (Such wording was eventually enacted with slight modifications in section 195(1), which now refers to “*engages in conduct*” or “*omits to discharge or perform any legal duty*” as we can see above.)

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57 New Zealand Law Commission report (Nov 2009), above, at para 5.11.

58 Same as above, at para 5.14.

59 Same as above, at para 5.13.

60 Same as above, at para 5.16, citing *R v Mead* [2002] 1 NZLR 594 (CA).

61 Same as above, at para 5.20.

62 Same as above.

*The mens rea of the offence – the move towards greater objectivity*

5.32 With regard to the mental element of the offence, the Law Commission noted that the inclusion of the term “*wilfully*” in section 195, as it then was:

*“[R]equires ill treatment to have been inflicted deliberately, with a conscious appreciation that it was likely to cause unnecessary suffering. Neglect, too, will only be regarded as ‘wilful’ where it is deliberate. These are subjective tests: they require the defendant’s state of mind to be proved. In practice, this means that ignorance or thoughtlessness is a defence.”*<sup>63</sup>

5.33 This was felt to be undesirable, and so the Law Commission recommended that any reference to “*wilfully*” should be removed from section 195, and be replaced with an objective “*gross negligence*” test for the offence. This would require the jury “*only to be satisfied that the conduct alleged was a major departure from the standard of care to be expected of a reasonable person.*”<sup>64</sup> As a consequence, “*ignorance or thoughtlessness would no longer absolve the defendant from liability.*”<sup>65</sup> The New Zealand Ministry of Justice found the Law Commission’s recommendation to replace the subjective elements of the offence with greater objectivity to be “*an important change, as the current offence allows the accused to escape liability if s/he is able to show that s/he was ignorant of the possible consequences of his/her actions or did not turn his/her mind to those risks.*”<sup>66</sup> This recommendation was also duly implemented and section 195 is now referenced by a gross negligence standard.

*Maximum penalty*

5.34 The Law Commission further proposed that there should be a substantial increase in the maximum penalty for the section 195 offence, from five years to 10 years’ imprisonment,<sup>67</sup> observing that “*the worst class of case under section 195 will be one just short of death.*”<sup>68</sup> This, too, was taken up

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63 Same as above, at para 5.17. In the leading case authority on the equivalent UK provision (ie, section 1 of the Children and Young Persons Act 1933), it has been observed (L Hoyano and C Keenan (2007), above, at 180) that the majority of the House of Lords interpreted ‘wilfully’ “*to mean either intentionally or subjectively reckless.*” As Lord Keith in *R v Sheppard* [1981] AC 394, at 418, stated:

*“The primary meaning of ‘wilful’ is ‘deliberate’. So a parent who knows that his child needs medical care and deliberately, that is by conscious decision, refrains from calling a doctor, is guilty under the subsection. As a matter of general principle, recklessness is to be equated with deliberation. A parent who fails to provide medical care which his child needs because he does not care whether it is needed or not is reckless of his child’s welfare. He too is guilty of an offence. But a parent who has genuinely failed to appreciate that his child needs medical care, through personal inadequacy or stupidity or both, is not guilty.”*

64 New Zealand Law Commission report (Nov 2009), above, at para 5.17.

65 Same as above, at para 5.17. See also New Zealand Law Commission press release (18 Dec 2009), above.

66 New Zealand Ministry of Justice report (July 2011), above, at 9.

67 New Zealand Law Commission report (Nov 2009), above, at Summary, para 26.

68 Same as above, at para 5.17.

and the current section 195 sets a maximum penalty of 10 years' imprisonment.

**(ii) Extending the scope of the duties under sections 151 and 152 of the Crimes Act 1961**

5.35 To underpin the changes to section 195, the Law Commission recommended the expansion of the scope of the existing statutory duties under sections 151 and 152 of the Act, which, prior to the reforms, only required parents and caregivers to provide children and other vulnerable dependents with “necessaries” and “necessaries of life” respectively.<sup>69</sup> These duties provisions also contain offences which, the Law Commission noted, “may be invoked when laying any other charges that refer to breach of a legal or statutory duty (eg, a homicide charge).”<sup>70</sup>

5.36 Section 151 imposes a duty in respect of vulnerable persons. It stated, at the time it was being considered by the Law Commission:

*“(1) Every one who has charge of any other person unable, by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is (whether such charge is undertaken by him under any contract or is imposed upon him by law or by reason of his unlawful act or otherwise howsoever) under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting without lawful excuse to perform such duties if the death of that person is caused, or if his life is endangered or his health permanently injured, by such omission.*

*“(2) Every one is liable to imprisonment for a term not exceeding 7 years who, without lawful excuse, neglects the duty specified in this section so that the life of the person under his charge is endangered or his health permanently injured by such neglect.”*

5.37 Section 152, relating to the care of children, then provided:

*“(1) Every one who as a parent or person in place of a parent is under a legal duty to provide necessaries for any child under the age of 16 years, being a child in his actual custody, is criminally responsible for omitting without lawful excuse to do so, whether the child is helpless or not, if the death of the child is caused, or if his life is endangered or his health*

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69 Same as above, at Summary, para 26.

70 Same as above, at para 5.2. The homicide charge referred to in the Law Commission's example (at para 5.2, footnote 60) is contained in section 160(2)(b) of the Crimes Act 1961. This states “Homicide is culpable when it consists in the killing of any person – ... by an omission without lawful excuse to perform or observe any legal duty; ...”

*permanently injured, by such omission.*

- (2) *Every one is liable to imprisonment for a term not exceeding 7 years who, without lawful excuse, neglects the duty specified in this section so that the life of the child is endangered or his health permanently injured by such neglect.”*

#### *The provision of “necessaries”*

5.38 Another feature of sections 151 and 152 that attracted the attention of the Law Commission was the discrepancy in the respective duties imposed under the two sections. Section 151 required the provision of “*necessaries of life*” whilst section 152 required the provision of “*necessaries*”. The Law Commission recommended that the two redrafted provisions be aligned to impose a duty to provide “*necessaries*”,<sup>71</sup> commenting:

*“While there is no authority on what is meant by the concept of ‘necessaries’, there is some basis for considering that it may be a somewhat broader concept than the ‘necessaries of life’ referred to in section 151. Not everything that is arguably ‘necessary’ to the reasonable raising of a child may fall within the quite narrow concept of the ‘necessaries of life’ – the latter being confined to the food, water, medical care, and so on necessary to sustain life.”<sup>72</sup>*

5.39 As will be seen below, this recommendation was implemented in the re-drafted sections 151(a) and 152(a). (One writer has criticised the Law Commission’s approach, however, commenting that the Law Commission failed to explain what the term “*necessaries*” encompasses, beyond stating that it is a “*broader concept*” than the former “*necessaries of life*”. The commentator asserts that, in the absence of further guidance from the legislature, the established concept of “*necessaries of life*” should be preferred to ensure that sections 151(a) and 152(a) are not given undue breadth.<sup>73</sup>)

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71 New Zealand Law Commission report (Nov 2009), above, at para 5.46.

72 Same as above, at para 5.33. Though see *R v Lunt* [2004] 1 NZLR 498 (CA), at 504 to 505 on the meaning of “*necessaries*” and “*necessaries of life*,” where the court states:

*“The expression ‘necessaries of life’ (or ‘necessaries’ in s 152, which in context bears the same meaning) has long been well understood as encompassing goods and services (food, clothing, housing, medical care) necessary to sustain life. ... [I]t has never ... been understood to include the taking of an action other than providing goods and services for the purpose of sustenance, albeit in relation to goods and services it is a flexible expression capable of adjusting to changing times and circumstances.”*

73 Anna Watson, “Failing To Break The Silence: A Critical Analysis Of Part 8 Of The Crimes Act 1961”, October 2012, available at: <http://www.otago.ac.nz/law/research/journals/otago043935.pdf>

*Imposition of an additional legal duty to take reasonable steps to protect victim from illegal injury*

5.40 In the review of these duties provisions, the Law Commission referred to the case of *R v Lunt*,<sup>74</sup> in which the Court of Appeal had stated that, while there is no general common law duty upon one person to take steps to prevent harm occurring to another, the common law did “*impose a duty upon a parent [or person in loco parentis] to take reasonable steps to protect his or her child from the illegal violence of the other parent or of any other person where that violence is foreseen or reasonably foreseeable.*”<sup>75</sup> Put another way, “[a] stranger can stand by and watch the child starve or drown. But that child’s parents cannot.”<sup>76</sup> The Court went on to state, however, that the duty on a parent or person in place of a parent to provide “*necessaries*” contained in sections 151 and 152 of the Act did not include a duty to protect a child from harm.<sup>77</sup>

5.41 In light of this, the Law Commission felt that sections 151 and 152 then existing did not offer sufficient express protection to children and vulnerable dependents, and hence proposed that they be amended so that parents and caregivers would “*have an additional legal duty [under each provision] to take reasonable steps to protect the person in their charge from injury.*”<sup>78</sup> The Law Commission proposed that the duty to take steps should go beyond that expressed in *Lunt*, in that it should apply not only to preventing the child from suffering harm through acts of violence, but also from suffering harm as a result of omissions to act. The Law Commission stated in relation to the proposed amended parental duty in section 152:

*“The new section 152 duty we propose is expressed in more general terms, as a duty on a parent or person in place of a parent to take reasonable steps to protect his or her child from injury. In other words, the scope of what we are proposing is not, in its express terms, confined to ‘illegal violence’. The reality is that many things likely to cause injury (ie, actual bodily harm) to a child will indeed amount to illegal violence. However, from time to time, an omission to perform a statutory duty may give rise to the same risk. Such an omission is equally culpable in our view, in the sense that the risk to the child is the same. Our proposed new duty is therefore cast in terms that do not exclude such a case.”*<sup>79</sup>

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74 [2004] 1 NZLR 498 (CA).

75 Same as above, at 504 (CA). See discussion in New Zealand Law Commission report (Nov 2009), above, at Summary, para 34, and at para 4.15. The New Zealand Court of Appeal in *Lunt* had cited as authority for this principle the Australian cases of *R v Russell* [1933] VLR 59 and *R v Clark and Wilton* [1959] VR 645.

76 *R v Lunt* [2004] 1 NZLR 498, at 504 (CA), quoting Simister and Brookbanks, *Principles of Criminal Law* (2nd ed) para 3.2.1.

77 *R v Lunt* [2004] 1 NZLR 498, at 504 (CA). See also New Zealand Law Commission report (Nov 2009), above, at para 4.15.

78 New Zealand Law Commission report (Nov 2009), above, at Summary, para 26. See also New Zealand Law Commission press release (18 Dec 2009), above.

79 New Zealand Law Commission report (Nov 2009), above, at Summary, para 35.

5.42 The Law Commission commented that this proposed additional parental duty to protect from harm had some similarity to an analogous duty provision in Queensland Criminal Code.<sup>80</sup>

5.43 The Law Commission observed that some of those whom it had consulted on the recommendations in relation to these provisions doubted whether the expansion of the duty under section 151 (with respect to those caring for vulnerable adults) was appropriate. They argued that the obligations of parents to their children “*should be more extensive than the obligations of others such as police, prison officers and hospital or rest home staff who are in charge of persons by reason of detention, age, sickness, mental impairment, or other cause.*”<sup>81</sup>

5.44 The Law Commission’s response to this was:

*“We note that the duty would require only reasonable steps to be taken. Moreover, the nature of the duty would vary according to the nature and degree of the vulnerability, and liability for a breach of that duty would arise only when there had been gross negligence as required by section 150A – that is, a major departure from the standard of care expected of a reasonable person in those circumstances. We think it appropriate to use the criminal law to penalise conduct that fails to meet this fairly low threshold.”*<sup>82</sup>

#### *The structure of the provisions and the proposed redrafting*

5.45 Apart from the shortcomings identified above, the Law Commission also found the overall structure of sections 151 and 152 confusing, noting that these provisions:

*“set out the duty in question; state that a person is criminally responsible for omitting to perform it if this results in death or endangerment of life or permanent injury; and in those latter cases (other than death), set a maximum penalty of 7 years’*

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80 Same as above, at Summary, para 36 and at para 5.36. Ie, under section 286 of the Criminal Code Act 1899 (QLD), which states:

- “(1) It is the duty of every person who has care of a child under 16 years to-*
- (a) provide the necessaries of life for the child; and*
  - (b) take the precautions that are reasonable in all the circumstances to avoid danger to the child’s life, health or safety; and*
  - (c) take the action that is reasonable in all the circumstances to remove the child from any such danger;*
- and he or she is held to have caused any consequences that result to the life and health of the child because of any omission to perform the duty, whether the child is helpless or not.*
- (2) In this section-*
- ‘person who has care of a child’ includes a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child.”*

81 New Zealand Law Commission report (Nov 2009), above, at para 5.47.

82 Same as above, at para 5.48.

*imprisonment.*<sup>83</sup>

5.46 In relation to section 152, the Law Commission observed that “[c]riminal responsibility only exists for breach of this duty in the very worst types of cases.”<sup>84</sup> Similarly, in relation to section 151, the Law Commission found that “*the duty imposed on [the caregivers] is too narrow....; it addresses only the most serious cases where life is endangered, there is permanent injury to health, or death occurs*”.<sup>85</sup>

5.47 Indeed, the Law Commission thought that the criminal responsibility aspect of these two provisions was in any event “*redundant*” as the source of criminal liability was the offence provisions. The Law Commission commented that if “*the reference to criminal responsibility legally adds nothing, it should not appear in the drafting at all.*”<sup>86</sup> Taking the view that the parallel proposed reforms – especially those in relation to section 195 (discussed above) – should address the shortcomings, the Law Commission therefore recommended a redraft of the two duties provisions in which the reference to “*criminal responsibility*” should be omitted.

#### *The reformed sections 151 and 152*

5.48 The Law Commission’s recommendations discussed above were implemented with slight amendments in the current sections 151 and 152, which now read:-

#### *“151 Duty to provide necessities and protect from injury*

*Every one who has actual care or charge of a person who is a vulnerable adult and who is unable to provide himself or herself with necessities is under a legal duty—*

- (a) to provide that person with necessities; and*
- (b) to take reasonable steps to protect that person from injury.*

#### *152 Duty of parent or guardian to provide necessities and protect from injury*

*Every one who is a parent, or is a person in place of a parent, who has actual care or charge of a child under the age of 18 years is under a legal duty—*

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83 Law Commission Submission to Social Services Committee of New Zealand Parliament on the Crimes Amendment Bill (No 2) 2011 (8 June 2011), at 3, at: [https://www.parliament.nz/resource/en-NZ/49SCSS\\_EVI\\_00DBHOH\\_BILL10599\\_1\\_A191313/c0b6273bb5f2064aa4f90001c8f24f12dc2a5410](https://www.parliament.nz/resource/en-NZ/49SCSS_EVI_00DBHOH_BILL10599_1_A191313/c0b6273bb5f2064aa4f90001c8f24f12dc2a5410)

84 New Zealand Law Commission report (Nov 2009), above, at para 5.39.

85 Same as above, at para 5.46.

86 Same as above, at para 5.41.

- (a) *to provide that child with necessities; and*
- (b) *to take reasonable steps to protect that child from injury.”*

5.49 As can be seen, sections 151 and 152 have been simplified, and now only delineate the scope of the (extended) duties; also, the offence-creating parts, and the references to the person under a legal duty being “*criminally responsible*”, have been dropped. The implication of these changes is that the two duties provisions cannot now be read in isolation, but must be read together with the reformed section 150A (discussed below), as well as section 195 (redrafted for the reasons discussed in detail above).

*The reformed section 150A: criminal responsibility and the standard of care*

5.50 Section 150A sets out the standard of care required of persons under legal duties set out in the Crimes Act 1961 – including sections 151 and 152 – the breach of which would attract criminal liability. The standard of care applicable is an objective gross negligence standard and the section (now) reads:

*“150A Standard of care applicable to persons under legal duties or performing unlawful acts*

- (1) *This section applies in respect of—*
  - (a) *the legal duties specified in any of sections 151, 152, 153, 155, 156, and 157; and*
  - (b) *an unlawful act referred to in section 160<sup>87</sup> where the unlawful act relied on requires proof of negligence or is a strict or absolute liability offence.*
- (2) *For the purposes of this Part, a person is criminally responsible for omitting to discharge or perform a legal duty, or performing an unlawful act, to which this section applies only if, in the circumstances, the omission or unlawful act is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies or who performs that unlawful act.”<sup>88</sup>*

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87 *le, “Culpable Homicide”*: see section 160, Crimes Act 1961 (NZ).

88 Prior to reforms, section 150A, although already referenced by the gross negligence standard, did not cover the performance of unlawful acts, and stated:

*“[A] person is criminally responsible for –*

- (a) *omitting to discharge or perform a legal duty to which this section applies; or*
- (b) *neglecting a legal duty to which this section applies –*

5.51 During its review of the draft Bill, the New Zealand Ministry of Justice stressed that the failure to provide necessities as required under sections 151 and 152 must be connected with the likelihood of injury. That is, there needs to be a causal connection between the parents' failure to provide the victim with necessities and the victim suffering an injury. The Ministry of Justice noted that:

*"It is likely that the courts will require that the prosecution establish that [the victim]'s injury would not have occurred as and when it did had [either parent] provided [the victim] with the necessities in question or took reasonable steps to prevent the injury from occurring and the omission must have been a substantial and operative cause of the injury. It is likely that the failure to provide necessities and take reasonable steps need not be the only cause of injury. It also needs to be proven that had the accused acted in performance of the duty that the injury would not or would probably not have eventuated."*<sup>89</sup>

5.52 Further, although the term "injury" was not defined in the Bill, the Ministry of Justice considered that "*the harm must be more than trivial and may include psychiatric conditions in certain circumstances: it does not extend to other states of mind such as fear, distress or panic.*"<sup>90</sup>

5.53 In summary, as a result of these reforms, each provision in the ill-treatment and neglect context now serves a clear function within the statutory framework: sections 151 and 152 impose the legal duties; section 150A sets the standard for criminal responsibility; and section 195 creates the offence.

**(iii) The new offence of "failure to protect a child or vulnerable adult from risk of serious harm" in section 195A of the Crimes Act 1961**

5.54 The Law Commission's third proposal in this area was the introduction of a new offence in section 195A of the Act, of failing to protect a child or vulnerable adult from risk of death, serious injury or sexual assault.<sup>91</sup> As noted earlier, this new offence,<sup>92</sup> which the Law Commission stated was "*closely modelled on section 5 of the Domestic Violence, Crime and Victims Act 2004 (UK),*"<sup>93</sup> was in response, as we have seen, to a series of highly

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*only if, in the circumstances of the particular case, the omission or neglect is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies in those circumstances."*

89 New Zealand Ministry of Justice report (July 2011), above, at 8 and 9.

90 Same as above.

91 New Zealand Law Commission report (Nov 2009), above, at para 5.24. The new offence proposed by the Commission was comprised in section 195A of the draft Bill appended to the New Zealand Law Commission's report. The text of this draft provision is set out in Annex G to this paper.

92 The text of this provision is set out in Annex F to this paper.

93 New Zealand Law Commission report (Nov 2009), above, at para 5.25. The Commission went on to note: "*There is also a similar South Australian provision.*"

reported cases in which children had suffered horrific child abuse, but the police had had difficulty in identifying the perpetrators of specific acts of violence.<sup>94</sup> The new offence is essentially designed to force people closely connected to those at risk, who know about the violent or sexual offending, to bring the offenders to the attention of the police or persons of authority.<sup>95</sup> Though primarily intended to apply to persons who are neither parents nor primary carers of the victim (as these parties would be more the focus of the offence under section 195, as supported by sections 150A, 151 and 152, discussed above), this new offence was also contemplated as applying to parents or primary carers.<sup>96</sup>

### *Overview of the offence*

5.55 Section 195A imposes liability where:

- a member of a household or a staff member of a hospital, institution or residence where the victim resides
  - who has frequent contact with the victim, and
  - knows the victim is at risk of death, serious injury or sexual assault as a result of an unlawful act by another person or an omission by another person to perform a legal duty, and
- fails to take reasonable steps to protect the victim from that risk.<sup>97</sup>

5.56 To meet the elements of the offence, a householder or staff member of a hospital, institution or residence where the victim resides must:

- be 18 years of age or over
- have *knowledge* of the risk
- have *frequent* contact with the child or vulnerable adult
- fail to *take* reasonable steps to protect the victim.<sup>98</sup>

5.57 The New Zealand Ministry of Justice has observed that whether the criteria for the offence are met “*is fact specific and will depend on the*

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94 See New Zealand Ministry of Justice, *Crimes Amendment Bill (No 2) Initial Briefing* [to Social Services Committee] (1 June 2011), at para 25, at: [https://www.parliament.nz/resource/en-NZ/49SCSS\\_ADV\\_00DBHOH\\_BILL10599\\_1\\_A190540/d13adc76c9fbbb6c1264e3257b14a1e6d56b6292](https://www.parliament.nz/resource/en-NZ/49SCSS_ADV_00DBHOH_BILL10599_1_A190540/d13adc76c9fbbb6c1264e3257b14a1e6d56b6292)

95 See H Abeygoonesekera, “Standing up for those who are vulnerable”, *NZ Lawyer* (Issue 179, March 2012).

96 See New Zealand Ministry of Justice Initial Briefing (1 June 2011), above, at para 22.1.

97 New Zealand Law Commission report (Nov 2009), above, at para 5.30.

98 New Zealand Ministry of Justice Initial Briefing (1 June 2011), above, at para 22.

*circumstances of each case.*<sup>99</sup>

### *The elements of the offence*

#### *(a) The victim is a child or vulnerable adult*

5.58 The victim must be either a child under the age of 18 years,<sup>100</sup> or a vulnerable adult. As noted earlier under the discussion of the re-drafted section 195, the Law Commission was of the view that to comply with New Zealand's obligations under the United Nations Convention on the Rights of the Child, the age of the child should be under 18 years for this new offence and for all of the revised offences in Part 8 of the Crimes Act 1961 which referred to children.<sup>101</sup>

5.59 The term "*vulnerable adult*" is defined under the Act to mean a person who is "*unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person.*"<sup>102</sup> (It has been observed that both the New Zealand and the English legislation have the same open-ended range of causes that might trigger the relevant vulnerability in the victimised adult, but the New Zealand legislation appears to require total impairment (where the word "*unable*" is used), as opposed to the "*significant*" impairment which will be satisfactory under the English law.<sup>103</sup>)

#### *(b) The harm includes the death, grievous bodily harm or sexual assault of the victim*

5.60 As noted earlier, this new offence is based on the "*causing or allowing the death of a child*" offence in section 5 of the Domestic Violence, Crime and Victims Act 2004 (UK) (discussed earlier, in Chapter 3). At the time of the enactment of the New Zealand offence, however,<sup>104</sup> the UK legislation applied only to cases where the victim had died.<sup>105</sup> In contrast,

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99 Same as above, at para 23.

100 Section 195(3), Crimes Act 1961, introduced by section 7, Crimes Amendment Act (No 3) 2011.

101 See New Zealand Law Commission report (Nov 2009), above, at paras 5.17 and 5.43. (The Law Commission pointed out that for the revised offences, this would mean some modifications to the existing legislation. For example, the definition of "*child*" under the previous section 195 (cruelty to a child) and section 152 (duty of parent or guardian to provide necessities) of the Act referred to children under 16 years of age. Also, the former section 10A of the Summary Offences Act (ill-treatment or wilful neglect of child), which became incorporated into the substituted section 195, applied to children under the age of 17 years.)

102 Section 2, Crimes Act 1961 as introduced by section 4(1), Crimes Amendment Act (No 3) 2011.

103 See Julia Tolmie, *The 'Duty to Protect' in New Zealand Criminal Law: Making it up as we go along?* *New Zealand Law Review* (2010)(4) 725, at 755.

The expansive approach to the meaning of "*vulnerable adult*" has been reinforced by the English Court of Appeal in *R v Khan and Others* [2009] 4 All ER 544 (CA), which held (at para 27) that vulnerability under the English legislation could be short or temporary.

104 In September 2011.

105 Though this has since been extended to cover cases of "*serious physical harm*." See Domestic Violence, Crime and Victims (Amendment) Act 2012 (UK), which received Royal assent on 8 March 2012, at:

section 195A applies not only to fatal cases but also to those involving the grievous bodily harm<sup>106</sup> or sexual assault<sup>107</sup> of the victim.

(c) *The offender*

(i) *is 18 years or older, and*

5.61 The offender must be 18 years of age or older at the time of the offence.<sup>108</sup> This was the approach originally taken by the New Zealand Law Commission, however when the Government first introduced the Bill to Parliament, it contained a proviso in section 195A(3) that in cases where the victim was a child, a parent of the child who was under 18 years of age could be liable for the offence.<sup>109</sup> Following opposition from various quarters, the proviso was subsequently dropped before the Bill's enactment. Echoing the comments of the Parliamentary Social Services Committee,<sup>110</sup> the Ministry of Justice noted that issues related to the liability of teenage parents “*are more easily and appropriately dealt with*” under section 152 (“*Duty of parent or guardian to provide necessaries and protect from injury,*” discussed above).<sup>111</sup>

(ii) *is a member of the same household as the victim, or*

5.62 This limb of the offence covers those who are members of the same household as the victim and have frequent contact with the victim. As stated by one New Zealand commentator about the UK offence on which the New Zealand offence is modelled:

*“Such a provision extends the obligation to intervene in cases of predictable domestic violence beyond those who have assumed obligations of care in respect of someone who is vulnerable, onto all immediate members of the victim's household who are put on notice about what is happening to the victim, thus rejecting the*

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<http://www.legislation.gov.uk/ukpga/2012/4/contents> and  
[http://www.legislation.gov.uk/ukpga/2012/4/pdfs/ukpga\\_20120004\\_en.pdf](http://www.legislation.gov.uk/ukpga/2012/4/pdfs/ukpga_20120004_en.pdf)

106 Instead of the term “*grievous bodily harm*” which is used in the enacted provision, the New Zealand Law Commission had proposed the use of the term “*serious injury*” in its draft Bill, which it recommended should be used for all of the core assault and injury provisions in Part 8 of the Crimes Act 1961. The Commission stated that this would have the meaning of “*grievous or really serious actual bodily harm.*” See New Zealand Law Commission report (Nov 2009), above, at para 5.30.

107 See the offences comprised in Part 7 of the Crimes Act 1961 (NZ).

108 Section 195A(3), Crimes Act 1961 (NZ), introduced by section 7, Crimes Amendment Act (No 3) 2011.

109 See New Zealand Ministry of Justice Initial Briefing (1 June 2011), above, at para 22.1, which notes that the offence as originally set out in the (No 2) Bill would apply to persons “*18 years or over unless they are a parent of the victim.*”

110 See NZ Parliamentary Social Services Committee, *Crimes Amendment Bill (No 2): Government Bill: As reported from the Social Services Committee: Commentary* (18 August 2011), at:

[https://www.parliament.nz/en/pb/sc/reports/document/49DBSCH\\_SCR5272\\_1/crimes-amendment-bill-no-2-284-2](https://www.parliament.nz/en/pb/sc/reports/document/49DBSCH_SCR5272_1/crimes-amendment-bill-no-2-284-2) and  
[https://www.parliament.nz/resource/en-NZ/49DBSCH\\_SCR5272\\_1/9e7d3b5220fd3ba381c53d9faa80eb20be74a5a8](https://www.parliament.nz/resource/en-NZ/49DBSCH_SCR5272_1/9e7d3b5220fd3ba381c53d9faa80eb20be74a5a8)

111 See New Zealand Ministry of Justice Initial Briefing (1 June 2011), above, at 16.

*libertarian notion that non-interference in other people's private business is an appropriate response when living in close proximity with people who are violent and vulnerable respectively.*"<sup>112</sup>

5.63 The offender may be regarded as a "*member*" of a particular household even if he or she does not live in the household, if the defendant is "*so closely connected*" with the household that it is reasonable to regard him or her as a member.<sup>113</sup> Relevant considerations in determining whether the offender is "*so closely connected*" will include the frequency and duration of visits to the household and familial relationship (if any) with the child, and any matters that may be relevant in the circumstances.<sup>114</sup> (These requirements and criteria are now contained in sections 195A(4) and (5).)

5.64 The Law Commission took the view that although those who live in close proximity to a child and are in frequent contact with the child have a sufficiently close nexus to make the imposition of a duty of care appropriate, the Law Commission deliberately refrained from recommending a new statutory duty (though one may be implicit from the effect of section 195A). This was because the Law Commission felt that such an approach would "*expose the household member to potential liability across the whole spectrum of criminal offences that refer to a statutory duty,*" ranging from the proposed new endangering provision under the new section 157A, to manslaughter under section 160.<sup>115</sup> The Commission stated:

*"In our view, while the nature of a co-habitation relationship is such that it is proper for there to be a degree of liability, the extent of such liability needs to be clear and circumscribed."*<sup>116</sup>

(iii) *is a staff member of any hospital, institution, or residence where the victim resides, and*

5.65 The scope of this limb has been discussed above in relation to the re-drafted section 195.

(iv) *has frequent contact with the victim, and*

5.66 The offender must be a person who has frequent contact with the victim, the parameters of which are discussed above.

(v) *knows that the victim is at risk of death, grievous bodily harm, or sexual assault, as a result of an unlawful act or an omission by another person to perform a legal duty, and*

5.67 The offender must know that the victim is at risk of death,

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112 Julia Tolmie (2010), above, at 729.

113 New Zealand Law Commission report (Nov 2009), above, at para 5.30.

114 Same as above.

115 Same as above, at para 5.27.

116 Same as above.

serious injury or sexual assault, as the result of an unlawful act or an omission to perform a legal duty “by another person” (ie, the parent/guardian or carer). The “risk” would need to be a “real or appreciable” risk of harm – ie, “there needs to be an immediate causal connection between the unlawful act or omission to perform a legal duty and the risk of harm.”<sup>117</sup>

5.68 In the enacted provision, the following rider has been added in section 195A(1)(a)(ii) after the reference to the omission by another to perform a legal duty: “if, in the circumstances, that omission is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies”. (This rider did not appear in the original draft provision recommended by the Law Commission, however the Commission had included a reference to section 195A in section 150A, discussed above, relating to the standard of care applicable to duties under the Act.)

(vi) *fails to take reasonable steps to protect the victim from that risk*

5.69 The offender must fail to take reasonable steps to protect the victim from harm, and what constitutes “reasonable steps” will be a matter for the jury to determine in the circumstances of each case.<sup>118</sup> Section 195A (unlike section 195) “does not impose a legal duty on an individual; it does, however, place an obligation on certain individuals to act in certain situations.”<sup>119</sup>

5.70 Notably, there was significant disagreement as to how this element could be satisfied between the Law Commission and the Ministry of Justice at the formal draft Bill stage. Under the Law Commission’s original proposal, it was envisaged that the failure to take reasonable steps must be “grossly negligent”. Therefore, in the Law Commission’s draft Bill, reference to section 195A was specifically included in section 150A, which sets the standard of gross negligence as the standard applicable to persons under legal duties (see discussion above). However, when the Government introduced its own draft Bill, the new section 195A was *not* included as a section to which section 150A applied; that is, under the Government’s proposal, the new offence under section 195A expressly referenced to a gross negligence standard on the part, instead, of the third-party person who committed the unlawful act, or omitted to perform their legal duty to the victim. The Government was very conscious of this difference in approach. In the Ministry of Justice’s report, it stated that the prosecution must prove under this proposed new offence that:

**“A has frequent contact with B, has knowledge of the risk of death, grievous bodily harm or sexual assault (and not just any injury) to B, and knowledge that the risk of death (etc) to B is a consequence of C’s unlawful actions or omission to perform a legal duty owed to B to the required standard. If C omitted to perform a legal duty,**

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117 New Zealand Ministry of Justice report (July 2011), above, at 10.

118 New Zealand Law Commission report (Nov 2009), above, at para 5.31.

119 New Zealand Ministry of Justice report (July 2011), above, at 10.

*A would also need to be aware that C's omission was grossly negligent. It is only at this stage that the question arises as to whether A took reasonable steps to protect B from that risk of harm.*<sup>120</sup>

5.71 In the Government's view, therefore, the gross negligence to be looked at was whether C – the third party (parent/guardian or carer) – was grossly negligent in his or her omission to perform a legal duty owed to the victim. In relation to A – the person to be charged under section 195A, it would be necessary to consider whether he or she had failed to take reasonable steps to prevent the victim from that (appreciable) risk of harm.

5.72 More specifically, the Ministry of Justice observed that:-

*“As section 195A does not provide a duty [on A], what is considered to be ‘reasonable steps’ will differ from the gross negligence standard in section 195. This provides for a level of subjectivity.*

*This different standard of criminal responsibility is appropriate as it recognises that culpability is based on a failure to protect as opposed to causing the harm or omitting to perform a legal duty to protect the victim. In these circumstances it is appropriate for the Court to have regard to personal factors that might have contributed to the failure to act [by A] even though they knew of the risks.*<sup>121</sup>

5.73 The Law Commission raised concerns on the Government's approach on this issue during the formal draft Bill stage, and considered it as possibly imposing a lesser negligence standard which may lead inappropriately to an increased number of prosecutions. In further justifying its approach, the Ministry of Justice replied that:

*“We consider that the standard of culpability in section 195A(1)(b) when read in conjunction with the standard of culpability in section 195A(1)(a) imposes a more stringent test than gross negligence. The reasonable steps test in section 195A(1)(b) is appropriate in the context of this provision and its objectives of holding observers of abuse to account.*<sup>122</sup>

5.74 The Government's approach accordingly prevailed, and liability of the offender [A] under the current section 195A is not referenced to the gross negligence standard dictated by section 150A *per se*, although the risk created by the omission of the other person [parent/guardian or carer, C] to discharge or perform a legal duty referred to in section 195A(1)(a)(ii) is referenced to that standard.

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120 Same as above.

121 Same as above, at 11.

122 Same as above, at 13 to 14.

5.75 On whether or not section 195A could be construed as effectively introducing a mandatory reporting requirement, the Ministry of Justice did not agree, stating:

*“Although reporting allegations of child abuse to authorities may be appropriate in some cases, it is possible that steps other than reporting to authorities will suffice. It is also possible that reporting of itself will be insufficient (for example where the risk of serious injury is more immediate).”*<sup>123</sup>

#### *Maximum sentence for the offence*

5.76 As recommended by the Law Commission, the maximum penalty for this offence is 10 years, to reflect *“that the worst class of case will be one in which the child has died, and the negligence has been truly gross (eg, the offender deliberately closed his or her eyes to the conduct over a prolonged period).”*<sup>124</sup> The Ministry of Justice has observed that the maximum penalty *“would be reserved for a severe failure to protect the victim from conduct of a heinous level.”*<sup>125</sup>

#### *Commentary on the overall scope of the new offence under section 195A*

5.77 With regard to the scope of the new offence generally, it has been observed that there are a number of protections in place *“to ensure that the reach of the offence is kept within appropriate boundaries,”*<sup>126</sup> in that it only applies in cases of serious offending and to a limited range of persons.<sup>127</sup>

5.78 Regarding concerns about the offence being potentially too broad, the Law Commission had equally noted that there were a number of ways in which the elements of the provision operated to place safeguards around the scope of liability:

- it only applies to the most serious cases;
- it only applies when there has been frequent contact with the victim in addition to status as a member of the household (or someone sufficiently closely connected with the household); and
- *“most importantly, the jury will need to be satisfied that there was [at least] a grossly negligent failure<sup>128</sup> to take reasonable steps to protect the victim from harm. What constitutes 'reasonable steps' will be a matter for the jury to determine, in*

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123 Same as above, at page 10.

124 New Zealand Law Commission report (Nov 2009), above, at para 5.30.

125 New Zealand Ministry of Justice Initial Briefing (1 June 2011), above, at para 26.

126 Same as above, at para 22.

127 Same as above.

128 As noted above, the Ministry of Justice considered that, in effect, an even higher standard of culpability than gross negligence would apply to the accused under section 195A (ie, incorporating a subjective element).

*the circumstances of each case.*<sup>129</sup>

5.79 The Ministry of Justice has stated that:

*“Whether these criteria are met is fact specific and will depend on the circumstances of each case. The offence is not designed to capture those persons who might have infrequent or limited ongoing contact with the child or vulnerable adult, such as teachers, social workers and neighbours.”*<sup>130</sup>

*“This new offence ensures that there is responsibility to protect children and vulnerable adults. The offence takes aspects of parental responsibility and extends them to those persons who live with or are closely connected to the child or vulnerable adult but otherwise have no direct responsibility for the care of the child or vulnerable adult.”*<sup>131</sup>

5.80 In answer to possible concerns that the scope of the offence was too narrow, in that it would capture *“a flatmate, for example, but not a schoolteacher whose degree of knowledge of and nexus with the child may be similar or even greater,”* the Law Commission had commented that it was *“arguably necessary to draw a line somewhere.”*<sup>132</sup> The Commission stated:

*“We acknowledge the merits of the argument that any person in relation to whom the requisite degree of knowledge and proximity can be proved should be liable. However, we have taken the view that those who live with a child have a different kind of relationship and responsibility than others with whom the child may come into contact; the home should be a place of safety.”*<sup>133</sup>

### **Specific areas of concern on consultation**

#### *“Victimising victims of domestic violence”*

5.81 In addition to the comments of the New Zealand Law Commission, the New Zealand Law Society and others noted above (in relation to various aspects of the (then proposed) reforms), certain other specific concerns were expressed during the New Zealand Government’s consultation on the proposals. In particular, the Ministry of Justice reported that it received a large number of submissions raising concerns on the amended section 152 and the new section 195A, that the requirement on parents and others to take reasonable steps to protect children from injury *“fails to recognise the reality of domestic violence or may have unintended*

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129 New Zealand Law Commission report (Nov 2009), above, at para 5.31.

130 See New Zealand Ministry of Justice Initial Briefing (1 June 2011), above, at para 23.

131 Same as above, at para 25.

132 New Zealand Law Commission report (Nov 2009), above, at para 5.31.

133 Same as above.

consequences on families”, with some of the submissions pointing to the strong correlation between child abuse and domestic (partner) abuse.<sup>134</sup>

5.82 One consultee submitted that:

*“[T]he proposed ‘duty to protect’ overlooks the realities of domestic violence and difficulties that victims have experienced in courts which have a romanticised view of the role of the mother and not shown a great understanding of the impact that domestic violence has on women and their ability to protect children from violence or other forms of abuse.”<sup>135</sup>*

Others commented that:

*“[T]he Bill currently asks the courts to assess whether the actions of the accused are reasonable with the benefit of hindsight rather than the reality experienced by women at that time. ... [T]he courts should take greater account of the context within which the offending is occurring when determining criminal liability.”<sup>136</sup>*

5.83 Various concerns were raised specifically in relation to section 195A:

*“[N]amely that there may be limited steps that a victim of domestic violence may reasonably take, insufficient regard is given to the extent to which a person experiencing or in fear of domestic violence may react to a situation where a child is at risk, a lack of understanding amongst the judiciary of the dynamics of domestic violence.”<sup>137</sup>*

Consultees referred to studies which showed that:

*“[V]ictims of domestic abuse are less likely to report these instances, remove the child from harm or intervene because of a fear of reprisals or abuse against other members of the household. The process of removing oneself from an environment of abuse can take place gradually over a period of years.”<sup>138</sup>*

### *Response of the Ministry of Justice*

5.84 In response to these submissions, the Ministry of Justice observed that the provisions in the Bill were designed to serve two main purposes. First, to affirm that parents and care-givers have a special

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134 See New Zealand Ministry of Justice report (July 2011), above, at 19.

135 Same as above.

136 Same as above.

137 Same as above.

138 Same as above.

relationship with their child or charge, and as a consequence the law has imposed an obligation on parents and care-givers to take steps that another person would not be required to do to protect the child or person from harm. Secondly, it is designed to improve the extent to which parents and caregivers who fail to take appropriate steps to protect the child or vulnerable adult from the risk of harm are held to account.<sup>139</sup> The Ministry of Justice commented:

*“Without seeking to diminish or dismiss the importance or significance of the concerns raised by these submissions, watering down the effect of these provisions as way of mitigating these concerns will at the same reduce the importance of improving increased levels of accountability for offending against children and goes against the purpose of the reforms.”<sup>140</sup>*

5.85 The Ministry of Justice also observed that, in many respects, the changes to sections 151 and 152 did not affect the existing obligations of parents to provide their child with necessities and to protect them from foreseeable violence. The Ministry noted, however, that the changes to section 195 and inclusion of a gross negligence standard will make it easier to bring prosecutions.<sup>141</sup>

5.86 In relation to the new section 195A offence, the Ministry commented:

*“Section 195A is intended to encourage members of a household other than the parent or caregiver to respond to situations in which they are aware that a child or vulnerable adult is at risk of serious harm to take sufficient steps as are appropriate to protect that person. The concerns relating to domestic or family violence in respect of this offence are potentially more remote.”<sup>142</sup>*

#### *Health professionals’ comments*

5.87 In relation to the new offence under section 195A, a health professional group sought an exemption for criminal responsibility for health professionals generally who fail to take reasonable steps to protect a child or vulnerable adult residing in a hospital, institution or other residence under section 195A(2)(b), *“as this may lead staff to second-guess health professionals and cause practical difficulties.”<sup>143</sup>*

5.88 The group was also concerned about the potential scope of section 195, stating that it may *“expose health professionals to criminal responsibility for a wide-range of everyday medical interventions.”<sup>144</sup>* They

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139 Same as above, at 20.

140 Same as above.

141 Same as above.

142 Same as above, at 21.

143 Same as above, at 18.

144 Same as above.

also considered that these provisions are also wider than the existing legal duties health professionals operate under.<sup>145</sup>

### *Response of the Ministry of Justice*

5.89 The Ministry of Justice commented that health professionals operate under a number of legal duties and professional codes of practice that require them to work to high standards of care, and that:

*“Section 195 in association with section 150A only requires health professionals to exercise the standard of care that other health professionals would exercise in those circumstances. Criminal responsibility only occurs where there has been a major departure from the standard of care normally associated with health professionals.”<sup>146</sup>*

5.90 The Ministry stated that it did not support an exemption for health professionals from the requirements of section 195A, noting:

*“As stated previously, section 195A sets a high standard of culpability and it is not unreasonable to expect a health professional to take reasonable steps to protect a third party if s/he is aware that a colleague has breached his or her duty in respect of that person and that person is at risk of death, grievous bodily harm, or sexual assault.”<sup>147</sup>*

## **Cases decided since the implementation of the reforms**

5.91 The cases below illustrate how the New Zealand courts have considered the application of the 2011 reforms to the Crimes Act described above. A discussion of further relevant New Zealand cases is included in Appendix IV.

### ***Under sections 152 and 195***

*JF v New Zealand Police*<sup>148</sup>

*(Drunk driving case – sections 195 and 152 of Crimes Act 1961 – “likely to cause injury” – “major departure from the standard of care expected of a reasonable person”)*

5.92 The case of *JF v New Zealand Police* provides useful illustration of the reach and workings of these reformed provisions, particularly on the

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145 Same as above.

146 Same as above.

147 Same as above.

148 [2013] NZHC 2729.

meaning of “*likely to cause injury*” and “*major departure from the standard of care expected of a reasonable person*”.<sup>149</sup>

5.93 This case was very much a test case of the new sections 152 and 195 of Crimes Act 1961. In this case, at about 10:45pm on 15 August 2012, a car driven by the appellant crashed into a give-way sign after she had failed to take a moderate bend in the road she was driving on and crossed over the centre line. On board the car was her daughter “A” (two months short of her fifth birthday) who was restrained by a conventional seatbelt in the front passenger seat, although a child’s booster seat was available at the back seat which was not being used. A, however, was not injured in the crash.<sup>150</sup>

5.94 A police car happened to be parked nearby and the officers in the car witnessed the crash. They found that the appellant was some 528 micrograms of alcohol per litre of breath over the legal limit (ie, about double).<sup>151</sup>

5.95 The appellant was charged with careless driving and driving with excess breath alcohol. She pleaded guilty to these charges and was sentenced to 6 months’ supervision and disqualified from driving for 10 months. The appellant was also charged with one count under section 195 of the Crimes Act of being a person who had actual care of A (a person under the age of 18 years) who omitted to take reasonable steps to protect that child from injury, that being a major departure from the standard of care to be expected of a reasonable person. The appellant pleaded not guilty to this charge and was convicted after trial. She was sentenced to 150 hours’ community work in addition to the sentences on other charges. She appealed against this conviction at the High Court.<sup>152</sup>

5.96 Further facts necessary to understand the issues were that early on that same night, the appellant had been drinking with a friend following a shared birthday dinner. They then decided to move to another address in the area, but because of the amount of alcohol she had consumed, the appellant did not drive but rather her friend drove. Along the way, the appellant insisted they stop to buy some vodka because she was anticipating a “*relatively big night*”. It was also her plan to put her daughter A to sleep at the second address.

5.97 Upon arrival, A was carried inside where she continued sleeping. The appellant accepted under cross-examination that her intention at this second address was to get drunk and this was what she did. She described in her evidence what happened a few hours later was that she and her friends heard a car pull up, and a gang member entered the premises. He was the

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149 This case can be compared to the case of *Rakete v Police* [2017] NZHC 2915 in which the High Court quashed the conviction under section 195 – see Appendix IV.

150 *JF v New Zealand Police* (2013) above, at para 1.

151 Same as above, at para 2.

152 Same as above, at paras 3 to 5.

partner of one of her friends. He started yelling and verbally abusing his partner. The appellant panicked out of her past experience with gang members, so much so that although she knew she was “*really drunk*”, she picked up her daughter, exited the house when she thought she would not be noticed, put her daughter into the front passenger seat of her car, fastened the seat belt over her, and set off to try to drive home although she accepted that she did not really know where she was at the time. As it turned out, the gang member stopped his threatening behaviour after only several minutes but by that time the appellant had fled.

5.98 Under cross examination, the appellant claimed that she was lost, and there was nowhere to pull over so she could use her smartphone to ascertain where she was, or to put her daughter into the child’s car seat. After the crash, she did not tell the police officers anything about the amount of vodka she had consumed, nor did she mention that she had left her friend behind in the house with an aggressive gang member.<sup>153</sup>

5.99 The trial judge was satisfied that the offence of section 195 was made out. Of significance was the “*cumulative effect*” of various factors including that the appellant had chosen to consume a considerable quantity of alcohol over an extended period that evening and that she decided to drive knowing that she was drunk. Essentially, this was “*a course of conduct*” that was a major departure from the standard of care to be expected of a reasonable person. The judge considered there was clearly a risk that the appellant would crash and hence an equally high risk that her daughter would be injured. The judge rejected her evidence that there was nowhere for her to pull over and put her daughter A into the car seat.<sup>154</sup>

5.100 The appeal court made some general observations of the reformed section 195. In particular, the court noted that it “*replaced the previous offence of cruelty to a child under 16 by raising the age limit to 18; broadening the scope of the offence to include vulnerable adults; and substituting an objective gross negligence test of liability for the previous requirement that ill-treatment or neglect be ‘wilful’.*”<sup>155</sup> Also:

*“[B]y the reference to ‘a major departure’ from a reasonable standard of care Parliament intended that prosecutions under the section should be confined to serious cases and not be resorted to in respect of every occasion upon which a person responsible for the care of a child or vulnerable adult fails to exercise a reasonable standard of care.”*<sup>156</sup>

5.101 The two key challenges on appeal were: (1) whether it had been established beyond reasonable doubt that the appellant’s actions were *likely* to cause suffering, injury or adverse effects to the health of her daughter; and

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153 Same as above, at paras 6 to 7.

154 Same as above, at paras 8 to 11.

155 Same as above, at para 15.

156 Same as above, at para 13.

(2) whether the act(s) relied upon to found the charge represented a “*major departure*” from the standard of care to be expected of a reasonable person.<sup>157</sup>

*“likely to cause injury”*

5.102 As to the first issue, the appeal court observed that “*the word ‘likely’ means such as might well happen; it connotes a real or substantial risk, rather than requiring any assessment or balancing of the probabilities*”, and that, “[i]njury’ is defined in the Crimes Act as meaning ‘to cause actual bodily harm’. *Whether the appellant’s acts were likely to cause injury is a question of fact and it is not necessary for the prosecution to prove that actual injury arose.*”<sup>158</sup>

5.103 The appeal court noted that the trial judge had held that the risk of harm to the appellant’s daughter was caused by a combination of factors including her intoxication, her manner of driving, and her placement of the child in the front seat rather than the booster seat in the rear. There was no evidence at trial as to the relative effectiveness of the front passenger seatbelt and the rear child booster seat in minimising the risk of injury to her daughter.

5.104 The court accepted that it was a reasonable inference from the obligation under rule 7.6 of the Land Transport (Road User) Rules 2004 (to ensure a child under the age of five years was properly restrained by an approved child restraint) that the risk of injury to her daughter was increased by the appellant’s failure to comply. Also considered was the fact that a subsequent amendment to extend the applicability of this rule to children of seven years of age, although not directly relevant, further supported the view that the use of adult restraints for young children was regarded as inadequate. The court therefore agreed with the conclusion of the trial judge that the combination of factors identified by the judge created a real or substantial risk of injury.<sup>159</sup>

*“major departure”*

5.105 As to the second issue on “*major departure*”, the court referred to the concept of gross negligence in the House of Lords judgment in *R v Adomako*.<sup>160</sup> The court decided that the approach to determining whether the conduct amounts to a “*major departure*” is a two-step process:

*“The first step is to consider whether there has been a departure from the standard of care expected from a reasonable person ..... and the second step is to consider whether such a departure was ‘major’ by reference to community standards. In determining the second step, the*

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157 Same as above, at para 27.

158 Same as above, at para 33.

159 Same as above, at paras 34 to 35.

160 [1994] 3 WLR 288 (HL).

*seriousness of the appellant's breach of duty and the circumstances in which the appellant was in when it occurred are highly relevant and, when looked at as a whole, the conduct must be so bad as to justifiably be considered criminal.*"<sup>161</sup>

5.106 The appeal court was satisfied, on the combination of the circumstances, that the appellant's act(s) were such as to constitute a "major departure" from the standard of care to be expected of a reasonable person, and that warranted a criminal sanction. The circumstances of the breach:

*"[I]nvolved the appellant driving at night in a rural area with which she was not familiar while she had a breath/alcohol level of more than twice the legal limit. Driving with a young child in the vehicle in those circumstances is bad enough; doing so when the child was not properly restrained exacerbates the risk of injury. It is significant factor that once the appellant had fled the address and removed the child and herself from any immediate harm caused by the unwelcome visitors, she failed to pull over and wait until she was fit to drive on. Nor did she move A to where she could at least be properly restrained in the car seat which was in the back of the vehicle."*<sup>162</sup>

Accordingly, the appellant's appeal was dismissed.

5.107 Subsequently, the appellant applied for leave to appeal to the Court of Appeal.<sup>163</sup> The appellant proposed that the following questions be stated for the opinion of the Court of Appeal.

- (1) Was the court entitled in law to conclude that the applicant had, by driving whilst intoxicated, and in a manner that was, at worst, careless, intentionally engaged in conduct or omitted to discharge a legal duty that was likely to cause injury to the child? If the answer is "no", then –
- (2) Was the court correct to rely upon the fact that it is an offence to fail to ensure that a child under the age of five is properly restrained in an approved child restraint to conclude that the applicant's failure to restrain her child in an approved child restraint increased the risk of injury to one that was real and substantial when there was no evidence of the relevant effectiveness of the adult front passenger seatbelt compared to the approved booster seat?
- (3) Was the court correct in finding that the combination of circumstances referred to in the judgment reached the legal threshold to amount to a major departure from the standard of

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161 *JF v New Zealand Police* (2013) above, at para 39.

162 Same as above, at para 41.

163 [2014] NZHC 547.

care to be expected from a reasonable person?<sup>164</sup>

5.108 As to substantiating the grounds to obtain leave to appeal, the court found these questions to be neither questions of law (but questions involving application of law to facts), nor did they involve matters of general or public importance. Accordingly, the application was dismissed.<sup>165</sup>

5.109 The appellant sought further leave from the Court of Appeal which, too, dismissed the application.<sup>166</sup> In so doing, the court made a general comment about the reformed provisions:

*“Nor can it be doubted that a single incident may breach the standard of care that the legislation imposes, and that actual injury need not result. The offence carries a long maximum penalty (10 years imprisonment), but the legislature evidently intended that it would encompass not only the worst cases but also those that once might have been charged under the now-repealed s 10A of the Summary Offences Act 1981.”<sup>167</sup>*

*M v R*<sup>168</sup>

*(Child neglect – sections 195 and 152 of Crimes Act 1961 – two defendants – whether differential penalty)*

5.110 In cases involving more than one defendant, the issue arises as to whether in imposing the sentence, there should be any differentiation between the culpability of the defendants, as illustrated by the case below.

5.111 This was an appeal against sentence by Mr M and Ms K, who were sentenced respectively to imprisonment for four years and four months and three years and six months imprisonment following their guilty pleas to two charges of neglect of a child under section 195 of the Crimes Act 1961, each in relation to the serious physical abuse suffered by their twin sons J and P aged between 8 to 10 weeks.<sup>169</sup>

5.112 J and P were born four weeks prematurely on 8 February 2012. On 20 April 2012 they were admitted to hospital by both appellants, where it was discovered that both twins had suffered various serious injuries, including a linear skull fracture suffered by J. While the timing of injuries could not be stated with any precision, it was determined that they had occurred in the two week period prior to their admission to hospital between 6 and 20 April 2012.<sup>170</sup> The material evidence before the court was as follows: (1) for a period before and after the birth of the twins, the appellants were living with

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164 Same as above, at para 14.

165 Same as above, at paras 16 to 18.

166 *F v The Queen* [2014] NZCA 360.

167 Same as above, at para 6.

168 [2016] NZCA 53.

169 Same as above, at para 1, See *R v DK & BM* [2015] NZHC 2137 (Sentencing Note).

170 [2016] NZCA 53, at paras 2 to 4.

Mr M's mother and stepfather; (2) between 9 and 18 April 2012, Ms K had the primary care of the children at her mother's home where Mr M visited, although the agreed summary of facts did not specify clearly how often he made such visits; (3) on 18 April 2012, Ms K returned to the home of Mr M's parents with the twins.<sup>171</sup>

5.113 Mr M submitted that Ms K was the person who had the primary care of the twins.<sup>172</sup> The police were unable to identify which of them inflicted the injuries, and so the appellants were to be sentenced on the basis of neglect, pursuant to the indictment alleging that each of them had failed to perform the legal duty under section 152 of the Crimes Act to provide the twins with necessaries by failing to obtain medical assistance and treatment for their sons, the omission of which was likely to cause suffering or adverse effects to their health.<sup>173</sup>

5.114 The sentencing judge characterised this case as “*moderately serious*”,<sup>174</sup> bearing in mind that:-

- (1) the offending involved two babies;
- (2) they were at the most vulnerable time in their lives, completely dependent on Mr M and Ms K;
- (3) the injuries, which were non-accidental, had been sustained over a period of days, and in some cases, weeks, and there were many separate injuries;
- (4) it was not credible that their level of pain and suffering could have gone unnoticed;
- (5) some of the injuries would heal without long-term injury; but others carry long-term consequences, particularly for J who suffered fracture of his skull.<sup>175</sup>

5.115 She observed that as a result of the reforms, the maximum penalty for section 195 has been increased from 5 to 10 years, and noted:-

*“... The changes signalled an effort by Parliament to ensure that children are adequately protected from assault, neglect and ill-treatment. I take the increase in penalty as indicating an intention that courts are to be equipped to respond to this type of offending with sentences that reflect the seriousness of it.”<sup>176</sup>*

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171 Same as above, at paras 6 to 8.

172 Same as above, at para 4.

173 Same as above, at para 5.

174 Same as above, at para 11.

175 Same as above, at paras 9 and 11.

176 Same as above, at para 10.

5.116 She therefore adopted a starting point of six years' imprisonment for both appellants.<sup>177</sup> In relation to Ms K, the judge allowed a 30% discount for personal factors and a further 10% discount for a late guilty plea. In relation to Mr M, she allowed a discount of 10% and a further 10% for his late guilty plea. None of these discounts were at issue on appeal, although counsel agreed that the sentencing judge had made some mathematical errors and had effectively adopted a starting point of 5 years and 6 months.<sup>178</sup>

5.117 The complaint on appeal made on behalf of Mr M was that his sentence was manifestly excessive, in that: (1) the starting point was too high; and (2) the judge had failed to recognize his lesser role in the care of the boys.

5.118 Likewise, it was also argued on behalf of Ms K that: (1) the starting point was too high. Moreover, it was submitted that the judge had in her case (2) erred in giving weight to the long-term consequences for the victims; (3) failed to take into account that she had taken the boys to the hospital, and (4) failed also to have regard to totality.<sup>179</sup>

5.119 Various cases were referred to the Court of Appeal, which did not find them of material assistance.<sup>180</sup> A comparison was also made with sentences for offences under section 188(1) of the Crimes Act [wounding with intent] and other offences of serious violence, which the Court also found unhelpful as it considered that section 195 "*is targeted specifically at children and vulnerable adults and reflects a Parliamentary intention to provide specific protection in that context against violence or neglect.*"<sup>181</sup> After referring to the relevant report published by the New Zealand Law Commission,<sup>182</sup> it observed that the amended section was intended to achieve four principal objectives:-

*"First, to make it an offence to engage in conduct likely to cause suffering, injury, adverse effects to health or any mental disorder or disability to a child or vulnerable adult. Second, to impose criminal sanctions as well on parents or other persons who have the care or charge of a child or vulnerable adult who omit to discharge or perform their legal duties towards the child or vulnerable adult. Third, to remove the requirement to prove the conduct or omission was wilful. Rather, the new section imposes what the Law Commission described as a gross negligence test. This is expressed in the statute as a major departure from the standard of care to be expected of a reasonable person. Fourth, the maximum penalty for any contravention under the section was doubled from five to 10 years. No differentiation in the maximum penalty was made*

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177 Same as above, at para 12.

178 Same as above, at paras 13 to 14.

179 Same as above, at paras 15 to 16.

180 Same as above, at paras 18 to 24.

181 Same as above, at para 25.

182 Same as above, at paras 27 to 30, referring to New Zealand Law Commission report (Nov 2009), above.

*between those who cause a child's injury or death and those who have the care of the child or fail to perform their legal duty to care for the child.*"<sup>183</sup>

The Court of Appeal further observed that:

*"There are cases, of which this is one, where it is not possible to prove to the criminal standard who is responsible for a child's injuries. In such cases, the protective purpose may be achieved by prosecuting those who are responsible for the child's care."*<sup>184</sup>

5.120 For reasons essentially identical to those identified by the judge, the Court of Appeal was satisfied that the judge did not err in fixing a starting point of six years' imprisonment.<sup>185</sup> It rejected the argument that she ought to have assessed Mr M's culpability as less than that of Ms K. In this respect, the Court agreed with the Crown that there should be no differentiation between the culpability of the two appellants, since neither of them *"were employed during the relevant period and both had the opportunity to identify the injuries and to take timely steps to obtain treatment. They both admitted a major departure from their duties in that respect."*<sup>186</sup> Equally, the Court also agreed with the Crown that no credit should be given here for the appellants finally taking their boys to hospital because *"[t]hey ought to have acted much earlier. The only effect of obtaining treatment was to bring an end to their breach of duty."*<sup>187</sup>

5.121 In conclusion, the Court of Appeal found that whether the starting point was taken to be six years' imprisonment or five years' and six months' imprisonment, it was appropriate. The end sentences were not manifestly excessive. The appeal was accordingly dismissed.<sup>188</sup> Following his failure at the Court of Appeal, Mr M sought leave to appeal at the Supreme Court raising three issues.<sup>189</sup>

5.122 First, it was argued that the Court of Appeal was wrong to conclude that a comparison of section 195 with section 188(1) of the Crimes Act and other offences of serious violence was irrelevant. The Supreme Court found this was the assessment of the Court of Appeal and did not see this as an issue of general or public importance.<sup>190</sup> Secondly, challenge was made to the comment that there should be no differentiation between the culpability of the two appellants. It was argued that this was a major departure from the principle that where it was not possible to prove who

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183 [2016] NZCA 53, at para 31.

184 Same as above, at para 33.

185 Same as above, at paras 34 to 36.

186 Same as above, at para 38.

187 Same as above, at para 39.

188 Same as above, at para 40.

189 [2016] NZSC 72.

190 Same as above, at paras 4 to 5.

committed an act, nobody should be held criminally liable. The Supreme Court did not share this reading of the Court of Appeal's comment. It considered that the Court of Appeal was simply noting the fact that the maximum penalty of 10 years' imprisonment under section 195 applies both to acts of commission (the infliction of violence) and to neglect of the kind that arose in the case. In any event, it did not find this observation appealable, let alone a matter of general or public importance.<sup>191</sup> Thirdly, Mr M also sought to argue that it was wrong for the Court of Appeal to reject the submission that he was less culpable than Ms K. The Supreme Court rejected this as a purely factual question which clearly raised no point of public importance.<sup>192</sup> For these reasons, Mr M's application for leave to appeal was dismissed.

### ***Under sections 151 and 195A***

*R v Cindy Taylor, Luana Taylor and Brian Taylor*<sup>193</sup>

*(Elder abuse – sections 151 and 195A – failure to provide necessaries – failure to protect vulnerable adult)*

5.123 This case illustrates the application of the reformed provisions in elder abuse cases.<sup>194</sup> This was the first sentencing case concerning section 195A following its insertion into the Crimes Act 1961 in 2011 and becoming operative in 2012.<sup>195</sup>

5.124 The case involved three defendants, Ms T, Mr T and Mrs T. Among other charges, Ms T was found guilty of manslaughter by failing to provide her mother V with the necessaries of life, thereby causing her death, contrary to sections 150A, 151, 160(2)(b), 171 and 177 of the Crimes Act 1961. Mr and Mrs T, on the other hand, were each found guilty of failing to protect a vulnerable adult, namely V, contrary to section 195A of the same Act.<sup>196</sup>

5.125 In late 2011 or early 2012, V moved to live in the house of Mr and Mrs T, who were her friends.<sup>197</sup> Ms T moved into the same house some time in 2013, in what seemed to be an attempt to reconcile with V, having earlier become estranged from her. It was intended that Ms T would look after V and an agreement in this regard was entered into with Mr and Mrs T.<sup>198</sup> In mid-2013, V was observed by a neighbour to be “quite normal”. However, when the same neighbour saw V again in September or October 2014, V was seen to be “really skinny” with legs like “toothpicks”.

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191 Same as above, at paras 6 to 8.

192 Same as above, at para 9.

193 [2016] NZHC 2846.

194 See also *R v Quinn* [2014] DCR 225 (2 April 2014) in relation to sections 150A, 151, 151(2) of the Crimes Act 1961.

195 [2016] NZHC 2846, at para 105.

196 Same as above, at paras 2 to 3.

197 Same as above, at paras 7 to 8.

198 Same as above, at para 9.

At much the same time the neighbour observed that Ms T emotionally and physically abused V.<sup>199</sup> On 15 January 2015, Mrs T called Health Line and told the registered nurse who took the call that V was trying to kill herself, that she had become incontinent, that she was falling frequently, and that she refused to see a doctor or go to hospital.<sup>200</sup> On 16 January 2015, another call was made by Mrs T, this time to the emergency services saying that she believed V had passed away.<sup>201</sup> The ambulance officers found V lying on a plastic sheet in her own urine and faeces. She had multiple pressure sores and at least one necrotic ulcer on the lower part of her body.<sup>202</sup>

5.126 Post-mortem examination revealed that, at some point, at least weeks but perhaps months earlier, V had suffered 14 fractures to her ribs and sternum. They might have been the result of multiple falls. It was clear that the injuries would have been extremely painful for V which interfered with her breathing and prevented her from moving.<sup>203</sup> She also suffered chemical burning to her buttocks, pelvis and upper thighs from contact with her own urine and faeces over a prolonged period.<sup>204</sup> Multiple pressure sores developed from her not being rotated or turned.<sup>205</sup> She had also developed bronchopneumonia.<sup>206</sup> The evidence suggested that V might have gone for a period of some 10 to 15 days without food and some 4 to 5 days without water.<sup>207</sup> Evidence suggested that her health had declined significantly over the period of 10 to 20 days before she eventually died.<sup>208</sup> It was found that she had died of dehydration and malnutrition, with her fractured ribs and sternum as contributing factors. There was expert opinion that V would have lived if she had been provided with sustenance, good nursing care, pain relief, good skin care, proper hygiene and the like.<sup>209</sup>

5.127 The court found that Ms T was responsible for the care of her mother in the period leading up to her death and yet she did not provide the latter with even the most basic care or assistance, in particular, adequate nourishment, hydration, medical care, and hygiene.<sup>210</sup> On the other hand, Mr and Mrs T were aware of V's deteriorating condition, and of Ms T's failure to look after V. Given the small size of the house they were living in together, they must have known about V's loss of weight, and could not have been unaware of the stench of urine, defecation and rotting flesh coming from V's room. They must have also witnessed Ms T being physically and verbally abusive to her mother, and yet neither of them did anything but turn a blind

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199 Same as above, at para 10.

200 Same as above, at para 25.

201 Same as above, at para 12.

202 Same as above, at para 13.

203 Same as above, at para 15.

204 Same as above, at para 17.

205 Same as above, at para 18.

206 Same as above, at para 19.

207 Same as above, at para 20.

208 Same as above, at para 16.

209 Same as above, at para 21.

210 Same as above, at para 22.

eye to V's obvious suffering.<sup>211</sup> The court found Ms T's culpability to be very high and her offending to have involved gross neglect by her as a daughter towards her mother.<sup>212</sup> Ms T was therefore sentenced to 12 years' imprisonment for the offence of manslaughter by neglect.<sup>213</sup> As regards Mr and Mrs T, the court noted that the immediate case appeared to be the first sentencing under section 195A of the Crimes Act 1961.<sup>214</sup> It therefore made the following observations before turning to passing sentence on them:

*"[106] Section 195A was introduced following a recommendation from the Law Commission that a new offence of failing to protect a child or vulnerable adult from serious physical harm or death should be created. Prior to its enactment, there were two provisions dealing with neglect and ill treatment of children. Neither of those provisions protected vulnerable adults, and neither created liability for those who, while not themselves the perpetrators of ill treatment or neglect, resided in the same household as the victim, had knowledge of the risk of death or serious injury as a result of ill treatment or neglect by another, but failed to take reasonable steps to prevent that risk.*

*[107] The Crimes Act previously provided a maximum penalty for this type of offending against children of five years' imprisonment. However, for the new offence created under s 195A, the Law Commission recommended a maximum penalty of 10 years' imprisonment. The Law Commission stated that this was to reflect the fact that the worse class of case would be one in which the victim had died, and the negligence had been truly gross, for example, where the offender deliberately closed his or her eyes to the conduct over a prolonged period.*

*[108] A similar approach was taken by the Select Committee which considered the Bill, and by the then Minister of Justice – the Honourable Simon Power, when the Bill was read in the House for the second time."*

5.128 The court found the immediate case to be an egregious one of its kind, as Mr and Mrs T deliberately closed their eyes to what was occurring, and over a prolonged period.<sup>215</sup> It noted many aggravating features, for example, that they turned a blind eye to what was not only an obvious risk of death, but of a slow and painful death,<sup>216</sup> that Mrs T attempted to conceal

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211 Same as above, at paras 23 to 24.

212 Same as above, at paras 72 and 82.

213 Same as above, at paras 75, 82 and 89.

214 Same as above, at para 105.

215 Same as above, at para 110.

216 Same as above, at para 111(a).

what happened by lying to Health Line,<sup>217</sup> and the extent of their indifference as neither of them had an excuse for not stepping in.<sup>218</sup>

5.129 Since this was the first case and there were no cases directly on point, the court considered some English authorities,<sup>219</sup> and also cases decided under section 195 of the Crimes Act,<sup>220</sup> which it observed was to:

*“[Deal] with the omission to discharge or perform any legal duty, the omission of which is likely to cause suffering, injury, adverse effects to health or any mental disorder or disability. [It] focuses on the situation where the offender has the primary duty of care.”*<sup>221</sup>

5.130 In the circumstances, the court sentenced Mr T to six years’ imprisonment and Mrs T to six years’ and six months’ imprisonment for the reason that she was the controlling influence in the house and because she had attempted to conceal the offending.<sup>222</sup> A discount of three months was, however, recognised, as the court accepted that Mrs T had belatedly shown some remorse.<sup>223</sup> Accordingly, Mrs T was sentenced to six years and three months’ imprisonment.<sup>224</sup>

5.131 The defendants’ appeals against sentence were dismissed, as the appeal court did not find their sentences manifestly excessive.<sup>225</sup> The appeal court also rejected counsel’s argument that a distinction should necessarily be drawn between cases involving vulnerable elderly persons and vulnerable children, and noted that section 195A draws no such distinction.<sup>226</sup>

### ***Further case examples***

5.132 Further illustrations of how the New Zealand courts have applied the 2011 reform provisions are set out in Appendix IV.

## **Postscript**

5.133 As will be seen from the discussion above, the New Zealand offence model, while being based to some extent on the underlying principles in the UK “*causing or allowing*” offence reforms, has also diverged from this in

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217 Same as above, at para 111(c).

218 Same as above, at para 111(d).

219 Same as above, at para 112.

220 Same as above, at para 113.

221 Same as above, at para 113.

222 Same as above, at para 116.

223 Same as above, at para 123.

224 Same as above, at para 127.

225 *Taylor v R* [2017] NZCA 574.

226 Same as above, at para 15.

significant respects – in that it comprises a more complex structure of interlocking offences, and furthermore, casts a wider net beyond simply the home, to expressly include residential institutional situations.

# Chapter 6

## Position in other jurisdictions

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### Introduction

6.1 In Chapters 3 to 5 of this paper, we examined the legal positions in the United Kingdom, South Australia and New Zealand, where in each case a specific offence has been enacted to meet the central issue of this consultation paper; namely, the imposition of criminal liability on not only those who have caused, but also those who have allowed, the death or serious injury of a child or a vulnerable adult in a domestic (or other residential) situation. In this chapter, we examine how the law in other major common law jurisdictions approaches child or vulnerable adult fatality and serious injury cases.

### Australia generally

#### Overview

6.2 In Australia, state and territory governments are constitutionally responsible for enacting legislation under criminal law.<sup>1</sup> Of the six states and two self-governing territories, criminal offences are either found in the region's Crimes Act,<sup>2</sup> Criminal Code,<sup>3</sup> or a combination of both.<sup>4</sup> Criminal liability for persons who cause death or bodily injury to children is covered both by general criminal offences and by certain offences which deal specifically with child victims. In addition, each state and territory has also enacted child protection legislation, which complies with the principles under the United Nations Convention on the Rights of the Child (1989).<sup>5</sup> These statutes identify the "*best interests of the child*" as paramount and provide a policy and legislative framework for protecting children within each state.

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- 1 Parliament of Australia: History of criminal law, available at: [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Browse\\_by\\_Topic/Crimlaw/Historycriminallaw](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/Crimlaw/Historycriminallaw)
  - 2 See Crimes Act 1900 (NSW); Criminal Law Consolidation Act 1935 (SA); and Crimes Act 1958 (VIC).
  - 3 Criminal Codes are attached as schedules to statutes in the code jurisdictions. See Schedule 1 of the Criminal Code Act (NT); Schedule 1 of the Criminal Code Act 1899 (QLD); Schedule 1 of the Criminal Code Act 1924 (TAS); and Appendix B of the Criminal Code Compilation Act 1913 (WA).
  - 4 In the Australian Capital Territory, criminal laws are contained in both the Crimes Act 1900 (ACT) and Criminal Code 2002 (ACT).
  - 5 See P Holzer and A Lamont, "Australian child protection legislation" (2009) *The Australian Institute of Family Studies*, No 14, Table 1.

6.3 At the national level, there is a strong focus at the present time on preventing child sexual abuse in Australia, following the release of the final report of the Royal Commission into Institutional Responses to Child Sexual Abuse in December 2017.<sup>6</sup> (The Royal Commission made 189 recommendations for change following a five-year investigation into child sexual abuse in institutional settings, including government departments, religious organisations, charities, schools, out of home care, juvenile justice setting, sporting and other clubs, businesses.<sup>7</sup>) For vulnerable adults, the Federal Government of Australia established a Royal Commission into Aged Care Quality and Safety in October 2018, after receiving more than 5,000 submissions “from aged care consumers, families, carers, aged care workers, health professionals and providers.”<sup>8</sup>

6.4 Other than for children, there appear to be few specific offences in Australia dealing with “vulnerable” victims, such as the elderly and people who are unable to withdraw themselves from the charge of another person by reason of sickness, unsoundness of mind, detention or other causes and who are unable to provide themselves with the necessities of life (though see later below). Furthermore, South Australia’s “criminal neglect” offence<sup>9</sup> which, as we have seen in Chapter 4, applies both to children and vulnerable adults, appears to be the only offence of its type in Australia to-date.<sup>10</sup>

6.5 The vulnerability of a victim may be taken into account by the Australian courts as a circumstance of aggravation in the determination of certain types of criminal offences and in imposing sentence. For this purpose, common categories of vulnerable victims include the elderly,<sup>11</sup> people with physical or mental disabilities<sup>12</sup> and pregnant women.<sup>13</sup>

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6 The Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, available at: <https://www.childabuseroyalcommission.gov.au/final-report>

In the Hong Kong context, it should be noted that the Law Reform Commission published a consultation paper on *Sexual Offences involving Children and Persons with Mental Impairment* in November 2016, available at: <https://www.hkreform.gov.hk/en/publications/sexoffchild.htm>

7 See South Australia Department for Child Protection web-site at: <https://www.childprotection.sa.gov.au/department/royal-commissions-and-reviews/royal-commission-institutional-responses-child-sexual-abuse>

8 See: <https://agedcare.health.gov.au/royal-commission-into-aged-care-quality-and-safety>  
In similar context, the New South Wales Ombudsman published a report in November 2018 on *Abuse and Neglect of Vulnerable Adults in NSW - the Need for Action*, in response to over 200 complaints to the Ombudsman’s Office into alleged abuse and neglect of adults with disability who live “in community settings” (for example, “the family home”); see: <https://aifs.gov.au/cfca/2018/11/07/report-abuse-and-neglect-vulnerable-adults-nsw-need-action> To follow up on the report, the NSW Government will establish a new Ageing and Disability Commissioner to investigate the abuse of older people and adults with disability, see: <https://www.nsw.gov.au/your-government/the-premier/media-releases-from-the-premier/new-commissioner-to-protect-older-people-and-adults-with-disability/>

9 Comprised in section 14 of the Criminal Law Consolidation Act 1935 (SA), introduced in 2005: see detailed discussion in Chapter 4.

10 Though see discussion below in this chapter in relation to recent reported developments in New South Wales and Victoria on this subject.

11 *R v PDJ* (2002) 7 VR 612; [2002] VSCA 211; Criminal Law Consolidation Act 1935 (SA), section 5AA(1)(f) (victims over the age of 60 years).

12 Criminal Law Consolidation Act 1935 (SA), section s 5AA(1)(j).

13 *R v Mizon* [2002] VSC 115.

6.6 Some states and territories, such as the Australian Capital Territory<sup>14</sup> and Tasmania,<sup>15</sup> have laws requiring registration of vulnerable persons in the workplace, which contain definitions of the term “*vulnerable person*” for the purposes of that legislation.

### **General criminal offences**

6.7 In addition to specific offences against children and certain people other than children who would be regarded as “vulnerable”, which are discussed later below, the prosecution can rely on general criminal law offences to charge offenders for crimes against children and any other victims. For these types of offences, the victim’s age is not an element of the offence:

- (a) homicide (including murder, manslaughter and infanticide);
- (b) causing grievous bodily harm; and
- (c) endangering life.

#### *Homicide*

6.8 With the exception of Victoria, which has a separate “*child homicide*” offence,<sup>16</sup> the prosecution in all other states must rely on the general homicide provisions to charge persons involved in the death of a person (irrespective of whether he or she is a child) for murder or manslaughter.<sup>17</sup>

#### *Murder*

6.9 The elements constituting murder differ across the states, but include situations where the prosecution can prove beyond reasonable doubt that a person caused the death of another person:

- (a) intending to cause the death of any person;<sup>18</sup> or
- (b) intending to cause serious harm to any person,<sup>19</sup> that the person knew would likely cause death in the circumstances;<sup>20</sup> or

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14 Section 7, Working with Vulnerable People (Background Checking) Act 2011.

15 Section 4, Registration to Work with Vulnerable People Act 2013.

16 Crimes Act 1958 (VIC), section 5A.

17 See, eg, *R v Farquharson* [2009] VSCA 307; *R v Barton* [2009] NSWCCA 164; *R v Merritt* [2004] NSWCCA 19; *R v Monroe* [2003] NSWSC 1271; *R v Laupama* [2001] NSWSC 1082; *R v Thurlow* 2007 NSWSC 1203; *R v Hoerler* 2004 NSWCCA 184; *R v Howard* [2000] NSWSC 876; *R v Melville* BC200807170 (unreported judgment NT); *R v Club* [2008] NTSC 50; *R v Riseley* [2009] QCA 285; *R v Clarke* [2004] VSC 541; *R v Quarry* BC200501823 (unreported judgment, Victoria Supreme Court, 4 April 2005); *R v Fitchett* [2009] VSCA 150; and *The State of Western Australia v Bryan*, INS 185 of 2009.

18 See, eg, Crimes Act 1900 (ACT), section 12(1)(a); Crimes Act 1900 (NSW), section 18(1)(a); Criminal Code (QLD), section 302(1)(a); Criminal Code (TAS), section 157(1)(a); Criminal Code (NT), section 156(1)(c); and Criminal Code (WA), section 279(1)(a).

- (c) with reckless indifference to the probability of causing the death of any person;<sup>21</sup> and
- (d) if death was caused by acts done in the prosecution of an unlawful purpose, which is of such nature as to be likely to endanger human life.<sup>22</sup>

6.10 In every state, murder is punishable by life imprisonment.<sup>23</sup>

6.11 The two related NSW cases of *R v Maybir (No 8)*<sup>24</sup> and *R v KJ*<sup>25</sup> concerned the tragic death of a seven year-old boy Levai in Oatley, NSW. Maybir, boyfriend of the victim's mother KJ (Kayla James), was charged with murder and 13 other offences including several counts of assault and reckless wounding. For about four months, Levai was subjected to strict discipline by Maybir. Apart from being physically assaulted and mentally abused, Levai was isolated from his siblings to "*receive the worst of Mr Maybir's extreme physical and mental cruelty*" due to his intellectual disability. It was certain that the fatal injury was caused by Maybir, but the actual cause was only known to Maybir himself, though it is very likely that it was caused by Maybir holding Levai's arm and hitting him towards some hard surface, which caused subdural bleeding and swelling of the brain.

6.12 Maybir pleaded guilty to some lighter offences, and was eventually convicted for most of the charges including murder. The judge described these circumstances as "*a very bad case of murder*", yet not at the extremity because of the absence of evidence indicating beforehand planning and actual intention to kill. Maybir was sentenced to imprisonment for 42 years with a non-parole period of 31 years and six months. KJ was separately charged with unlawful killing by gross criminal negligence, failure to provide Levai with necessities of life and other similar non-murder offences as Maybir. While the judge gave extensive discount due to her plea of guilty to all charges and her assistance to authorities, he opined that the manslaughter was "*an example of a most serious category of offences of its kind*". She was sentenced to imprisonment for 14 years with a non-parole period of 10 years and six months.

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19 Crimes Act 1900 (ACT), section 12(1)(c); Criminal Code (NT), section 156(1)(c); and Criminal Code (WA), section 279(1)(b).

20 Criminal Code (TAS), section 157(1)(b).

21 Crimes Act 1900 (ACT), section 12(1)(b); and Crimes Act 1900 (NSW), section 18(1)(a).

22 Criminal Code (QLD), section 302(1)(b); Criminal Code (TAS), section 157(1)(c); and Criminal Code (WA), section 279(1)(c).

23 Crimes Act 1900 (ACT), section 12; Crimes Act 1900 (NSW), section 19A(1); Criminal Code (NT), sections 156 and 157; Criminal Code (QLD), sections 302 and 305(1); Criminal Law Consolidation Act 1935 (SA), section 11; Criminal Code (TAS), section 158; Crimes Act 1958 (VIC), section 3; and Criminal Code (WA), section 279(4).

24 (2016) NSWSC 166.

25 (2015) NSWSC 767.

## *Manslaughter by criminal negligence*

6.13 In general, a person who unlawfully kills another under circumstances other than murder will be guilty of manslaughter.<sup>26</sup> One charge commonly pursued by the prosecution in child homicide cases, as well as cases concerning homicide of a victim in the care of another person, is manslaughter by criminal negligence.<sup>27</sup> This offence is based on the killing (including by omission) by a person who had a legal duty over the victim.<sup>28</sup> In particular, many such cases involve the failure of parents to obtain medical assistance for their children, following the infliction of injuries.<sup>29</sup>

6.14 Manslaughter by criminal negligence is established if the accused acted:

*“consciously and voluntarily without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment”*<sup>30</sup>

6.15 The test is an objective one, based on whether the reasonable person, in the position of the offender, would have realised that the risk existed.<sup>31</sup> The maximum penalty for manslaughter varies between 20 years' imprisonment,<sup>32</sup> 25 years' imprisonment,<sup>33</sup> and life imprisonment.<sup>34</sup>

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26 See, eg, Crimes Act 1900 (ACT), section 15; Crimes Act 1900 (NSW), section 18(1)(b); Criminal Code (QLD), section 303; Criminal Code (TAS), section 159(1); and Criminal Code (WA), section 280. Compare however with Criminal Code (NT), section 160, which establishes manslaughter as a separate offence.

27 See, eg, *R v BW (No 3)*; *R v Wilkinson* [1999] NSWCCA 248; and *R v Thomas Sam; R v Manju Sam (No 18)* [2009] NSWSC 1003.

28 Stephen, *History of the Criminal Law of England*, quoted in *Reynolds & Melville v R* [2008] NTSC 30, at para 14.

29 This trend was published in the Judicial Commission of New South Wales' Sentencing Bench Book on the topic of "Manslaughter and Infanticide", available online at: <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/manslaughter.html>

See, eg, *R v Turchino*; *R v HMF* [2005] NSWSC 1214 (Supreme Court of NSW); and *Reynolds & Melville v R* [2008] NTSC 30.

30 *Nydam v R* [1977] VR 430, at para 445, approved in *The Queen v Lavender* (2005) 222 CLR 67, at para 136, and cited in *R v Thomas Sam; R v Manju Sam (No 18)* [2009] NSWSC 1003, at para 5. See also *R v Woodland* [2001] NSWSC 416, at para 5, for a discussion of cases involving manslaughter by a parent of a young child by "an unlawful and dangerous act."

31 *R v Thomas Sam; R v Manju Sam (No 18)* [2009] NSWSC 1003, at para 6.

32 Crimes Act 1900 (ACT), section 15(2); and Crimes Act 1958 (VIC), section 5.

33 Crimes Act 1900 (NSW), section 24.

34 Criminal Code (NT), sections 160 and 161; Criminal Code (QLD), sections 303 and 310; Criminal Law Consolidation Act 1935 (SA), section 13; and Criminal Code (WA), section 280.

6.16 In *R v BW (No 3)*,<sup>35</sup> the Supreme Court of NSW convicted the mother of murder and father of manslaughter by criminal negligence for the fatal starvation of their seven year-old daughter in squalid conditions.<sup>36</sup> The mother was sentenced to life imprisonment,<sup>37</sup> and the father was sentenced to 12 years' imprisonment.<sup>38</sup> In its finding that the mother was guilty of murder by reckless indifference to human life, the court found that the mother exercised a deliberate choice not to do anything that might save her daughter, as "*the situation went from possibility to probability to certainty that [the daughter] would die without intervention.*"<sup>39</sup> The court also held that the objective gravity of the father's offence of manslaughter by criminal negligence was "*within the worst case category of the crime of manslaughter.*"<sup>40</sup> In respect to sentencing considerations, the court referred to the case of *R v Thomas Sam; R v Manju Sam (No 18)*,<sup>41</sup> also a case of manslaughter by criminal negligence, where the court held that:

*"It is necessary that the sentence to be imposed reflect a significant element of general deterrence given the need for the community to understand the serious consequences of parents breaching the trust reposed in them to care for their infant children, culminating in unlawful homicide of the child....A heavy responsibility rests upon parents to care for a child who is utterly defenceless...The fundamental consideration is that the sentences be imposed must accord with the general moral sense of the community."*<sup>42</sup>

6.17 The Supreme Court of NSW also held in *R v Wilkinson*,<sup>43</sup> that in relation to manslaughter by criminal negligence that:

*"Carers and parents carry a very heavy responsibility to ensure, when children are hurt or sick that they are taken promptly for medical attention, or that other steps are taken to remove them from risk. Parents...are also expected to maintain the degree of fortitude of mind and will of reasonable persons in their shoes in fulfilling that duty."*

6.18 *R v Pesnak*<sup>44</sup> was a Queensland case concerning a victim under others' care. In that case, the applicants, who were husband and wife, were charged with the manslaughter of a friend on the basis of criminal negligence in not obtaining medical assistance. They and the victim shared beliefs in

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35 [2009] NSWSC 1043.

36 Same as above, at paras 148 to 158.

37 Same as above, at para 193.

38 Same as above, at para 192.

39 Same as above, at paras 148 to 158.

40 Same as above, at para 176.

41 [2009] NSWSC 1003.

42 Cases referred to in this paragraph include: *R v Howard* [2001] NSWCCA 309, at para 19; *R v Wilkinson* [1999] NSWCCA 248, at para 26; and *R v Foulstone* (NSWCCA, 18 July 1990).

43 [1999] NSWCCA 248, cited by *R v BW (No 3)*, above, at para 179.

44 [2000] QCA 245.

Breatharianism, and the victim came to stay in a caravan in their backyard where she voluntarily commenced a 21-day spiritual cleansing program conducted by the male applicant with the assistance of his wife, involving a fast of seven days without food or fluid followed by 14 days with some fluid. During the program, the victim suffered a stroke, acute renal failure and ischemia of the right foot which led to pneumonia from which she eventually died. The applicants were held criminally negligent in not obtaining medical assistance for her until it was too late. The male applicant was sentenced to four years' imprisonment with a parole recommendation after 18 months and the female applicant to two years' imprisonment with a parole recommendation after nine months.

6.19 When reviewing the sentence, the Queensland Court of Appeal noted that:

*“Whilst intention is relevant to sentence, a major criminal factor in criminal negligence manslaughter cases is the extent of the departure from reasonable community standards which constitutes the criminal negligence. The applicants did not intend to harm the deceased through their failure to obtain medical assistance for her; they believed her serious symptoms were caused by a spiritual struggle. Nevertheless their failure to respond to her obvious and increasingly serious symptoms constituted an extremely grave departure from reasonable community standards. It should be noted that by the time of the most alarming symptoms on the Tuesday, her death was probably inevitable.”<sup>45</sup>*

### *Grievous bodily harm*

6.20 The criminal statutes of every state include a category of offences involving “*grievous bodily harm*” or “*serious bodily harm*.” The maximum penalties for offences within this category are distinguishable on the basis of the mental element and the severity of harm inflicted.

6.21 The maximum penalties for causing “*grievous bodily harm*” varies between two years' imprisonment (in NSW) and life imprisonment (in Queensland), and decreases, depending on whether the accused acted:

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45 Same as above, at para 24. In a more recent case of this type reported in the press, a six year-old boy died in April 2015 in the course of a “*self-healing*” therapy. The AUD1,800 week-long treatment involve slapping the boy's body until bruising appeared, stretching and fasting. The victim suffering from Type 1 diabetes had not been allowed to receive insulin injections. He was found unconscious afterwards and died at the scene. In 2017, the press reported that the boy's parents had been charged with manslaughter by gross negligence for deliberately denying the boy food and medicine, as announced by the New South Wales authorities. See: Samantha Schmidt, “A diabetic boy in Australia died after a controversial ‘self-healing’ course. Now his parents are charged with manslaughter.” *Washington Post* 16 March 2017, available at: [https://www.washingtonpost.com/news/morning-mix/wp/2017/03/16/a-diabetic-boy-in-australia-died-after-a-controversial-self-healing-course-now-his-parents-are-charged-with-manslaughter/?utm\\_term=.87dcf2ea64a1](https://www.washingtonpost.com/news/morning-mix/wp/2017/03/16/a-diabetic-boy-in-australia-died-after-a-controversial-self-healing-course-now-his-parents-are-charged-with-manslaughter/?utm_term=.87dcf2ea64a1)

- (a) intentionally;<sup>46</sup>
- (b) recklessly;<sup>47</sup>
- (c) unlawfully;<sup>48</sup> or
- (d) negligently.<sup>49</sup>

6.22 *The mental element of the offence.* In order to establish the offence of intentionally causing grievous bodily harm, the prosecution must show that the accused “*intended to do an act, and that act in fact caused serious injury.*”<sup>50</sup> It is not necessary that the accused intended to cause serious injury. Conversely, recklessly causing serious injury is a lesser offence, and requires proof that the accused was “*reckless as to the mere doing of the act which in fact caused serious injury.*”<sup>51</sup> The differences between establishing an “*intentional*” in contrast to a “*reckless*” mental state were discussed in the Victorian Supreme Court case of *R v Westaway*.<sup>52</sup> In that case, the accused was re-sentenced to four years’ imprisonment for recklessly causing serious injury to the four week-old daughter of his girlfriend, who suffered major cerebral trauma resulting in permanent brain damage.<sup>53</sup>

6.23 *The proscribed conduct.* Some states distinguish between acts causing “*grievous bodily harm*” from the lesser offences of causing bodily harm, injury, or wounding.<sup>54</sup>

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46 Crimes Act 1900 (ACT), section 19(1) (20 years’ imprisonment); Crimes Act 1900 (NSW), section 33(1) (25 years’ imprisonment); Criminal Code (QLD), section 317 (life imprisonment); Criminal Code (TAS), sections 170 and 389(3) (sentences governed by the Sentencing Act 1997 (TAS)); Crimes Act 1958 (VIC), section 16 (20 years’ imprisonment); and Criminal Code (WA), section 294 (20 years’ imprisonment). See also cases, eg, *Ugle v The Queen* [2001] WASCA 263; *R v Westaway* (1991) 52 A Crim R 336 and *R v Cockburn* [2006] NSWDC 131.

47 Crimes Act 1900 (ACT), section 20 (13 years’ imprisonment); Crimes Act 1900 (NSW), section 35 (10 to 14 years’ imprisonment, depending on whether the harm was inflicted in the presence of other persons); and Crimes Act 1958 (VIC), section 17 (15 years’ imprisonment). See also *R v BWJ* [2008] NSWCCA 333; *R v Smith* [2005] NSWCCA 286; and *R v Gardeniers* [1998] VSCA 114 (Supreme Court of Victoria).

48 Crimes Act 1900 (ACT), section 25 (5 years’ imprisonment); Criminal Code (QLD), section 320 (14 years’ imprisonment); Criminal Code (TAS), sections 172 and 389(3) (sentences governed by the Sentencing Act 1997 (TAS)); and Criminal Code (WA), section 297 (10 years’ imprisonment).

49 Crimes Act 1900 (ACT), section 25 (5 years’ imprisonment); Crimes Act 1900 (NSW), section 54 (2 years’ imprisonment); and Criminal Code (NT), section 174E (10 years’ imprisonment). Case law suggests that this offence is largely used to prosecute offenders of culpable driving, and not cases of child abuse or neglect.

50 *R v O’Connor* (1980) 146 CLR 64, followed by *R v Westaway* (1991) 52 A Crim R 336, at 337.

51 See, eg, *R v Westaway* (1991) 52 A Crim R 336, at 337.

52 (1991) 52 A Crim R 336.

53 BC9100749 (unreported judgment, Supreme Court of Victoria, 24 September 1991), at 2 and 3. There was no issue in this case whether the mother could have committed the crime, as she was away shopping with a friend at the time the incident occurred.

54 Criminal Code (QLD), section 328 (2 years’ imprisonment); Crimes Act 1958 (VIC), section 18 (5 to 10 years’ imprisonment, depending on whether the injury was inflicted recklessly or intentionally); Criminal Code (WA), section 301 (5 years’ imprisonment), and section 304 (7 years’ imprisonment).

6.24 Where defined, “*grievous bodily harm*” involves bodily injury of such a nature that it is “*likely to endanger life*” or “*cause permanent injury to health*,”<sup>55</sup> and may include:

- (a) acts intended to maim, disfigure, or disable any person;<sup>56</sup>
- (b) the loss of a distinct part or an organ of the body;<sup>57</sup>
- (c) serious disfigurement;<sup>58</sup>
- (d) the destruction of the foetus of a pregnant woman, whether or not the woman suffers any other harm;<sup>59</sup> and
- (e) any grievous bodily disease.<sup>60</sup>

### *Endangering life*

6.25 In some states, a person is guilty of an offence if the person recklessly engages in conduct that gives rise to a danger of death, or a danger of serious harm or injury to any person.<sup>61</sup> The maximum penalty for this offence across the states is 10 years’ imprisonment.<sup>62</sup>

### **Statutory offences**

6.26 Every Australian state and territory has enacted legislation containing specific offences against children. These offences are found either in the general criminal statutes, or child protection legislation. The most common offences concerning children include:

- (a) “*exposing or abandoning*” a child;
- (b) “*failure to provide necessities*” to a child;
- (c) child abuse; and
- (d) “*failure to protect child from harm.*”

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55 Criminal Code (WA), section 1; and Criminal Code (QLD), section 1.

56 Criminal Code (NT), section 177; Criminal Code (QLD), section 317(1)(a); Criminal Code (TAS), section 170; and Criminal Code (WA), section 294.

57 Criminal Code (QLD), section 1(a).

58 Criminal Code (QLD), section 1(b); and Crimes Act 1900 (NSW), section 4(1), Definition of *Grievous bodily harm* (b).

59 Crimes Act 1900 (NSW), section 4(1), Definition of *Grievous bodily harm* (a).

60 Crimes Act 1900 (NSW), section 4(1), Definition of *Grievous bodily harm* (c).

61 For example, see Crimes Act 1900 (ACT), section 27(3); Criminal Code (NT), section 174C; Crimes Act 1958 (VIC), sections 22 and 23. See also Crimes Act 1900 (NSW), sections 39, 93G, 198, 199; Criminal Code (QLD), Chapter 29 generally; and Criminal Code (WA), Chapter XXIX generally.

62 Same as above.

6.27 The definition of “child” varies across the states to mean a person under the ages of either 12, 16, 17 or 18 years’ old.<sup>63</sup> The age of the child can also constitute an element of the offence, such that the offence only applies to younger victims.<sup>64</sup>

6.28 However, there is little legislation specifically dealing with offences against vulnerable victims other than children: the elderly is protected from abuse under specific rules, and in some states it is an offence to neglect to provide the necessities of life to certain people other than children who are unable to provide themselves with the necessities of life for various reasons.

#### *Exposing or abandoning a child*

6.29 In four states, it is an offence for a person to intentionally or otherwise “abandon or expose” a child, such that the action causes a danger of death or serious injury to the child.<sup>65</sup> The maximum penalty for this offence varies between five years’ imprisonment (in the ACT and NSW) and seven years’ imprisonment (in the Northern Territory and Queensland).<sup>66</sup>

#### *Failure to provide necessities*

6.30 In six states, it is an offence for a person to neglect to provide the necessities of life to a child under his or her duty of care.<sup>67</sup> Where expressly stated, the necessities of life include access to adequate and proper food, nursing, clothing, medical aid and lodging.<sup>68</sup> The maximum penalty for this offence varies between the states and ranges from a fine, to five years’

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63 See, eg, Children and Young People Act 2008 (ACT), section 11 (under 12 years’ old); Children and Young Persons (Care and Protection) Act 1998 (NSW), section 3 (under 16 years’ old); Criminal Code (NT), section 1 (see definitions for “child” and “adult”); Children, Young Persons and Their Families Act 1997 (TAS), section 3 (under 18 years’ old); Children, Youth and Families Act 2005 (VIC), section 3 (under 17 years’ old); and Children and Community Services Act 2004 (WA), section 3 (under 18 years’ old).

64 See, eg, Crimes Act 1900 (ACT), section 41 (offence only applies to a child under 2 years); Crimes Act 1900 (NSW), sections 43, 43A(1) (offences only apply to children under 7 years for section 43, and under 16 years for section 43A); Criminal Code (QLD), section 326 (offence only applies to a child under 7 years); and Criminal Code (TAS), section 178 (offence only applies to a child under 14 years).

65 Crimes Act 1900 (ACT), section 41 (child under age 7); Crimes Act 1900 (NSW), section 43 (child under age 7); Criminal Code (NT), section 184 (child under age 2); and Criminal Code (QLD), section 326 (child under age 7).

66 Same as above. See also: NSW and Western Australia make it an offence for a person who has care and control of a child to leave a child unattended and unsupervised in a motor vehicle: see Children and Young Persons (Care and Protection) Act 1998 (NSW), section 231; Children and Community Services Act 2004 (WA), section 102.

Victoria and Tasmania make it an offence to leave a child unattended and unsupervised (Children, Youth and Families Act 2005 (Vic), section 494; Children, Young Persons and Their Families Act 1997 (Tas), section 92).

See also, Criminal Code (WA), which makes it an offence for a parent (who is able to maintain a child) to desert a child under the age of 16 years: section 344.

67 Criminal Code (NT), sections 149 and 153; Children and Young Persons (Care and Protection) Act 1998 (NSW), section 228; Crimes Act 1900 (NSW), section 43A; Criminal Code (TAS), sections 145 and 177; Criminal Code (QLD), sections 286, 324 and 364; Criminal Law Consolidation Act 1935 (SA), section 30; and Criminal Code (WA), section 263.

68 Children and Young Persons (Care and Protection) Act 1998 (NSW), section 228.

imprisonment.<sup>69</sup> For example, in *PTC v R*,<sup>70</sup> the Supreme Court of NSW sentenced a father to 2 years' and 6 months' imprisonment for failing to provide appropriate medical attention for his infant son, after the baby was seriously injured by the mother.<sup>71</sup> The Court found that the relevant conduct was the failure to seek medical attention until the next morning, despite having an opportunity to do so. The child died two days after the incident.<sup>72</sup>

6.31 Many states also extend this protection to other persons to whom the accused owes a legal duty, including persons who “*by reason of age, sickness, unsoundness of mind, detention, or any other cause*” cannot provide for themselves the necessities of life.<sup>73</sup> This applies in five states where there is a legal duty of care to provide the “*necessaries of life*” where someone is in charge of another person who cannot remove themselves from that charge. A person failing to discharge that duty without reasonable excuse which causes a danger of death or serious injury or the likelihood of serious injury to that person, or failing to use reasonable care and take reasonable precautions to avoid or prevent danger to that person’s safety or health, would be guilty of an offence.<sup>74</sup> The maximum penalty for this offence varies between the states and ranges from three years’ imprisonment to five years’ imprisonment.<sup>75</sup> In some states those to whom the necessities of life should be provided are defined in the statute to be, for example, “*any person who is unable to withdraw himself from such charge by reason of age, sickness, unsoundness of mind, detention or other cause and who is unable to provide himself with the necessities of life*”.<sup>76</sup>

### *Child abuse*

6.32 It is an offence in four states for a person to intentionally, knowingly or recklessly take action that results in the abuse or harm of a

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69 Children and Young Persons (Care and Protection) Act 1998 (NSW), section 228 (fine of 200 penalty units); Crimes Act 1900 (NSW), section 43A (5 years’ imprisonment); Criminal Code (TAS), sections 145 and 389 (sentences governed by the Sentencing Act 1997 (TAS)); and Criminal Code (WA), section 263 (sentences depends on result of the act/omission; see sections 283 and 304).

70 2011 NSWCCA 51.

71 2011 NSWCCA 51, at para 13. The sentence was reduced from 5 years at trial (para 2). The co-offender, being the mother, pleaded guilty to unlawfully causing the baby’s death (para 9) and was sentenced to 4 years’ and 2 months’ imprisonment, minus 30% reduction for her guilty plea.

72 2011 NSWCCA 51, at para 3.20.

73 Crimes Act 1900 (NSW), section 44; Criminal Code (NT), sections 149 and 183; Criminal Code (QLD), section 324; Criminal Code (TAS), sections 144 and 177; and Criminal Code (WA), section 262.

74 Crimes Act 1900 (NSW), section 44; Criminal Code (NT), sections 149 and 183; Criminal Code (QLD), section 324; Criminal Code (TAS), sections 144 and 177; and Criminal Code (WA), section 262.

75 Criminal Act 1900 (NSW), section 44 (5 years’ imprisonment); Criminal Code (QLD), section 324 (3 years’ imprisonment); Criminal Code (WA), section 262 (sentence depends on result of act/omission; governed by sections 283 and 304).

76 Criminal Act 1900 (NSW), section 44; Criminal Code (TAS): sections 144 and 146; Criminal Code (WA), section 262.

child.<sup>77</sup> The type of suffering envisioned by this category of offence includes physical injury, sexual abuse, emotional or psychological harm and harm to a child's physical development.<sup>78</sup> The maximum penalty for this offence varies from a fine in NSW, to 10 years' imprisonment in Western Australia.<sup>79</sup>

### *Elder abuse*

6.33 The Commonwealth of Australia has enacted the Aged Care Act to make it mandatory for federally-funded residential aged care providers to report suspected physical and sexual abuse on seniors living in residential aged care to the police and the Department of Social Services. In limited circumstances, approved providers do not need to report when the alleged assault is perpetrated by a resident with an assessed cognitive or mental impairment, or when previous reports of the same or similar incidents have been made.<sup>80</sup> The aged care providers should not wait until an allegation is substantiated, and an allegation that someone has assaulted a resident is sufficient to trigger the reporting requirements.<sup>81</sup>

6.34 The Aged Care Act does not protect the majority of older people, however, who are not accessing federally-funded services. Apart from the compulsory reporting requirements and the remit of guardianship legislation, there is no legislation in place that specifically addresses elder abuse.<sup>82</sup> It has been commented that under the Constitution, the Federal Parliament's powers to address elder abuse were "*virtually nil*" with "*almost no capacity to develop a comprehensive systemic framework.*"<sup>83</sup>

6.35 In its 2011 report on elder abuse in Western Australia, the University of Western Australia's Crime Research Centre noted that:

*"[T]he management of elder abuse differs from state to state [in Australia], with inter-agency protocols used in some states,*

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77 Children and Young Persons (Care and Protection) Act 1998 (NSW), section 227 (200 penalty units); Children, Young Persons and Their Families Act 1997 (TAS), section 91 (50 penalty units or 2 years' imprisonment); Children, Youth and Families Act 2005 (VIC), section 493(1)(a) (50 penalty units or 12 months' imprisonment); and Children and Community Services Act 2004 (WA), section 101(1) (10 years' imprisonment).

78 Same as above.

79 Same as above.

80 See website of Australian Government, Department of Health: Ageing and Aged Care at: <https://agedcare.health.gov.au/ensuring-quality/aged-care-quality-and-compliance/guide-for-reporting-reportable-assaults>

81 An allegation usually requires a claim or accusation to have been made to the approved provider and can be associated with physical evidence or the witnessing of an assault. Reporting suspicion allows reports to be made where there is no actual allegation or where an actual assault may not have been witnessed and where staff observe signs that an assault may have occurred.

82 See Prof Mike Clare, Dr Barbara Black Blundell, Dr Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative and Quantitative Investigation of Existing Agency Policy, Service Responses and Recorded Data*, by Crime Research Centre of The University of Western Australia (April 2011), at para 6.

83 As stated by Prof Lacey, the SA Minister for Health's Steering Committee: see Darragh O'Keeffe, *Expert calls for legal reform on elder abuse* (28 Nov 2014), available at: <http://www.australianageingagenda.com.au/2014/11/28/expert-calls-legal-reform-elder-abuse/>

*abuse-specific agencies and services in other states, and more informal responses in others.*<sup>84</sup>

### *Failure to protect child from harm*

6.36 It is an offence in three states for a person owing a duty of care to a child to intentionally, knowingly or recklessly fail to take action that results in the child being abused or harmed.<sup>85</sup> The type of harm contemplated under this offence is in essence the same as the harm under the “*child abuse*” provisions.<sup>86</sup> The maximum penalty under this offence varies between 12 months’ imprisonment in Victoria, to 10 years’ imprisonment in Western Australia.<sup>87</sup>

### **State-specific offences**

6.37 In addition to the common statutory offences discussed above, there are also a number of offences which are unique to each state. These include:

- (a) criminal neglect (South Australia);
- (b) infanticide (NSW and Victoria);
- (c) child homicide (Victoria); and
- (d) ill-treatment of children (Tasmania and the ACT).

### *Criminal neglect*

6.38 In terms of unique state offences, the “*criminal neglect*” offence (ie, “*criminal liability for neglect where the death or serious harm results from an unlawful act*”) under section 14 of the Criminal Law Consolidation Act 1935 in South Australia, which covers both child victims and vulnerable adult victims, would fall under this head. The offence is discussed in detail in Chapter 4 of this consultation paper and forms the basis for a number of the Sub-committee’s recommendations set out in Chapter 7.

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84 Prof Mike Clare, Dr Barbara Black Blundell, Dr Joseph Clare (2011), above, at para 6.

85 Children, Youth and Families Act 2005 (VIC), section 493(1)(b); Children, Young Persons and Their Families Act 1997 (TAS), section 91; and Children and Community Services Act 2004 (WA), section 101(1).

86 Same as above.

87 Children, Youth and Families Act 2005 (VIC), section 493(1) (50 penalty units or 12 months’ imprisonment); Children, Young Persons and Their Families Act 1997 (TAS), section 91 (50 penalty units or 2 years’ imprisonment); and Children and Community Services Act 2004 (WA), section 101(1) (10 years’ imprisonment). See, also *Western Australia v Tik* [2009] WASCA 122, where two persons having the “*care and control*” of a child were sentenced to seven years and seven and a half years imprisonment respectively for engaging in conduct “*reckless as to whether such conduct may have resulted in [the child] from suffering harm as a result of physical, emotional or psychological abuse*” contrary to section 101(1) of the Children and Community Services Act 2004 (WA).

6.39 There have also been developments in NSW and Victoria concerning the possible introduction of a new offence of allowing death or injury caused to a child, but as yet no concrete moves have been made towards legislation.

6.40 On 16 July 2014, it was reported that the NSW Attorney-General, Brad Hazzard, was investigating the Deputy Coroner MacMahon's recommendation that the NSW Attorney-General should consider introducing a new offence to deal with cases where the injury to the child could only have been inflicted by one of two or more persons who were at home with the child, but there is not enough evidence to point out the identity of the perpetrator.<sup>88</sup>

6.41 A few years earlier, in late 2010, the Victorian Department of Justice conducted a consultation process on a discussion paper on "Failure to Protect Laws", proposing two new offences for adults who failed to take action in the following circumstances: (1) where the adult knows or believes that a child who they have custody or care of, or live in the same household as, is suffering sexual abuse or abuse that may result in serious injury or death; and (2) where the child living in the same household as the adult dies due to child abuse and that adult was aware of the abuse and its seriousness.

6.42 On consultation, one area of concern expressed in response to these proposals<sup>89</sup> was that "*non-abusive parents may themselves be the victims of family violence, and may be unable to act protectively towards their children ... [also the proposed offences] might have a dampening effect on help-seeking behaviour and the reporting of abuse.*"<sup>90</sup> Some felt that such a new "failure to protect" law should "*provide that the prosecution is required to prove ... that the accused was not the subject of, or exposed to, relevant family violence.*"<sup>91</sup>

6.43 Separately, in response to a 2013 Parliamentary Committee report on the handling of child abuse by religious and other organisations,<sup>92</sup>

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88 C Hart, "Cootamundra baby death prompts investigation of state laws", ABC, 16 July 2014, available at: <http://www.abc.net.au/news/2014-07-16/ag-scifleet/5600144>; A Pearson, "Cootamundra baby death prompts law research", *Daily Advertiser*, 17 July 2014, available at: <http://www.dailyadvertiser.com.au/story/2422556/cootamundra-baby-death-prompts-law-research/>

See also Lenny Roth, NSW Parliamentary Research Service, "Criminal liability of carers in cases of non-accidental death or serious injury of children" (September 2014) e-brief 12/2014, available at: <https://www.parliament.nsw.gov.au/researchpapers/Documents/criminal-liability-of-carers-in-cases-of-non-acc/Criminal%20liability%20of%20carers%20in%20cases%20of%20non-accidental%20death%20or%20serious%20injury%20of%20children.pdf>

89 See, eg, the joint submission from Victorian community organisations working in the family violence area, available at: <http://www.dvrcv.org.au/sites/thelookout.sites.go1.com.au/files/FINAL%20Failure%20to%20Protect%20Laws%20Submission%207%20September%202011.pdf>

90 As noted in Hon Philip Cummins, *Report of the Protecting Victoria's Vulnerable Children Inquiry*, Volume 2, at 359 to 361, available at: <http://s3.documentcloud.org/documents/335965/report-of-the-protecting-victorias-vulnerable.pdf>

91 Same as above.

92 le, Family and Community Development Committee, 2013, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non Government Organisations*, available at:

the Victoria Government enacted the Crimes Amendment (Protection of Children) Act 2014, introducing a new criminal offence for failing to protect a child under the age of 16 from a risk of sexual abuse, which came into force on 1 July 2015. The offence applies where there is a substantial risk that a child under the age of 16 under the care, supervision or authority of a relevant organisation will become a victim of a sexual offence committed by an adult associated with that organisation. A person in a position of authority in the organisation will commit the offence if they know of the risk of abuse and have the power or responsibility to reduce or remove the risk, but negligently fail to do so.<sup>93</sup>

### *Infanticide*

6.44 In NSW, Tasmania and Victoria, the offence of “*infanticide*” specifically contemplates situations where a child under the age of 12 months has died as a result of an act or omission of the biological mother, whose mind was disturbed due to her not having fully recovering from the child birth.<sup>94</sup> Currently, infanticide is both a substantive criminal offence and a partial defence to murder under the above criminal statutes.<sup>95</sup> In NSW, infanticide is punishable by the same penalty as manslaughter (25 years’ imprisonment), whereas in Victoria, it is punishable by up to five years’ imprisonment. In Tasmania, sentences are governed by the Sentencing Act 1997 (TAS). Infanticide has been reviewed in detail by both the NSW and Victorian Law Reform Commissions in their reports concerning defences to homicide.<sup>96</sup> The two Commissions ultimately differed in their views about whether infanticide should be retained as a criminal offence and defence.<sup>97</sup> Although Western Australia once had the specific offence of infanticide, it was

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[https://www.parliament.vic.gov.au/file\\_uploads/Inquiry\\_into\\_Handling\\_of\\_Abuse\\_Volume\\_2\\_FINAL\\_web\\_y78t3Wpb.pdf](https://www.parliament.vic.gov.au/file_uploads/Inquiry_into_Handling_of_Abuse_Volume_2_FINAL_web_y78t3Wpb.pdf)

93 See: Victoria State Government: *Failure to protect: a new criminal offence to protect children from sexual abuse*, available at:

<https://www.justice.vic.gov.au/safer-communities/protecting-children-and-families/failure-to-protect-a-new-criminal-offence-to>

Also see related research paper on the Bill released by the Parliament of Victoria, available at:

<http://www.parliament.vic.gov.au/publications/research-papers/9025-crimes-amendment-protection-of-children-bill-2014>

94 Crimes Act 1958 (VIC), section 6; Criminal Code Act 1924 (TAS), section 165A; and Crimes Act 1900 (NSW), section 22A.

95 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (1997, Rep 83), Chapter 3, available at:

<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-83.pdf>; and Victorian Law Reform Commission, *Defences to Homicide* (2004, Final Rep), Chapter 6, available at:

[http://www.lawreform.vic.gov.au/sites/default/files/VLRC\\_Defences\\_to\\_Homicide\\_Final\\_Report.pdf](http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Defences_to_Homicide_Final_Report.pdf) See also, eg, *R v Cooper* [2001] NSWSC 769.

96 Same as above.

97 Same as above. The NSWLRC recommended in its report that the offence/defence of infanticide be abolished, and that cases of mothers killing their infant children should be brought forward on the basis of diminished responsibility. Conversely, the Victorian LRC recommended that infanticide should be retained as an offence and statutory alternative to murder, in line with the overwhelming positive public response to this provision.

repealed in 2008 under the recommendation of the Western Australia Law Reform Commission.<sup>98</sup>

### *Child homicide*

6.45 In 2008, Victoria was the first and only Australian state to introduce the offence of “*child homicide*” against victims under the age of six years. Child homicide is an alternative verdict to the charge of murder and is punishable by up to 20 years’ imprisonment.<sup>99</sup>

6.46 *R v Hughes*<sup>100</sup> is a case where a three-year-old boy Zane was killed by his mother’s boyfriend Mr. Hughes, the defendant. Zane and his brother were involved in an incident that irritated the defendant. Both the defendant and Cunningham, Zane’s mother, yelled at him. Out of anger, the defendant then grabbed Zane by the back of neck and threw him onto his bed, leading to his head striking the corner of the bed frame and the wall, and possibly the window sill. After the failed attempt to resurrect the unconscious victim, an emergency call was made. He died around 1.5 hour after being delivered to the hospital. The defendant was charged and convicted of child homicide, together with two charges of intentionally causing injury to Zane and his brother. The court commented the case as “*a serious example of child homicide*”, but recognized that there had been other substantially more serious examples of that offence. After giving value to various mitigating factors, the defendant was sentenced to nine years and six months imprisonment with a non-parole period of six years and three months. The mother had been silent all the time towards her boyfriend’s abusive behavior. Despite her involvement in the fatal accident, she was not charged for the death of her son.

### *Ill-treatment of children*

6.47 The Tasmanian Criminal Code establishes a composite offence called “*ill-treatment of children*” which incorporates concepts from various separate offences discussed above. Section 178(1) of the Criminal Code provides:

*“Any person over the age of 14 years who, having the custody, care, or control of a child under the age of 14 years, wilfully ill-treats, neglects, abandons, or exposes such child, or causes such child to be ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering or injury to health, is guilty of a crime.”*

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98 See Criminal Law Amendment (Homicide) Act 2008 (WA). See also Law Reform Commission of Western Australia, *Project 97: Review of the Law of Homicide* (2007, Final Report), Chapter 3, available at: [https://www.lrc.justice.wa.gov.au/P/project\\_97.aspx](https://www.lrc.justice.wa.gov.au/P/project_97.aspx)

99 Crimes Act 1958 (VIC), sections 5A, and 421.

100 [2015] VSC 312.

6.48 (It should be noted that this provision is substantively similar to the existing offence of “*ill-treatment or neglect of a child*” under section 27 of the Offences against the Person Ordinance (Cap 212) in Hong Kong.<sup>101</sup>)

6.49 Examples of orders made by Tasmanian courts in cases involving ill-treatment of children include:

- (a) a 15 months suspended sentence against a mother for causing permanent brain injury to her 19 month-old son;<sup>102</sup> and
- (b) four years’ imprisonment against a father for ill-treatment of, and assault against, his three daughters, which lasted over a decade for each daughter.<sup>103</sup>

6.50 The Crimes Act 1900 of the Australian Capital Territory creates a similar offence for a person to “*ill-treat or abuse a child who is in the person’s care*” or to “*neglect a child for whom he or she is caring or has parental responsibility.*”<sup>104</sup> The maximum penalty under this statute is 200 penalty units, and/or two years’ imprisonment.

## Canada

### Overview

6.51 In Canada, legislation relating to criminal law and procedure may be enacted only at the federal level<sup>105</sup> and is comprised in the Criminal Code of Canada.<sup>106</sup>

6.52 Under Part VIII of the Code (“*Offences against the Person and Reputation*”), there are three main categories of offences which establish criminal liability for persons who cause death or bodily injury to a person:

- (a) The first includes the “*culpable homicide*” offences of murder or manslaughter.<sup>107</sup>
- (b) The second category of offences appears under a sub-part of the Code headed “*Duties tending to Preservation of Life.*” These offences include criminal liability for the “*failure to provide necessaries of life*” by a person with a legal duty over a child<sup>108</sup>

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101 In Hong Kong, the minimum statutory age of the offender under this offence is 16 years.

102 *Tasmania v Lowe* [2004] TASSC 62.

103 *P v Tasmania (No 2)* [2006] TASSC 35.

104 Crimes Act 1900 (ACT), section 39.

105 The Federal Parliament is vested with the exclusive jurisdiction to enact legislation under “*Criminal Law*” and “*Procedure in Criminal Matters*” under Item 27 of section 91 in Part VI of The Constitution Act 1982.

106 RSC 1985, c C-46 (Criminal Code 1985).

107 Criminal Code 1985, section 222(4).

108 Criminal Code 1985, section 215(1)(a).

or another person “under his charge if that person is either unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge” and “unable to provide himself with necessaries of life”<sup>109</sup>. With respect to the duty imposed on the above persons (except children), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.<sup>110</sup> The maximum penalty for this offence, on indictment, is five years’ imprisonment.<sup>111</sup> In addition, criminal liability is imposed on those who *unlawfully abandons or exposes a child who is under the age of ten years.*<sup>112</sup> These offences may apply in both fatal and non-fatal cases.

- (c) The third category relates to non-fatal assault offences, including “assault,” “aggravated assault”<sup>113</sup> and “criminal negligence causing bodily harm.”<sup>114</sup>

### **Culpable homicide offences**

6.53 Culpable homicide is where a person causes the death of a human being by, amongst other things, “means of an unlawful act” or “criminal negligence.”<sup>115</sup> The three culpable homicide offences under the Code are murder, manslaughter and infanticide.<sup>116</sup>

#### *Murder*

6.54 Murder is defined under section 229 of the Code to include circumstances where the person who causes the death of a human being:

- (a) means to cause his death,<sup>117</sup> or  
 (b) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.<sup>118</sup>

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109 Criminal Code 1985, section 215(1)(c).

110 Criminal Code 1985, section 215(2)(b).

111 Criminal Code 1985, section 215(3)(a).

112 Criminal Code 1985, section 218.

113 Criminal Code 1985, sections 265 to 267 and 268 respectively.

114 Criminal Code 1985, section 221.

115 Criminal Code 1985, section 222(5)(a) and (b).

116 Criminal Code 1985, section 222(4). For murder, see sections 229 to 232 and 235. For manslaughter, see sections 234 and 236. For infanticide, see sections 233 and 237.

117 Criminal Code 1985, section 229(a)(i).

118 Criminal Code 1985, section 229(a)(ii). On the *mens rea* of murder under this provision, see the Canadian Supreme Court case of *R v Cooper* [1993] 1 SCR 146. In that case, Cory J stated for the majority that two aspects of intent must be established before a person may be properly convicted of murder, namely, “there must be (a) subjective intent to cause bodily harm; and (b) subjective knowledge that the bodily harm is of such a nature that it is likely to result in death”: see [1993] 1 SCR 146, at para 23.

6.55 Murder in the first degree is “when it is planned and deliberate,”<sup>119</sup> or when death was caused by committing or attempting to commit certain other offences, including various forms of sexual assault<sup>120</sup> and “kidnapping and forcible confinement.”<sup>121</sup> Murder that is not in the first degree is deemed to be second degree murder.<sup>122</sup> The prescribed penalty for murder, either in the first or second degree, is a mandatory sentence of life imprisonment.<sup>123</sup>

### *Manslaughter*

6.56 “Culpable homicide that is not murder or infanticide is manslaughter.”<sup>124</sup> Unlike murder, manslaughter does not require proof of intention or actual foresight of a prohibited consequence (ie, “murder requires subjective foresight of death, while manslaughter does not”<sup>125</sup>).

6.57 Manslaughter is an indictable offence and a person found guilty may be sentenced to a maximum term of life imprisonment.<sup>126</sup> Unlike murder, however, there is no mandatory minimum sentence unless a firearm is used in the commission of the offence (in which case a minimum term of four years’ imprisonment applies).<sup>127</sup>

6.58 In the context of homicide of a child or a vulnerable person who is “unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge [by another person]” and “unable to provide himself with necessaries of life”, manslaughter may be constituted by the offences of “causing death by criminal negligence”<sup>128</sup> or causing death by “failure to provide necessaries of life.”<sup>129</sup>

### *Manslaughter by criminal negligence*

6.59 The Canadian Supreme Court has stated that the underlying premise for finding fault in negligence-based offences “lies in the ‘failure to

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119 Criminal Code 1985, section 231(2).

120 Criminal Code 1985, section 231(5)(b), (c) and (d).

121 Criminal Code 1985, section 231(5)(e). See, eg, *R v Kematch* [2010] MJ No 58, where the appellant and her common-law partner were convicted of first degree murder of her five year-old daughter based on unlawful confinement under section 231(5)(e). Their appeals against the sentences of life imprisonment were dismissed.

122 Criminal Code 1985, section 231(7). See, eg, *R v Dooley* [2009] OJ No 5483 (second degree murder); and *R v Sunshine* [2010] BCJ No 54 (second degree murder).

123 Criminal Code 1985, section 235 provides that imprisonment for life is both the maximum and minimum penalty.

124 Criminal Code 1985, section 234. In some cases, a person charged with murder may be convicted of the lesser charge of manslaughter if the defence of provocation can be proven (ie, “if the person who committed [the culpable homicide] did so in the heat of passion caused by sudden provocation”): see Criminal Code 1985, section 232.

125 Larry Wilson, “Beatty, JF, and the Law of Manslaughter” (Apr 2010) 47 *Alberta L Rev* 651, at 652, citing *R v Martineau* [1990] 2 SCR 633.

126 Criminal Code 1985, section 236.

127 Criminal Code 1985, section 236. See also Wilson (2010), above, at 658.

128 Criminal Code 1985, sections 220 and 222(5)(b).

129 Criminal Code 1985, sections 215(1)(a) and 215(1)(c).

*direct the mind to the risk [of harm] which the reasonable person would have appreciated’.*<sup>130</sup> The court is required to determine not what the person knew or intended, “*but what he ought to have foreseen.*”<sup>131</sup>

6.60 Under section 220 of the Code, “*every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable... (b) to imprisonment for life.*” For the offence of manslaughter by criminal negligence, it must be established that a person:

- “(a) *in doing anything, or*
  - “(b) *in omitting to do anything that it is his [legal<sup>132</sup>] duty to do,*
- shows wanton or reckless disregard for the lives or safety of other persons.*”<sup>133</sup>

6.61 “*Wanton*” has been held to mean “*a demonstrated carelessness for the life and safety of the person concerned. It conveys not only a sense of indifference to, but also an unrestrained disregard for, the consequences of the act or omission.*”<sup>134</sup> The Supreme Court of Canada has held that in cases involving children, proof of criminal negligence will flow from a finding that there has been a “*marked and substantial departure*” from what a reasonably prudent parent or foster parent would have done in the circumstances.<sup>135</sup> The same principles should be applied to criminal negligence cases concerning other vulnerable persons as well, where, for example, the court in *R v Pitre* noted that “*the level of moral blameworthiness for the offence of criminal negligence is high, and more specifically requires, on an objective standard, ...a wanton and reckless disregard for the life and safety [of the victim].*”<sup>136</sup>

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130 *R v JF* [2008] 3 SCR 215, at para 65, citing *R v Creighton* [1993] 3 SCR 3, at 58.

131 *R v JF* [2008] 3 SCR 215, at para 7.

132 Criminal Code 1985, section 219(2).

133 Criminal Code 1985, section 219(1). See also Canadian Supreme Court decision of *R v JF* [2008] 3 SCR 215, where the elements of this offence are discussed.

134 *R v TE* [2010] OJ No 1372, at para 62. The judgment continues, “*‘Wanton’ has also been found to mean ‘heedlessly’, and when combined with the word ‘reckless’ means heedless of the consequences or without regard for the consequences.*”

135 *R v JF* [2008] 3 SCR 215, at paras 9, 16 and 68. In that case, the foster father was charged with *inter alia* manslaughter by criminal negligence for the death of a child who was beaten by his foster mother. See also *R v Carstensen* [2010] BCJ No 1365. In *R v Pauchay* [2009] SJ No 2, a father pleaded guilty to causing death by criminal negligence after his two daughters died from exposure to the elements, namely hyperthermia. A leading authority on the *mens rea* for criminal negligence generally is the Supreme Court decision of *R v Beatty* [2008] 1 SCR 49.

Wilson (2010), above, at 668, comments that following the Supreme Court decisions of *Beatty* and *JF*, “*we now have three levels of objective fault [in Canadian law]: mere departure; marked departure; and marked and substantial departure. The mere departure, or simple negligence, standard will be used for strict liability offences, marked departure will be the test for crimes of penal negligence, and marked and substantial departure will be the mens rea for crimes of criminal negligence.*”

136 *R v Pitre* [2015] NBJ No 63. In this case, the operator of a special care home pleaded guilty for criminal negligence contrary to section 219 of the Code causing death of a long-time resident, aged 74, who was found suffering from acute chronic cardiac insufficiency before his death. The Court acknowledged that the basis for the guilty plea was the offender’s acknowledgment that she should have called the police earlier given the extreme and serious condition of the

### *Manslaughter by failure to provide necessities of life*

6.62 Under section 215 of the Code, a person with a legal duty over a child under 16 years of age commits an indictable offence if he or she fails to “provide the necessities of life” to the child. Section 215 also contains another offence of failure to provide necessities of life to a person who, “by reason of detention, age, illness, mental disorder or other cause ... is unable to provide himself with necessities of life”.<sup>137</sup> The law imposes the duty on parents, foster parents, guardians and heads of families and anyone who provides necessities of life to a person under his charge.<sup>138</sup> In the context of child abuse, this offence appears to be one of the avenues available to the prosecution in cases where it is uncertain which parent committed the physical harm, or in order to punish the passive parent who permitted the abuse to occur or continue.<sup>139</sup> Courts have held that those owing the duty are required to provide food and shelter,<sup>140</sup> as well as nourishment and assistance with feeding,<sup>141</sup> seek medical attention for injuries,<sup>142</sup> call community agency for help<sup>143</sup> and protect a child or a vulnerable person from physical harm.<sup>144</sup>

6.63 The proscribed conduct for the offence is that a person under the duty to provide necessities of life to a child or a person who is unable to provide himself with necessities of life failed, from an objective standpoint, to perform the duty, and thereby (also from an objective standpoint) endangered the life of the child or the said person (as the case may be), or caused or was likely to cause the health of the child or the said person to be endangered permanently.<sup>145</sup> Compared to the more serious ‘manslaughter by criminal negligence’ offence,<sup>146</sup> the fault element of the offence of “manslaughter by failure to provide necessities of life” is that there was a “marked departure” (rather than a “marked and substantial departure”) from what the reasonable parent or foster parent or a reasonably prudent person in the circumstances would have done in the circumstances.<sup>147</sup>

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victim, upon which she showed a wanton and reckless disregard for the victim’s safety. The offender was sentenced to eight months’ imprisonment plus two years’ probation.

137 Criminal Code 1985, section 215(1)(c).

138 Criminal Code 1985, s 215(1)(a).

139 See, eg, *R v JF* [2008] 3 SCR 215 at para 41; *R v Jonah* [2007] NBJ No 194; and see also *obiter* aspect of the judgment in *R v Dooley* [2009] OJ No. 5483, at para 4.

140 See, eg, *R v Turner (SA) and Turner (LA)* 185 NBR (2d) 190; and *R v Brennan* [2006] NSJ No 141.

141 See, eg, *Bentley (Litigation guardian of) v Maplewood Seniors Care Society* [2015] BCJ No 367.

142 See, eg, *R v Alexander* [2011] OJ No 646, where a mother was convicted for manslaughter for failing to seek medical attention for her 19-month old son after he suffered severe burns due to immersion in hot water. See also *R v JCF* [2005] NJ No 387 and *R v JRB* [2004] NJ No 238.

143 See, eg, *R v Peterson* [2005] OJ No 4450.

144 See *R v JF* [2008] 3 SCR 215, at para 41 (death of a child); and *R v Peterson* [2005] O.J. No. 4450, at para 34 (maltreatment of a dependent father suffering mental disability).

145 *R v JF* [2008] 3 SCR 215, at para 66; and *R v Devereaux* [1999] N.J. No. 25, at para 53.

146 *R v JF* [2008] 3 SCR 215, at paras 8, 16 and 67; and *R v Devereaux* [1999] N.J. No. 25, at para 53 (no fault was found on the defendant in this case where the victim was intoxicated and had trouble breathing and was later pronounced dead of a heart attack at the hospital).

147 *R v JF* [2008] 3 SCR 215, at para 67; and *R v Devereaux* [1999] N.J. No. 25, at para 34.

## **Non-fatal offences**

6.64 Depending on the circumstances, where a child or a person who is unable to provide himself with necessities of life has been harmed, but has not died as a result, a person may be charged with a combination of criminal negligence causing bodily harm, assault or aggravated assault, and failure to provide the victim with the necessities of life.<sup>148</sup> Each of these offences is discussed below.

### *Causing bodily harm by criminal negligence*

6.65 As with criminal negligence manslaughter, in order to establish the offence of “*causing bodily harm*” by criminal negligence under section 221 of the Code, it must be shown that a person:

- “(a) *in doing anything, or*
  - (b) in omitting to do anything that it is his [legal<sup>149</sup>] duty to do,*
- shows wanton or reckless disregard for the lives or safety of other persons.”<sup>150</sup>*

6.66 “*Bodily harm*” is defined to mean “*any hurt or injury to a person that interferes with the health or comfort of that person and that is more than merely transient or trifling in nature.*”<sup>151</sup> Causing bodily harm by criminal negligence is an indictable offence and attracts a maximum penalty of 10 years’ imprisonment.<sup>152</sup>

### *Failure to provide necessities of life*

6.67 As noted earlier, the proscribed conduct for this offence<sup>153</sup> is that a person under a legal duty to provide necessities of life to a person objectively failed to perform the duty and this failure objectively endangered the life of that person, or caused or was likely to cause the health of that person to be endangered permanently.<sup>154</sup> Also as noted earlier, the fault element of this offence is that there was a “*marked departure*” from what the reasonable parent or foster parent would have done in the circumstances.<sup>155</sup> A remark has been made by the court that the personal characteristics of the defendants, falling short of capacity to appreciate the risk, are not a relevant

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148 See, eg, *R v TE* [2010] OJ No 1372; *R v VI* [2008] OJ No 3640; and *R v Naglik* 46 OAC 81.

149 Criminal Code 1985, section 219(2).

150 Criminal Code 1985, section 219(1).

151 Criminal Code 1985, section 2.

152 Criminal Code 1985, section 221.

153 Criminal Code 1985, section 215(1)(a).

154 *R v JF* [2008] 3 SCR 215, at para 65. For non-fatal cases, the word “*endanger*” does not require actual injury or damage: see *R v Thornton* (1991) 42 OAC 206, at 26, and *R v TE* [2010] OJ No 1372, at 45; see also *R v Peterson* [2005] OJ No 4450 (maltreatment of a father who is mentally incapable and dependent on his son).

155 *R v JF* [2008] 3 SCR 215, at para 67.

consideration as the use of the word “*duty*” is indicative of a societal minimum that has been established and is aimed at establishing a uniform minimum level of care.<sup>156</sup> The maximum penalty for this offence is five years’ imprisonment if charged as an indictable offence and 18 months’ imprisonment if charged summarily.<sup>157</sup>

### *Assault*

6.68 A person who physically injures another person in a household may also be charged under:

- (a) “*Assault*” for causing “*bodily harm*”<sup>158</sup> or
- (b) “*Aggravated assault*”, if that person “*wounds, maims, disfigures, or endangers the life of the complainant.*”<sup>159</sup>

6.69 The *mens rea* for both aggravated and common assault include, “*intent to apply force intentionally, recklessly, or being wilfully blind to the lack of consent of the victim*”. Aggravated assault involves the additional element of objective foresight of risk of bodily harm.<sup>160</sup>

6.70 The maximum penalty for assault is 10 years’ imprisonment<sup>161</sup> and the maximum penalty for aggravated assault is 14 years’ imprisonment.<sup>162</sup> However, under the *Kienapple* principle,<sup>163</sup> assault causing bodily harm is an included offence of aggravated assault. Therefore, a conviction of both charges will result in the former charge being stayed. This principle was applied in the case of *R v Donnelly*,<sup>164</sup> where the defendant was convicted of both charges for shaking his girlfriend’s seven-month old daughter, causing rib fractures and neurological damage to the child. The defendant was convicted on the basis of circumstantial evidence, after the court decided that of the two individuals who could have committed the offence, it was not a “*rational*” or “*logical*” conclusion to find the mother responsible for the harm.<sup>165</sup>

### *Abandoning or exposing a child to injury*

6.71 The Code also includes the offence of abandoning or exposing a child under 10 years of age “*so that its life is or is likely to be endangered or*

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156 *R v Peterson* [2005] OJ No. 4450, at para 35.

157 Criminal Code 1985, section 215(3)(a) and (b) respectively.

158 Criminal Code 1985, section 267.

159 Criminal Code 1985, section 268. See eg, *R v TE* [2010] OJ No 1372; *R v SG* [2011] OJ No 1604; and *R v CGO* [2011] BCJ No 1216.

160 See *R v Donnelly* [2007] OJ No 2560, at para 209.

161 Criminal Code 1985, section 267.

162 Criminal Code 1985, section 268(2).

163 *R v Kienapple* [1975] 1 SCR 729.

164 *R v Donnelly* [2007] OJ No 2560.

165 *R v Donnelly* [2007] OJ No 2560, at paras 150 and 192.

*its health is or is likely to be permanently injured.*<sup>166</sup> The terms “abandon” or “expose” are stated to include: “(a) a wilful omission to take charge of a child by a person who is under a legal duty to do so; and (b) dealing with a child in a manner that is likely to leave that child exposed to risk without protection.”<sup>167</sup> The maximum penalties for this offence are five years’ imprisonment if charged on indictment, or 18 months’ imprisonment if charged summarily.<sup>168</sup>

### **Evidentiary issues**

6.72 Canadian case law suggests that in practice, the prosecution is not prevented from prosecuting two individuals under circumstances where a victim (usually a child) has been harmed and the evidence is equivocal as to who was ultimately responsible for the physical conduct resulting in the harm. This situation may arise where the victim was injured in the presence of two or more persons, or where the injuries were sustained over a period of time. Where one person is the main perpetrator of the abuse, and the other person failed to protect the victim in question, the prosecution may pursue the passive person under a number of statutory offences, including:

- (a) criminal negligence<sup>169</sup> (causing death<sup>170</sup> or causing bodily harm<sup>171</sup>);
- (b) failure to provide necessities of life<sup>172</sup> (as an element of manslaughter<sup>173</sup> or for endangering the life of a person<sup>174</sup>) and
- (c) aiding and abetting a crime.

6.73 For example, in *R v Dooley*,<sup>175</sup> a father and step-mother were both convicted of second degree murder and sentenced to life imprisonment for the killing of a seven year-old child. Both parties abused the child, both were aware that the other was abusing the child, and each blamed the other.<sup>176</sup> The Court of Appeal held that it was clear that the perpetrator of the fatal assault was guilty of *at least* manslaughter for unlawfully causing death, and the other parent was guilty of *at least* manslaughter for failing to protect the child and/or criminal negligence causing death (emphasis added).<sup>177</sup> The issue at trial was whether both parties had the culpable mental state required

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166 Criminal Code 1985, section 218.

167 Criminal Code 1985, section 214.

168 Criminal Code 1985, section 218.

169 Criminal Code 1985, section 219(1).

170 Criminal Code 1985, sections 220(b), 222 and 234.

171 Criminal Code 1985, section 221.

172 Criminal Code 1985, section 215(1)(a).

173 Criminal Code 1985, section 222 and 234.

174 Criminal Code 1985, section 215(2)(a)(ii).

175 *R v Dooley* [2009] OJ No 5483.

176 *R v Dooley* [2009] OJ No 5483, at paras 3 to 5.

177 Same as above.

to satisfy a murder charge against them.<sup>178</sup> The issue was settled in the affirmative.<sup>179</sup> In particular, in finding that the father aided and abetted the murder, the trial judge held that the father knew of the nature of his wife's beatings, and "*deliberately chose to let... [his son] die by not removing him from his violent stepmother*".<sup>180</sup> Legal challenges to their convictions were dismissed on appeal.<sup>181</sup>

6.74 In *R v Jonah*,<sup>182</sup> the parents of a five year-old girl were both convicted of failing to provide the necessaries of life and each sentenced to eight months' imprisonment. In that case, the child suffered a catalogue of injuries including a broken wrist, a broken arm and bruises all over her body.<sup>183</sup> None of the physical abuse was proved to have been attributable to either of the parents and evidence established that the victim was in their physical presence for all of the period covering the dates of the charge.<sup>184</sup> Nevertheless, both parents were convicted of the failing to provide necessaries of life. The analysis provided by the Court was that:

*"[A] breach of trust by a parent or parents in failing to carry out any of the fundamental legal duties owed [to] a young child in such circumstances is especially serious... . Cases that fall into the category of failing to provide the necessaries of life thereby endangering life while requiring judges, as all sentence hearings do, to consider all the principles of sentence share a special focus on denunciation and general deterrence in determining an appropriate sentence."*<sup>185</sup>

6.75 Where the prosecution cannot prove which parent committed the physical assault, it must proceed on the basis of circumstantial grounds such as the defendant having an "*exclusive opportunity*" or "*motive*" to commit the acts.<sup>186</sup> Here, medical evidence concerning the timing of the injuries

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178 Same as above.

179 *R v Dooley* [2002] OJ No 5921.

180 *R v Dooley* [2002] OJ No 5921, at para 18, the judge held that "*I am satisfied that Tony Dooley was not present at the time that Marcia Dooley inflicted the fatal assault... that eventually caused [the child's] death. However Tony Dooley knew that his wife was constantly beating his son and that his wife would inevitably kill his son unless he intervened to stop the abuse.*"

181 *R v Dooley* [2009] OJ No. 5483, at para 180.

182 *R v Jonah* [2007] NBJ No. 194, at paras 13 to 15.

183 *R v Jonah* [2007] NBJ No. 194, at paras 13 to 15.

184 *R v Jonah* [2007] NBJ No.194, at para 49.

185 *R v Jonah* [2007] NBJ No. 194, at paras 34 and 37.

186 See, eg, discussion in *R v Donnelly* [2007] OJ No 2560, at paras 132 to 144. In that case, the boyfriend of the victim's mother was convicted of aggravated assault endangering life, and assault causing bodily harm, after the victim displayed conclusive symptoms of shaken-baby syndrome. The conviction was secured on the basis of circumstantial evidence, and despite the defence showing a lack of exclusive opportunity to commit the acts. In response, the court recites (at para 134) the relevant passages in *R v Yeves* [1987] 2 SCR 168, which outlines the principle of exclusivity:

*"It may then be concluded that where it is shown that a crime has been committed and the incriminating evidence against the accused is the primary evidence of opportunity, the guilt of the accused is not the only rational inference which can be drawn unless the accused had exclusive opportunity. In a case, however, where the evidence of opportunity is*

becomes crucial to securing a conviction. Notwithstanding evidence adduced, however, according to the authority in *R v Schell and Paquette*,<sup>187</sup> “if a jury is satisfied beyond a reasonable doubt in a murder prosecution that the victim was killed by one of two accused, but is unable to determine which one of them, then both accused are entitled to be acquitted”.<sup>188</sup> This principle (which is the general approach taken in those jurisdictions, such as Hong Kong, which do not have a specific “causing or allowing”-type offence) also applies in non-murder cases.<sup>189</sup>

6.76 For example, in *R v VI*,<sup>190</sup> the child sustained nine metaphysical fractures of her legs, however both parents were acquitted of all charges including aggravated assault, criminal negligence causing bodily harm and failing to provide necessities of life. In reaching its decision, the court held that there was no evidence to prove that the mother directly or indirectly harmed her child,<sup>191</sup> nor could it be established that the father had the “exclusive opportunity” to commit the offence, because medical experts gave conflicting opinions about the timing of the injuries.<sup>192</sup>

6.77 Further cases relevant to these issues (ie, *R v SJ*,<sup>193</sup> and *R v Maloney*<sup>194</sup> are discussed in Appendix V.

### **Sentencing considerations**

6.78 During the process of sentencing for offences under the Code, the court is required to give “primary consideration to the objectives of denunciation and deterrence” when the offence involves “abuse of a person under the age of eighteen years.”<sup>195</sup> Such offences are deemed “aggravating circumstances” and may attract an increased penalty.<sup>196</sup> Other aggravating circumstances include, *inter alia*, evidence that the offence was motivated by age,<sup>197</sup> mental or physical disability,<sup>198</sup> health and financial situation.<sup>199</sup>

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**accompanied by other inculpatory evidence, something less than exclusive opportunity may suffice.”** [Original emphasis].

The Court held, at para 150, that the mother did not shake her daughter.

187 (1977) 33 CCC (2d) 422.

188 Cited in *R v VI* [2008] OJ No 3640, at para 146.

189 Same as above.

190 Same as above.

191 The court had reasonable doubt as to whether the mother knew of the injuries, as she kept all medical appointments with the child’s doctor, and was described as a “paranoid mom”, who is “always asking the doctor whether her daughter is all right or not”. See, same as above, at paras 83, and 108 to 115.

192 See, same as above, at paras 42, 47 and 101 to 103.

193 (2015) ONCA 97.

194 (2011) NSSC 477.

195 Criminal Code 1985, section 718.01. “Abuse” is not defined in the statute.

196 Criminal Code 1985, section 718.2(a)(ii.1).

197 Criminal Code 1985, sections 718.2(a)(i) & (a)(iii.1).

198 Criminal Code 1985, section 718.2(a)(i).

199 Criminal Code 1985, section 718.2(a)(iii.1).

However, given the wide range of conduct that can give rise to these offences, sentences which are imposed can vary widely.<sup>200</sup>

## United States

### Overview

6.79 In the United States, each state's criminal code contains offences which may apply to persons who cause or allow the death or serious harm of children and other vulnerable victims. These offences appear to fall into three main categories, although their substantive elements, scope of application and maximum penalties may vary significantly from state to state. A key point is that all of these offences are predicated on the prosecution being able to differentiate the "active" from the "passive abuser."<sup>201</sup> Where this cannot be established, the prosecution of either or both parties may fail, even where the victim, especially a child, may have died from the abuse. As one commentator observes:

*"No [US] state court or legislature has proposed an effective method of overcoming the evidentiary insufficiency inherent in this most horrible of crimes – the murder of an innocent child."*<sup>202</sup>

6.80 Under the first category of offence under the US system, a person who directly inflicts harm on the victim (the active abuser) may be prosecuted for general homicide (murder/manslaughter), "homicide by abuse" or child/vulnerable adult cruelty or child/vulnerable adult abuse offences, depending on the extent of the harm inflicted on the victim.

6.81 Under the second category, many states also recognise a separate, non-homicide offence based on an affirmative parental duty to protect children and vulnerable adults/incompetent persons.<sup>203</sup> The object of this category of offences is to punish passive parents, legal guardians, caregivers and those having custody of the victims who "fail to protect" the victims from the conduct of the active abuser.

6.82 Under a third category, the passive caregiver may be charged with an offence through accomplice liability, although the evidentiary burden in these cases may be significantly higher than under the second category.

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200 See *R v Guimond* [2010] MJ No 196, at paras 12 to 22, for a review of sentences handed down in various manslaughter and failure to provide necessities of life cases (where although the maximum penalty in some cases may be life imprisonment, sentences imposed commonly appear to range between one year and three years' imprisonment).

201 Lissa Griffin, "Which one of you did it? Criminal liability for 'causing or allowing' the death of a child" (2004) *Pace University School of Law Faculty Publications* 89, at 89.

202 Griffin (2004), above, at 89 to 90. Griffin goes on to advocate the introduction in the US of a new offence along the lines of the English model comprised in sections 5 and 6 of the Domestic Violence, Crimes and Victims Act 2004, discussed earlier, in Chapter 3 of this paper.

203 Griffin (2004), above, at 97.

6.83 The statutory definition of “*child*” varies between the states, to mean a child under maximum ages which range between 8 years to 19 years, depending on the state.<sup>204</sup> In some instances, the age of the child is a specific element of the offence and is determinative of the level of offence charged.<sup>205</sup>

6.84 On the other hand, the statutory definition of “*vulnerable adult*” (alternative descriptions like “*incompetent*”, “*physically disabled person*”, “*dependent persons or elderly persons*” are used in various states) generally means an individual over 18 years of age who is unable to protect himself from abuse, neglect, maltreatment or exploitation because of age, mental or physical impairment.<sup>206</sup> In a few states, vulnerability includes debilitation, cognitive disability, chronic use of drugs, chronic intoxication, fraud, confinement or disappearance.<sup>207</sup> Some states’ laws limit the portion of elderly persons who are protected, for example, two in three states require elderly persons to be completely dependent before the specific laws intervene.<sup>208</sup>

6.85 The maximum penalties imposed under state codes vary widely, depending on the category of the offence. Where the victim has died as a result of the abuse and a general homicide or a “*homicide by abuse*” offence is charged, the maximum penalty may be life imprisonment<sup>209</sup> or even capital punishment.<sup>210</sup> For cruelty and abuse offences, the maximum sentences range from one year’s imprisonment<sup>211</sup> to life imprisonment.<sup>212</sup> For the “*failure*

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204 See, for example, California Penal Code, Title 9, §273ab (8 years); Vermont Code, Title 13, §1304 (10 years); Alabama Code, Title 13A, § 13A-13-4(a) and §13A-13-6 ((a) 16 years for the offence of directing or authorising a child to engage in an occupation involving a substantial risk of danger to his life or health or (b) 18 years for the offence of failing to prevent a child from becoming a dependent child or a delinquent child or (c) 19 years for the offence of failing to provide support such as food, shelter and medical attention); General Statutes of Connecticut, Title 53, §53-21 (16 years); and Revised Statutes of Missouri, Title 38, §568.045 (17 years).

205 For example, under §2504 of Pennsylvania Consolidated Statutes, Title 18, the offence of involuntary manslaughter is generally classed as a “*misdemeanour of the first degree*”. However, where the victim is aged under 12, the offence is classed as a more serious “*felony of the second degree*.” (For the offence of endangering the welfare of a child under §4304 of the same statute, a “*child*” is a person under 18 years of age. This offence is generally classed as a “*misdemeanour of the first degree*,” although where it involves a course of conduct, it is classed as a “*felony of the third degree*.”)

206 See for example, Alaska Statutes, Chapter 11.51, §11.51.220 & §47.24.900; Arizona Revised Statutes, Title 13, §13-3623.F.6; Minnesota Criminal Code, Chapter 609, §609.232 Subdivision 11; New York Penal Code, Title O, §260.31(4).

207 See for example, Alaska Statutes, Chapter 11.51, §11.51.220 & §47.24.900; Delaware Code, Title 11, §1105; Arizona Revised Statutes, Title 13, §13-3623.F.6; Idaho Penal Code, Title 18, §18-1505; Maine Criminal Code, Title 17-A, §555; Maryland Criminal Law Code, Title 3, §§3-604 and 3-605; New Hampshire Criminal Code, Title LXII, §639:3; Oregon Revised Statutes, Title 16, §163.205(1); and Revised Code of Washington, Title 9A, §9A.32.055.

208 Arthur Meirson, ‘Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State’ (2009) 60(2) *Hastings Law Journal* 441.

209 South Carolina Code of Laws, Title 16, §16-3-85(C)(1); Utah Code, Title 76, §§76-5-208 and 76-3-203(1); Revised Code of Washington, Title 9A, §9A.32.055(3); and West Virginia Code, Chapter 61, §61-8D-2a(c)(40 years).

210 For example, Delaware Code, Title 11, §§634(a) and 4209(a); and Oklahoma Code, Title 21, §§701.7 and 701.9.

211 See Missouri Revised Statutes §565.184.2 and 558.011.1(6); Vermont Code, Title 13, §1305.

to protect” offences (usually involving the ‘passive’ caregiver), the maximum sentences range from six months’ imprisonment<sup>213</sup> to, in some states, up to 10 years’ imprisonment.<sup>214</sup>

### “Active abuser” offences

#### *Homicide offences*

6.86 *Murder, manslaughter and infanticide.* As in other jurisdictions, the general homicide offences are murder, manslaughter and infanticide. In the case of murder and infanticide, an intent to kill, or at least a foreseeability that death would result and recklessness as to whether or not it could result, is required. For manslaughter, a person may have unlawfully killed another, but without the specific intent or recklessness required to establish murder.

6.87 *Homicide by abuse.* In addition to the general homicide offences of murder and manslaughter, at least 33 states have adopted “*homicide by abuse*” statutes,<sup>215</sup> which impose criminal liability in child abuse cases in circumstances where it may be difficult to prove a positive intention to harm the child.<sup>216</sup> Homicide by abuse attracts the highest grade of penalty in each state, and is punishable by either life imprisonment<sup>217</sup> or capital punishment.<sup>218</sup> This offence is, in some states, extended to protect vulnerable adults through similar or mirror provisions.<sup>219</sup>

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212 For example, California Penal Code, Title 9, §273ab; Revised Statutes of Missouri, Title 38, §568.060.5(2); and Mississippi Code of 1972, Title 97, §97-5-39(2)(a).

213 For example, Montana Code, Title 45, §45-5-622(5)(a) (endangering the welfare of children).

214 Minnesota Statutes, §609.233 Subdivision 3 (criminal neglect).

215 Office For Victims of Crime Training And Technical Assistance Center, “Child Abuse and Neglect”, originally authored in 2007 and updated in 2012, at page 15, available at: [http://www.ncdsv.org/images/OVCTTAC\\_ChildAbuseAndNeglectResourcePaper\\_2012.pdf](http://www.ncdsv.org/images/OVCTTAC_ChildAbuseAndNeglectResourcePaper_2012.pdf)

216 As a matter of statutory construction, these “*homicide by abuse*” offences may be:

(a) established under a separate provision and heading in the legislation (see Delaware Code, Title 11, §634; Oklahoma Code, Title 21, §701.7; South Carolina Code of Laws, Title 16, §16-3-85; Utah Code, Title 76, §76-5-208; Revised Code of Washington, Title 9A, §9A.32.055; and West Virginia Code, Chapter 61, §§61-8D-2 and 61-8D-2a);

(b) one of the defined terms within the general homicide statute, (see Minnesota Criminal Code, Chapter 609, §609.185(a)(5); and Mississippi Code of 1972, Title 97, §97-3-19(2)(f)) or

(c) implicated as one of the consequences under the abuse offence (see California Penal Code, Title 9, §273ab; Maryland Criminal Law Code, Title 3, §3-601(b) (child abuse) & §3-604 & §3-605 (abuse or neglect of a vulnerable adult); and Revised Statutes of Missouri, Title 38, §568.060.5(2)).

217 Minnesota Criminal Code, Chapter 609, §609.185(a)(5); South Carolina Code of Laws, Title 16, §16-3-85(A) and (C); Utah Code, Title 76, §§76-5-208(1) and 76-3-203(1); and Revised Code of Washington, Title 9A, §§9A.32.055 and 9A.20.021(1)(a).

218 Delaware Code, Title 11, §634(d); Mississippi Code of 1972, Title 97, §§97-3-19(2)(f) and 97-3-21(b); and Oklahoma Code, Title 21, §§701.7B and 701.9.A.

219 For example, California Penal Code, Title 9, §368(b)(1); Maryland Criminal Law Code, Title 3, §3-604; Minnesota Criminal Code, Chapter 609, §609.2325(1)(a); and Revised Code of Washington, Title 9A, §9A.32.055.

6.88 In states that do not distinguish between the offences of general homicide and homicide by abuse, the burden on the prosecution is higher, as the defendant must be shown to have intended the child to be killed, or to have acted in conscious disregard for human life.

6.89 In most states, the general elements of homicide by abuse consist of the following:

- (a) a person (whether or not that person is a parent, legal guardian or caregiver)
- (b) with some form of culpable state of mind
- (c) causes the death of a child or a vulnerable adult
- (d) through an act of abuse, neglect or torture, or
- (e) as a result of engaging in a previous pattern of abuse, etc.

6.90 *The proscribed conduct.* Conduct constituting a lesser offence, for example “abuse”, is defined in many states to be the *actus reus* of this homicide offence. For example, in Delaware, the offence of “murder by abuse or neglect” defines “abuse” and “neglect” to have the same meaning as the actual offences.<sup>220</sup> Similarly, in Minnesota, “causing the death of a minor while committing child abuse” defines “child abuse” to include the separate offences of assault, malicious punishment and endangerment.<sup>221</sup> Minnesota also contains an offence of criminal abuse of a vulnerable adult, which means “subjects a vulnerable adult to any aversive or deprivation procedure, unreasonable confinement, or involuntary seclusion.”<sup>222</sup> In Washington, homicide by abuse of a developmentally disabled person or a dependent adult means causing the death whilst having previously engaging in “a pattern or practice of assault or torture” of the victim.<sup>223</sup>

6.91 Where a person is charged with homicide on the basis of a “previous pattern” of abuse, it is not necessary for that person to be convicted of each act of abuse, so long as such acts would have constituted the offence of abuse.<sup>224</sup>

6.92 *The mental element of the offence.* The states differ in relation to the level of *mens rea* required to establish homicide by abuse. In some states, it is sufficient to convict a person of murder in the first degree where the cause of the victim’s death arose from reckless conduct,<sup>225</sup> criminal negligence,<sup>226</sup> or even where the person had no design to effect death.<sup>227</sup> In

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220 Delaware Code, Title 11, §1103.

221 Minnesota Criminal Code, Chapter 609, §609.185(d).

222 Minnesota Criminal Code, Chapter 609, §609.2325(1)(a).

223 Revised Code of Washington, Title 9A, §9A.32.055.

224 See Delaware Code, Title 11, §634(c); and Minnesota Criminal Code, Chapter 609, §609.185(a)(5).

225 Delaware Code, Title 11, §634(a); and Utah Code, Title 76, §76-5-208(1)(a).

226 For example, Utah Code, Title 76, §76-5-208(1)(b).

227 See Mississippi Code, Title 97, §97-3-19(2)(f).

other states, the defendant must be shown to have caused the victim's death wilfully or maliciously,<sup>228</sup> or to have manifested an extreme indifference to human life.<sup>229</sup>

### *Child/vulnerable adult cruelty and child/vulnerable adult abuse offences*

6.93 In all the states, offences concerning “*abuse*” and/or “*cruelty*” of a child or a vulnerable adult (terminology which is used interchangeably or concurrently) are established once the following elements are satisfied:

- (a) a person who, having the care, control or custody of a child (similar element might not be required for abuse of a vulnerable adult<sup>230</sup>, or it only requires permanent or temporary care or responsibility for the supervision of the vulnerable adult<sup>231</sup>)
- (b) knowingly, wilfully, intentionally or maliciously (the mental element of the offence or *mens rea*)
- (c) commits some form of act by means of force (the proscribed conduct or *actus reus*.)
- (d) in a way that does or would likely produce great bodily injury or death.

6.94 *The proscribed conduct.* Where defined, the proscribed conduct differs between the states, and includes for example, “*maltreatment*,”<sup>232</sup> “*assault*,”<sup>233</sup> “*cruel or inhumane treatment*,”<sup>234</sup> “*torture*,”<sup>235</sup> “*sexual abuse*,”<sup>236</sup> “*excessive physical restraint*”<sup>237</sup> and “*aversive or deprivation procedure, unreasonable confinement, or involuntary seclusion.*”<sup>238</sup>

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228 For example, Maryland Criminal Law Code, Title 3, §§3-601(a)(2) (child abuse) & 3-604(a)(2) (abuse of vulnerable adult); Oklahoma Code, Title 21, §701.7C; and West Virginia Code, Chapter 61, §61-8D-2(a).

229 Minnesota Criminal Code, Chapter 609, §609.185(a)(5); South Carolina Code of Laws, Title 16, §16-3-85(A)(1); and Revised Code of Washington, Title 9A, §9A.32.055(1).

230 For example, General Statutes of Connecticut, Title 53, §§53-20(a)(1) & (a)(2); Minnesota Statutes, §609.2325(a); and Vermont Code, Title 13, §1305.

231 For example, Maryland Criminal Law Code, Title 3, §3-604(10)(b)(1).

232 For example, Alabama Code, Title 26, §26-15-3.

233 For example, California Penal Code, Title 9, §273ab.

234 For example, Maryland Criminal Law Code, Title 3, §§3-601(a)(2) (child abuse) and 3-604(a)(2) (abuse of vulnerable adult).

235 For example, Alabama Code, Title 26 (Infants and Incompetents), §26-15-3; Mississippi Code of 1972, Title 97, §97-5-39(2)(a).

236 The prohibition of “*sexual abuse*” is also contained in the endangering the welfare of the child provisions. See for example, Oklahoma Code, Title 10A, §10A-1-1-105 and Title 21, §21-852.1; Mississippi Code, Title 97, §§ 97-5-39(1)(e) and 97-5-40(1); New Jersey Statutes, Title 2C, §2C:24-4.a; Delaware Code, Title 11, §1103; and Minnesota Criminal Code, Chapter 609, §609.378(a)(2).

237 For example, New Jersey Statutes, Title 9, §9:6-1.

238 For example, Minnesota Statutes, §609.2325.

6.95 Where the statute distinguishes between “*child abuse*” and “*child cruelty*,” the latter term is graver and incorporates concepts such as unnecessarily severe corporal punishment, unnecessary suffering or pain,<sup>239</sup> and unnecessary hardship.<sup>240</sup> On the other hand, cruelty by person having custody of another person (irrespective of the latter’s age) would include inflicting unnecessary cruelty, unnecessarily and cruelly failing to provide food, drink, shelter or protection from the weather, neglecting to properly care for the victim.<sup>241</sup>

6.96 *The mental element of the offence.* In most states, the state of mind required to satisfy the charge of abuse or cruelty is defined as engaging in the proscribed conduct:

- (a) “*knowingly*,”<sup>242</sup>
- (b) “*wilfully*,”<sup>243</sup>
- (c) “*intentionally*,”<sup>244</sup> or
- (d) a combination of the above.<sup>245</sup>

6.97 It is significant that in some states, the offence of abuse may impose criminal liability not only on the person who actively carried out the abuse, but also on a person who failed to protect the victim from it. Such liability is imposed in two ways:

- (a) defining the impugned conduct, namely “*abuse*” or “*cruelty*” to include both the act itself and the failure to prevent the act from occurring,<sup>246</sup> and
- (b) creating a separate concept of “*neglect*,” which is defined as knowingly permitting the abuse or injury to the well-being of the victim<sup>247</sup> or intentionally failing to provide necessary assistance and resources for the physical needs of a vulnerable adult (including food, clothing, toileting, essential medical treatment, shelter or supervision).<sup>248</sup>

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239 See Vermont Code, Title 13, §1304.

240 See New Jersey Statutes, Title 9, §9:6-1.

241 See Vermont Code, Title 13, §1305.

242 For example, Revised Statutes of Missouri, Title 38, §568.060. 2(1).

243 For example, Alabama Code, Title 26, §26-15-3; and Vermont Code, Title 13, §1304.

244 For example, General Statutes of Connecticut, Title 53, §53-20; Minnesota Statutes, §609.2325 Subdivision 1(a); and Florida Statutes, Title XLVI, §827.03(1).

245 For example, Florida Statutes, Title XLVI, §827.03(1).

246 For example, New Jersey Statutes, Title 9, §9:6-1(d), under “*Cruelty*”; and New York Penal Code, Title O, §260.10.2, which defines “*abused child*” to mean the same as the term in §1012(e)(iii) of the Family Court Act.

247 For example, Florida Statutes, Title XLVI, §827.03(1)(e). Other examples are: Mississippi Code, Title 97, §97-5-39(1)(c); and New Jersey Statutes, Title 9, §9:6-1.

248 For example, General Statutes of Connecticut, Title 53, §53-20(a)(1); and Maryland Criminal Law Code, Title 3, §3-604(7)(i).

6.98 In a Florida offence provision, in which “*neglect of a child*” is defined as:

- (a) a caregiver’s failure or omission to provide a child with the care, supervision, and services necessary to maintain the child’s physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child; or
- (b) a caregiver’s failure to make a reasonable effort to protect a child from abuse, neglect, or exploitation by another person.<sup>249</sup>

6.99 Neglect of a child under the Florida provision may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or mental injury, or a substantial risk of death, to a child.<sup>250</sup>

6.100 The maximum penalties for child/vulnerable adult abuse and/or child/vulnerable adult cruelty offences range between 18 months’ imprisonment to life imprisonment,<sup>251</sup> depending on whether the conduct has resulted in the death of the child.

6.101 In *State of Tennessee v Gregory Nelson and Tina Nelson*,<sup>252</sup> the victim, Gregory and Tina Nelson’s two-and-a-half-month-old daughter, died on May 11, 2011. At the time of her death, she had brain hemorrhages, a retinal hemorrhage in one eye, optic hemorrhages behind both eyes, and multiple broken ribs. The autopsy report stated that the cause of death was homicide from a closed head injury and that her numerous injuries were from non-natural causes. The parents, who were unable to sufficiently explain the cause of the victim’s extensive injuries, were both convicted of aggravated child abuse and first degree felony murder in perpetration of aggravated child abuse. The appellants argued that there was no evidence that Gregory or Tina committed any act that injured the victim, so evidence was insufficient to sustain both convictions.

6.102 The court rejected their argument and held that as long as the jury could find that Gregory or Tina was either principally responsible for the injuries, or was criminally responsible for the other’s acts in injuring the victim,

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249 See Florida Statutes, Title XLVI, §827.03(1)(e).

250 Other examples are Mississippi Code, Title 97, §97-5-39(1)(c) and New Jersey Statutes, Title 9, §9:6-1.

251 For example, Vermont Code, Title 13, §1304 (2 years’ imprisonment for cruelty to children); General Statutes of Connecticut, Title 53, §53-20(a)(1) (5 years); Minnesota Criminal Code, Chapter 609, §609.377 (10 years); New Jersey Statutes, Title 2C, §2C:43-6(4) and Title 9, §9:6-3 (18 months); Florida Statutes, Title XLVI, §§827.03(2) and 775.082(3)(b) (30 years’ imprisonment for aggravated child abuse); Maryland Criminal Law Code, Title 3, §3-601(b)(2)(ii) (40 years’ imprisonment where the child has died); California Penal Code, Title 9, §273ab (life imprisonment); Revised Statutes of Missouri, Title 38, §568.060. 5(2) (life imprisonment where the child has died); and Mississippi Code of 1972, Title 97, §97-5-39(2)(a) (life imprisonment).

252 (2015) Tenn. Crim. App. LEXIS 331.

they could be convicted of child abuse, and consequently first degree felony murder. This case illustrated that identifying the actual perpetrator does not appear to matter in charging for the offence of child abuse under these provisions.

### ***“Endangering the welfare of a child or vulnerable adult” offences***

6.103 Many states have “*failure to protect*,” “*endangering the welfare*,” or “*contributing to the dependency*” statutes. These codify the common law duty imposed on a caregiver to protect a child or a vulnerable adult under his custody or control from being exposed to an unjustifiable risk of death or injury. The evidential standard of this omission-based offence is lower than that of child/vulnerable adult abuse, and requires:

- (a) a person (generally the parent, guardian or other person legally charged with the care or custody of the child or the caregiver of an elderly person or disabled adult or impaired person)
- (b) to knowingly, intentionally, recklessly, or with criminal negligence
- (c) cause or permit
- (d) a child or a vulnerable adult to be placed in a situation likely to endanger his/her life or limb.

6.104 *The proscribed conduct.* The actual conduct that results in the injury or endangerment of the victim’s health is carried out by another person (“*the active abuser*”). The passive caregiver is held criminally liable “*not for the active abuser’s conduct, but rather for his or her own conduct in, for example, permitting a child to be exposed to great bodily injury, neglecting a child, failing to provide medical care, exposing a child to abuse, or failing to report abuse of his or her child.*”<sup>253</sup> This principle also applies to vulnerable victims other than children, as transpired from the wording of the relevant statutory provisions (such as Arizona’s statute which makes it an offence for a caregiver to cause or permit a vulnerable adult under his/her care to be injured or to be placed in a situation where the health of the vulnerable adult is endangered.<sup>254</sup>)

6.105 *The mental element of the offence.* Intent to injure is not required, although most states require that the accused have a conscious state of mind with respect to the actual harm suffered by the child or vulnerable adult. The accused must have caused or permitted the victim’s injury or death knowingly,<sup>255</sup> willfully<sup>256</sup> or recklessly.<sup>257</sup> The standard of proof

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253 Griffin (2004), above, at 97.

254 Arizona Revised Statutes, Title 13, §13-3623.A.

255 See for example, Arizona Revised Statutes, Title 13, §13-3623.A.1; California Penal Code, Title 9, §368(b)(1); Revised Statutes of Missouri, Title 38, §568.045.1(1) & §565.184.1(3); Montana Code, Title 45, §45-5-622(1); Minnesota Criminal Code, Chapter 609, §609.378(a)(2); New Hampshire Criminal Code, Title LXII, §639:3.I; New York Penal Code, Title O, §260.10.1;

required to establish the relevant *mens rea* is determined objectively, and is based on whether the reasonable person would find that the failure to act would likely have resulted in the requisite harm.<sup>258</sup> However, a few states do not expressly require proof of intent and make it a strict liability offence to endanger a person or impaired person subject to protection.<sup>259</sup>

6.106 These crimes are generally classed as misdemeanours and carry lesser sentences than the homicide statutes,<sup>260</sup> such as imprisonment for six months<sup>261</sup> or one year,<sup>262</sup> even where the underlying conduct has caused a victim's death.<sup>263</sup> However, in some states, child/vulnerable adult endangerment where the conduct is "*likely to cause death or serious bodily injury*" is classed as a felony and is punishable by up to 10 years' imprisonment.<sup>264</sup> Separately, in some states failing to make a reasonable effort to protect an elderly person or disabled adult from abuse, neglect or exploitation by another person could be classed as a felony.<sup>265</sup>

6.107 In a few states, it is a positive defence to child endangerment if the defendant could show that he or she had a "*reasonable apprehension*" that any action to stop the physical abuse would "*result in the substantial bodily harm to the person or child*" in the form of retaliation.<sup>266</sup> However, most

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Oklahoma Code, Title 21, §852.1.A & §843.3.B; and Oregon Revised Statutes, Title 16, §163.205(1) under "*Criminal mistreatment in the first degree*".

256 For example, California Penal Code, Title 9, §273a; General Statutes of Connecticut, Title 53, §53-21; and Idaho Penal Code, Title 18, §18-1501(1) and (2).

257 For example, Maine Criminal Code, Title 17-A, §554.1.B-2; and Maryland Criminal Law Code, Title 3, § 3-204.

258 For example, under §18-1501(5) of the Idaho Penal Code, Title 18, "*willfully*" is defined as "*acting or failing to act where a reasonable person would know the act or failure to act is likely to result in injury or harm or is likely to endanger the person, health, safety or well-being of the child*".

259 For example, Arkansas Code, Title 5, subtitle 3, Chapter 27, §5-28-103.

260 Griffin (2004), above, at 97.

261 For example, Arizona Revised Statutes, Title 13, §13-3619; California Penal Code, Title 9, §§ 273a(b) and 19; Idaho Penal Code, Title 18, §§18-1501(2) and 18-113; and Montana Code, Title 45, §45-5-622(5)(a).

262 For example, Alabama Code, Title 13A, §§13A-13-6(c) and 13A-5-7(a)(1); California Penal Code, Title 9, §368(b)(1); and Minnesota Criminal Code, Chapter 609, §609.378(a)(2).

263 Griffin (2004), above, at 97.

264 For example, Arizona Revised Statutes, Title 13, §13-3623.A.1 and §13-705.D (24 years' imprisonment if victim under 15 years of age); California Penal Code, Title 9, §273a(a) (6 years); Idaho Penal Code, Title 18, §18-1501(1) (10 years); Minnesota Criminal Code, Chapter 609, §609.378, subdivision 1(b) (5 years); and Montana Code, Title 45, §45-5-622(5)(b) (10 years).

Also, in some states, the maximum penalty depends on the nature of the defendant's *mens rea*. Eg, in Arizona, *intentional* conduct resulting in the likelihood of death or serious physical injury is a Class 2 felony. *Reckless* conduct is a Class 3 felony, and *criminal negligence* is a Class 4 felony. (Under §13-702D of the Arizona Revised Statutes, Title 13, a Class 2 felony attracts a presumptive maximum penalty of 10 years' imprisonment; a Class 3 felony attracts a presumptive maximum penalty of 7 years' imprisonment and a Class 4 felony attracts a presumptive maximum penalty of 3 years' imprisonment.) Similar provisions are found in Missouri's criminal statute: see Statutes of Missouri, Title 38, §§568.045 and 568.050.

265 For example, Florida Statutes, Title XLVI, § 825.102.

266 For example, Minnesota Criminal Code, Chapter 609, §609.378, Subd 2; and Oklahoma Code, Title 21, §852.1.

states do not provide such defence for both child endangerment and vulnerable adult endangerment offences.

6.108 Although child endangering offences are expressed in gender neutral terms, case law reveals that a disproportionately large number of defendants charged with this offence are female.<sup>267</sup> One reason for this phenomenon appears to be that the prosecution has relied on gender-based expectations to argue that women have a greater capacity for nurturing and therefore a heightened duty to protect. Thus, mothers are deemed more blameworthy for failing to protect their child from abusive fathers or live-in boyfriends than fathers from their counterparts.<sup>268</sup>

### ***Other forms of liability***

6.109 It is also possible for the passive parent to be charged as a principal under accomplice liability for aiding and abetting someone who commits homicide by child abuse.<sup>269</sup> However, the evidentiary burden associated with accomplice liability is more onerous than that of homicide by abuse because the alleged accomplice must have had knowledge of, and shared the principal's intent to commit the crime.<sup>270</sup>

### **Further cases**

6.110 Further examples of relevant overseas cases are discussed in Appendix V.

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267 See for example, Fugate, J.A. "Who's failing whom? A critical look at failure to protect laws" (2001) 76 *New York University Law Review* 272, for an analysis of cases, including *Campbell v State*, 999 P 2d 649, 654 (Wyo 2000); *Boone v State*, 668 SW 2d 17, 21 (Ark 1984); and *State v Williquette* 385 NW 2d 145, 147 (Wis 1986).

268 Same as above.

269 See for example, *State v Smith* 391 SC 353, 705 SE 2d 491 and *State v Walden* 293 SE 2d 780.

270 Liang, BA and Macfarlane, WL, "Murder by omission: Child abuse and the passive parent" (1999) 36 *Harvard Journal on Legislation* 397, 6.

# Chapter 7

## Our proposed reform model for Hong Kong

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### Introduction

7.1 In the preceding chapters of this consultation paper we have reviewed how the law in this area applies, both here in Hong Kong and in various overseas jurisdictions. We have analysed in detail the reform models in the United Kingdom,<sup>1</sup> South Australia<sup>2</sup> and New Zealand,<sup>3</sup> where specific legislation has been enacted to answer the central issue of this paper: how to effectively impose criminal liability for serious injuries suffered by children or vulnerable persons in situations *where the identity of the person who inflicted the harm is in doubt*.

7.2 In this chapter, we set out our proposals for reform of the law in Hong Kong. In determining the content of these reforms, we have carefully considered the significant legislative and judicial developments that have taken place in this area in recent years, so that the benefit of that overseas

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1 The English Law Commission's proposed offences of "*cruelty contributing to death*" and "*failure to protect a child*" (the English Law Commission's proposed model) are reviewed in the first part of Chapter 3, above. These reform proposals were recommended in the English Law Commission report, *Children: Their Non-accidental Death or Serious Injury (Criminal Trials)* (Sep 2003, Law Com No 282). The text of these offences is set out in Annex D (see also Annex E) of this paper.

We analysed in the second part of Chapter 3 the enacted UK offence of "*causing or allowing the death of a child*" (the UK enacted model) which is comprised in sections 5, 6 and 6A of the Domestic Violence, Crime and Victims Act 2004 (DVCV Act 2004 (UK)). (The Act was amended by the Domestic Violence, Crime and Victims (Amendment) Act 2012 to extend the offence to cover cases of "*serious physical harm*". These changes came into effect on 2 July 2012 (SI 2012/1432).) The text of the UK enacted model is set out in Annex C of this paper. See also the discussion of further related UK cases in Appendix II.

2 In Chapter 4 we reviewed the South Australian offence of "*criminal liability for neglect where death or serious harm results from unlawful act*" (criminal neglect), which is comprised in section 14 of the Criminal Law Consolidation Act 1935 (SA) (CLC Act 1935 ((originally amended 2005) (SA)). On 2 August 2018, legislation was enacted to significantly reform the provisions on which the South Australian offence model is based – ie, the Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018 ("the 2018 Amendment Act"), which came into force on 6 September 2018. See discussion in Chapter 4. For the text of the offence, see Annexes B(1) to B(3) of this paper. See also the discussion of further related South Australia cases in Appendix III.

3 The reform model enacted in New Zealand in 2011 (the New Zealand enacted model), as well as the New Zealand Law Commission's proposed model on which it was based, are analysed in Chapter 5 above.

The text of the New Zealand enacted model, comprised in sections 150A, 151, 152, 195 and 195A of the New Zealand Crimes Act 1961 is set out in Annex F to this paper. The draft provisions proposed by the New Zealand Law Commission (in Appendix B of the New Zealand Law Commission report, *Review of Part 8 of the Crimes Act 1961: Crimes against the Person* (Nov 2009, Rep 111)) are set out in Annex G to this paper. See also the discussion of further related NZ cases in Appendix IV.

experience could be reflected in our own proposals for reform. In particular, while we found the legislative model adopted in South Australia in 2005 especially useful as a starting point<sup>4</sup> (ie, in preference to the more limited 2004 United Kingdom model and the more complex 2011 New Zealand model), we note that difficulties encountered in practice in South Australia with the application of their legislation led to substantial further reform in 2018.<sup>5</sup> In formulating our reform proposals for an offence for Hong Kong based broadly on the South Australian model, it has therefore been necessary to take careful account of these very latest developments.

## Overview of proposed new offence of “*failure to protect*”

7.3 As we saw in Chapter 4, the offence of “*criminal liability for neglect where death or serious harm results from an unlawful act*”, also referred to as “*criminal neglect*”, was introduced in South Australia in April 2005 by section 4 of the Criminal Law Consolidation (Criminal Neglect) Amendment Act 2005, which inserted a new Division 1A, section 14, into South Australia's Criminal Law Consolidation Act 1935 (the South Australian offence provisions).

7.4 While these provisions underwent substantial reform in 2018 (apparently for reasons uniquely relevant to the criminal law framework in South Australia<sup>6</sup>), we concluded after studying the matter in detail that the original 2005 version of the legislation remained a more useful model for the purposes of our own reform proposals.

7.5 Therefore, using the South Australian offence provisions as a starting point, we have carefully considered each aspect of the criminal neglect offence to develop a model appropriate for Hong Kong. As discussed below, we would propose to title the offence “*failure to protect*” rather than “*criminal neglect*”. The suggested text of our proposed offence is at Annex A of this paper.

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4 The text of the relevant provisions appears at Annex B(1) of this paper and are discussed in Chapter 4, above.

5 The text of the relevant amending and amended provisions appears at, respectively, Annex B(2) and Annex B(3) of this paper. See also discussion in Chapter 4, above.

6 Regarding, for example, their lack of a general offence of child neglect (along the lines of Hong Kong's section 27 of the Offences against the Person Ordinance (Cap 212) (OAPO)): see broader discussion of the relevant issues in Chapter 4, above, esp at paras 4.94 to 4.104.

## Recommendation 1

We recommend the introduction of a new offence of “*Failure to protect a child or vulnerable person where the child’s or vulnerable person’s death or serious harm results from an unlawful act or neglect*”, to be broadly based on section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended by the Criminal Law Consolidation (Criminal Neglect) Amendment Act 2005).<sup>7</sup>

## Legislative approach

7.6 Before turning to look in detail at the substantive provisions of our recommended offence, we set out below our proposals for the legislative approach to be taken in this case, noting of course that ultimately these are matters largely for the Law Draftsman to determine.

### ***Title of the proposed new offence***

7.7 We propose that the Hong Kong offence should be entitled “*Failure to protect a child or vulnerable person where the child’s or vulnerable person’s death or serious harm results from an unlawful act or neglect*”. Our reason for proposing to use the term “*failure to protect*”<sup>8</sup> rather than “*criminal neglect*” in entitling and describing the new offence is to avoid the possible confusion of having two concepts of “*neglect*” referred to in the relevant provisions (ie, one being a type of “*neglect*” which (along with an “*unlawful act*”) may be a cause of harm to the victim,<sup>9</sup> while the other is the defendant’s ‘neglect’ in failing to take steps to protect the victim from harm, which is the conduct targeted by the offence<sup>10</sup>).

### ***Location of the new offence***

7.8 During the course of our deliberations, we considered whether the new offence provisions should be included generally within, or as a separate Part, of an existing criminal law Ordinance such as the Offences against the Person Ordinance (Cap 212), or whether these provisions should comprise a discrete, self-contained Ordinance. We considered the latter

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7 Our suggested draft of the relevant provisions appears at Annex A of this paper.

8 Which was adopted in both the original English Law Commission model and the enacted New Zealand model: see, respectively, Chapter 3 and Chapter 5, above.

9 The term “*neglect*” is used in this sense in our proposed draft section 25A(1)(a), (b) and (c) of the OAPO, set out in Annex A of this paper.

10 See our proposed draft section 25A(1)(d) of the OAPO, set out in Annex A of this paper.

option because we were mindful that if any evidential and procedural changes were to be proposed as part of this recommendation model,<sup>11</sup> these should not be seen as applying outside the bounds of this specific offence to the wider criminal law.

7.9 In the event, we have determined that our reform proposals for Hong Kong should not encompass evidential or procedural reforms such as those adopted in the United Kingdom, therefore the necessity of having the new offence comprised in a separate Ordinance does not arise. Our preference then would be for these new provisions to be located earlier within the Offences against the Person Ordinance (Cap 212) than section 27 (ie, the existing child abuse and neglect offence) in order to indicate the more serious nature of the new offence. (For the purposes of the draft amendment Bill attached at Annex A, we have numbered the section comprising the offence provisions as “*section 25A*”.)

#### **Recommendation 2**

**Subject to the views of the Law Draftsman, we recommend that the new offence of “*Failure to protect a child or vulnerable person where the child’s or vulnerable person’s death or serious harm results from an unlawful act or neglect*” should be comprised in a new section of the Offences against the Person Ordinance (Cap 212)<sup>12</sup> and should be located earlier in the Ordinance than section 27 of that Ordinance, to indicate the more serious nature of the proposed new offence.**

#### ***Impact on section 27, Offences against the Person Ordinance (Cap 212)***

7.10 In arriving at our overall recommendations, one of the issues we have considered is the extent to which the new “*failure to protect*” offence may impact on the provisions of section 27 of the Offences against the Person Ordinance (Cap 212), which is the existing child abuse and neglect offence.<sup>13</sup> One of the matters we considered was whether section 27 should be amended, or repealed and incorporated within the new failure to protect offence.

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11 Such as those adopted in the United Kingdom regarding: (1) the drawing of adverse inferences from the defendant’s silence or failure to give evidence; and (2) the deferring of the prosecution’s obligation to state whether there is a case to answer on murder or manslaughter charges laid along with the ‘causing or allowing the death of a child’ offence until the close of the defence case.

12 Our suggested draft of the relevant provisions appears at Annex A of this paper, as a new draft section 25A in the Offences against the Person Ordinance (Cap 212).

13 The current scope and application of section 27 of the Offences against the Person Ordinance (Cap 212) is discussed in Chapter 2 of this paper.

7.11 Having considered these issues, we have concluded that, despite some possible confusion that may arise for a time between the application of the existing child abuse and neglect offence and the new failure to protect offence, we do not propose to amend or repeal the existing provisions of section 27 of the Offences against the Person Ordinance (Cap 212). We note, however, that there may be a case for the current maximum penalty applicable under section 27(1)(a) of the Ordinance – ie, of 10 years' imprisonment on conviction on indictment – to be reviewed upwards in light of the maximum penalties we recommend later in this chapter for our proposed failure to protect offence (see Recommendations 12 and 13 below).<sup>14</sup> We therefore recommend that the Government undertake such a review of the current maximum penalty under section 27(1)(a).

### **Recommendation 3**

#### **We recommend:**

- (a) subject to (b) below, the retention in its current form of section 27 of the Offences against the Person Ordinance (Cap 212); and**
- (b) that the Government undertake a review of the maximum penalty applicable under section 27(1)(a) of the Offences against the Person Ordinance (Cap 212) with a view to increasing it as appropriate.**

## **Scope of the offence of failure to protect**

7.12 We set out below the various elements of the new offence of failure to protect and to whom it will apply.

### ***Victim is a child or vulnerable person***

7.13 As we have seen earlier in this paper, the overseas models differ on the scope of the victim under the respective offences. The South Australian offence provisions, the enacted UK offence provisions and the New Zealand offence model cover both children and vulnerable adults,<sup>15</sup>

<sup>14</sup> We also wish to draw to the Government's attention the comments of the judge in a recent tragic Hong Kong case discussed in Chapter 2 (see esp para 2.140) in which the judge called for maximum penalty under section 27 of the Offences against the Person Ordinance (Cap 212) to be considered for reform, as the judge considered that an increased penalty was needed to deal with the most serious cases of non-fatal child abuse: see *HKSAR v Wong Wing-man, Mandy alias Wang Xuexin and Ling Yiu-chung, Rocky* [2018] HKCFI 1484; HCCC 76/2017, per Hon Zervos J (as he then was).

<sup>15</sup> See, respectively, section 14(1)(a) and (4) of the CLC Act 1935 (amended 2005) (SA) (set out in Annex B(1) of this paper), section 5(1)(a) and (6) of the DVCV Act 2004 (UK) (set out in

however the English Law Commission's model was proposed to apply to children and young persons only.<sup>16</sup>

7.14 Our own view is that the scope of the provisions should apply as widely as possible to those who may be vulnerable to abuse, so recommend the inclusion of “*vulnerable person*” as well as “*child*” within the scope of “*victim*” under the new failure to protect offence.

#### *Definition of “child”*

7.15 In the South Australian offence model, and in both the English Law Commission and the enacted UK models, “*child*” is determined to be a person under 16 years of age.<sup>17</sup> In contrast, the New Zealand Law Commission proposed raising the age of “*child*” in its proposed package of reforms to “*under 18 years*”<sup>18</sup> and this approach was adopted in the enacted New Zealand offence model.<sup>19</sup> Having reviewed these approaches, we consider that a similar definition of “*child*” to that applicable in South Australia and the UK should apply in the new failure to protect offence for Hong Kong.

#### *Definition of “vulnerable person”*

7.16 Under the South Australian offence model, the enacted UK offence and the enacted New Zealand model (based on the New Zealand Law Commission’s proposed model), “*vulnerable adult*” is included within the definition “*victim*”.<sup>20</sup> We agree that the scope of the offence should be extended beyond the “*child and young person*” indicated in the English Law Commission model.

7.17 We note, however, that the age limit under the term “*vulnerable adult*” would include persons 18 years and over in Hong Kong. We are concerned that this would leave a gap in coverage under the offence for vulnerable 16 and 17 year-olds. We therefore propose to adopt for the Hong Kong failure to protect offence the term “*vulnerable person*” rather than “*vulnerable adult*”, and to include in the definition of “*vulnerable person*” that it means “*a person aged 16 years or above*”.

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Annex C of this paper) and section 195A(1) of the Crimes Act 1961 (NZ) (set out in Annex F of this paper) and clause 195(3)(b) of the New Zealand Law Commission's proposed offences, discussed in the New Zealand Law Commission report (Nov 2009, Rep 111), above, at Appendix B (“*The draft Bill*”), at 73.

16 See clause 1A(1)(a) of the English Law Commission's proposed offence (set out in Annex D of this paper).

17 See, respectively, section 14(4) of the CLC Act 1935 (amended 2005) (SA) (see Annex B(1)), section 5(6) of the DVCV Act 2004 (UK) (see Annex C) and, for the English Law Commission's model, section 1(1) of the Children and Young Persons Act 1933 (UK) (see Annex E) and clauses 1 and 1A(1)(a) of the English Law Commission's proposed offence (see Annex D), where the term used is “*child or young person*”.

18 See New Zealand Law Commission report (Nov 2009, Rep 111), above, at para 5.43.

19 See sections 152(1) and 195(3), Crimes Act 1961 (NZ) (see Annex F).

20 See, respectively, section 14(1)(a) and (4) of the CLC Act 1935 (amended 2005) (SA) (see Annex B(1)), section 5(1)(a) and (6) of the DVCV Act 2004 (UK) (see Annex C) and sections 151, 195 and 195A(1) of the Crimes Act 1961 (NZ) (see Annex F).

7.18 The remainder of the definition of “*vulnerable adult*” under the South Australian offence model, as enacted in 2005, included “... *whose ability to protect himself or herself from an unlawful act is significantly impaired through physical or mental disability,<sup>21</sup> illness or infirmity*”. Under the enacted UK offence, the equivalent wording is “... *whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.*” The New Zealand Law Commission recommended that, for the purposes of its offence model, “*vulnerable adult*” would be defined as “*a person unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person.*”<sup>22</sup> The same definition has been adopted in the New Zealand enacted model.<sup>23</sup>

7.19 After considering these alternative definitions, our preference was for the wording in the South Australian model; however, we were concerned that in its 2005 form it may be too limited to apply in some appropriate situations. We therefore considered adding at the end of the definition the catch-all phrase “*or otherwise*” from the enacted UK offence model. After due deliberation on this, we concluded that, instead of “*or otherwise*”, the wording “*for any reason, including but not limited to physical or mental disability, illness or infirmity*”, should be inserted into the definition of “*vulnerable person*” after “*significantly impaired*”. We note that the scope of this definition of “*vulnerable person*” within our proposed offence would also provide a strong sanction in elder abuse cases against those who fail to protect elderly persons (especially in the absence of a specific offence against elder abuse similar to the child abuse offence comprised in section 27 of the Offences against the Person Ordinance (Cap 212)<sup>24</sup>).

#### **Recommendation 4**

**We recommend that under the new offence of failure to protect:**

- (a) the scope of “*victim*” should include “*a child or a vulnerable person*”;<sup>25</sup>**

21 As we discussed in Chapter 4, the reference in the South Australian offence provision to “*mental disability*” was replaced with the term “*cognitive impairment*” in 2016 by the Statutes Amendment (Attorney-General’s Portfolio) Act 2016.

22 See clause 195(3)(a) of the New Zealand Law Commission’s proposed offences, discussed in New Zealand Law Commission report (Nov 2009, Rep 111), above, at Appendix B (“*The draft Bill*”), at 73.

23 See section 2(1) of the Crimes Act 1961 (NZ), which states that this definition of “*vulnerable adult*” applies for the purposes of sections 151, 195, and 195A of the Act.

24 See earlier discussion in Chapter 2, above, at para 2.3.

25 Our suggested draft of the relevant provision appears at Annex A of this paper as a new draft section 25A(1)(a) in the Offences against the Person Ordinance (Cap 212).

- (b) ***“child” should be defined as “a person under 16 years of age”,<sup>26</sup> and***
- (c) ***“vulnerable person” should be defined as “a person aged 16 years or above whose ability to protect himself or herself from an unlawful act or neglect is significantly impaired for any reason, including but not limited to, physical or mental disability, illness or infirmity”.<sup>27</sup>***

### ***Includes cases of death or serious harm***

7.20 The South Australian offence provisions apply both in fatal cases and in cases where the victim has suffered serious harm.<sup>28</sup> As we saw earlier in this paper, a similar approach was advocated under the English Law Commission's recommended offence model,<sup>29</sup> while the UK model as originally enacted applied only in cases where the victim had died, though this has now been extended to cover cases of *“serious physical harm.”*<sup>30</sup> Like the South Australian and UK models, the New Zealand Law Commission proposed that the offence would cover cases either of death or serious harm. This was followed subsequently in the New Zealand enacted model.<sup>31</sup> We agree with this broader approach, and recommend that the Hong Kong failure to protect offence should apply in both fatal cases and in cases where the victim has suffered serious harm.

### ***Definition of “serious harm”***

7.21 In the 2005 version of the South Australian legislation (ie, prior to its reform in 2018),<sup>32</sup> *“serious harm”* is defined as:

- “(a) harm that endangers, or is likely to endanger, a person's life;  
or***

26 Our suggested draft of the relevant provision appears at Annex A of this paper as a definition in new draft section 25A(6) in the Offences against the Person Ordinance (Cap 212).

27 Our suggested draft of the relevant provision appears at Annex A of this paper as a definition in new draft section 25A(6) in the Offences against the Person Ordinance (Cap 212).

28 Section 14(1)(a) of the CLC Act 1935 (amended 2005) (SA) (see Annex B(1)). As discussed in Chapter 4, this is subject to the amendment made to substitute *“serious harm”* with *“harm”* in the 2018 Amendment Act 2018, which came into force on 6 September 2018.

29 See section 1A(1)(c) and 2(c) of the English Law Commission's proposed offence (see Annex D).

30 See section 5(1)(a) of the DVCA Act 2004 (UK), as amended by the Domestic Violence, Crime and Victims (Amendment) Act 2012, which came into effect on 2 July 2012 (SI 2012/1432) (see Annex C).

31 See sections 195 and 195A, Crimes Act 1961 (NZ) (see Annex F).

32 Section 14(4) of the CLC Act 1935 (amended 2005) (SA) (see Annex B(1)).

- (b) *harm that consists of, or is likely to result in, loss of, or serious and protracted impairment of, a part of the body or a physical or mental function; or*
- (c) *harm that consists of, or is likely to result in, serious disfigurement”.*

(As discussed earlier in Chapter 4, however, the inclusion of the term “*protracted impairment*” in this definition caused unforeseen problems in bringing prosecutions in South Australia, in particular for cases involving non-fatal injuries to young children. This has resulted in very recent major reform of the South Australian offence model in 2018.<sup>33</sup>)

7.22 The English Law Commission proposed that its offence of “*failure to protect a child*”, could be committed if the victim had suffered one of a range of specified offences, including: murder; manslaughter; wounding and causing grievous bodily harm; administering poison; assault occasioning actual bodily harm; rape; indecent assault; or an attempt to commit any of these offences.<sup>34</sup> The enacted UK model, which includes reference to the risk of “*serious physical harm*”, states that “*‘serious’ harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861.*”<sup>35</sup> It therefore includes “*murder and the wide range of offences against the person (grievous bodily harm, assault, sexual offences).*”<sup>36</sup> (We note the common law approach to the concept of “*grievous bodily harm*”, that this should be given its ordinary and natural meaning of “*really serious bodily harm*”, and that “*it is undesirable to attempt any further definition of it.*”<sup>37</sup> Further, it is not necessary that the harm should be either permanent or dangerous, nor is it a precondition “*that the victim should require treatment or that the harm would have lasting consequences.*”<sup>38</sup> In assessing whether particular harm was “*grievous*”, case authority states that account should be taken of the effect on, and the circumstances of, the particular victim.<sup>39</sup> We also note that grievous bodily harm at common law

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33 One of the amendments made under the reform is to substitute “*serious harm*” with “*harm*”: see 2018 Amendment Act (assented to on 2 August 2018 and came into force on 6 September 2018), discussed in Chapter 4.

34 See clause 2(1)(c) and Schedule 1 of the English Law Commission’s proposed offence (see Annex D), discussed in English Law Commission report (Sep 2003, Law Com No 282), above, at para 6.9.

35 See section 5(6), DVCA Act 2004 (UK), set out in Annex C of this paper.

36 R Ward and R Bird, *Domestic Violence, Crime and Victims Act 2004 – a Practitioner’s Guide* (2005, Jordan), at para 3.17.

37 *Archbold Criminal Pleading Evidence and Practice (Archbold UK)* (2019, Sweet & Maxwell), at para 19-258, citing *DPP v Smith* [1961] AC 290 (HL); *R v Cunningham* [1982] AC 566 (HL); *R v Brown (A)* [1994] 1 AC 212 (HL).

38 *Archbold Criminal Pleading Evidence and Practice (Archbold UK)* (2019, Sweet & Maxwell), at para 19-258.

39 See *Archbold UK* (2019), at para 19-258 and *R v Bollom* [2004] 2 Cr App R 6, where the Court of Appeal stated, at para 52, that:

“[Counsel] on behalf of the Appellant ... submits that the injuries should be assessed without reference to the particular victim. He suggests the age, health or any other particular factors relating to the person harmed should be ignored when deciding whether the injuries amounted to really serious harm. We are unable to accept that proposition. To use this case as an example, these injuries on a six-foot adult in the fullness of health would be less serious

can include serious psychiatric injury<sup>40</sup> (though not psychological injury<sup>41</sup>) and that it is “*certainly within the bounds of possibility that psychiatric harm might form part of the course of mistreatment, physical or mental, that leads to death [or serious harm], and is not something which a court should be constrained from considering.*”<sup>42</sup>)

7.23 Under the New Zealand Law Commission’s proposals, the “*risk of serious harm*” from which the defendant may have failed to protect the victim was a “*risk of death, serious injury, or sexual assault.*”<sup>43</sup> Elsewhere in its report, the New Zealand Law Commission stated that the term “*serious injury*” was intended to replace the existing concept of “*grievous bodily harm*” in its wider “*offences against the person*” reforms, while still retaining the same meaning as that concept, of “*really serious harm.*”<sup>44</sup> This approach was not adopted in the enacted New Zealand model, however, where the expression “*grievous bodily harm*” was used. The relevant statutory provision refers to the victim being at risk of “*death, grievous bodily harm, or sexual assault . . .*”<sup>45</sup>

7.24 In considering whether a statutory definition of “*serious harm*” should be included in the Hong Kong provision, we have also taken account of the separate, express reference to “*sexual assault*” under the New Zealand model and have considered whether a similar express reference to harm of this nature should be included in the terms of the Hong Kong offence. In addition, we have given thought to the extent to which psychological or psychiatric harm should be considered as falling within the scope of “*serious harm*”.

7.25 After due deliberation of the advantages and disadvantages of having a statutory definition (ie, on the one hand, providing a pre-defined scope to the concept of “*serious harm*”, while on the other, allowing flexibility for development through the common law), we have concluded that an express definition of serious harm should *not* be included within the Hong Kong offence. (We note that this is especially so in light of the difficulties encountered with the application of the statutory definition in South Australia, which necessitated the very recent reforms there mentioned above and discussed in Chapter 4.) We consider that the issue of what constitutes “*serious harm*” for the purposes of the failure to protect offence should be left to the judge and jury to determine in any particular case.

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*than on, for instance, an elderly or unwell person, on someone who was physically or psychiatrically vulnerable or, as here, on a very young child. In deciding whether injuries are grievous, an assessment has to be made of, amongst other things, the effect of the harm on the particular individual. We have no doubt that in determining the gravity of these injuries, it was necessary to consider them in their real context.”*

40 Same as above, and *R v Ireland; R v Burstow* [1998] AC 147 (HL).

41 *Archbold UK* (2019), at para 19-258, and *R v Dhaliwal* [2006] 2 Cr App R 24 (CA).

42 *R Ward and R Bird*, above, at para 3.17.

43 See clause 195A(1)(a) of the New Zealand Law Commission’s proposed offence (see Annex G).

44 See New Zealand Law Commission report (Nov 2009, Rep 111), above, at paras 2.27 to 2.28.

45 See sections 195A(1)(a), Crimes Act 1961 (NZ) (see Annex F).

## Recommendation 5

**We recommend that the offence of failure to protect should apply in cases involving either the death of the victim, or where the victim has suffered serious harm.<sup>46</sup>**

**We are not in favour of the inclusion of a statutory definition of “*serious harm*” within the terms of the offence.**

## The range of those potentially liable for the offence

### ***Defendant had a “duty of care” to the victim***

7.26 As we discussed in detail in Chapter 4, the basis for liability under the South Australian offence is that the defendant owed “*a duty of care*” to the victim at the time of the unlawful act.<sup>47</sup> We saw that a duty of care is imputed under this legislation where the defendant is a parent<sup>48</sup> or guardian of the victim, or where the defendant “*has assumed responsibility for the victim’s care*”,<sup>49</sup> which must be proven beyond reasonable doubt.

7.27 We agree and recommend that this concept of “*duty of care*” to the victim, as encapsulated in the South Australian legislation, should be one of the bases for liability under the Hong Kong offence.

7.28 We note that under the offence model proposed by the English Law Commission, any person “*who had responsibility for the child at the relevant time*” was also imputed to have a “*statutory responsibility*” to assist the police in the investigation of the offence and the court in proceedings in respect of the offence.<sup>50</sup> As discussed later in this chapter, we do not propose that the defendant’s duty of care under this head would have similar implications for his right of silence in relation to the giving of evidence.

### ***Defendant was a “member of the same household” and had “frequent contact” with the victim***

7.29 During the course of our deliberations, we have also reviewed in detail the basis for liability under the enacted UK offence, of the defendant being “*a member of the same household*” as the victim, and having “*frequent*

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46 Our suggested draft of the relevant provision appears at Annex A of this paper as a new draft section 25A(1)(a) in the Offences against the Person Ordinance (Cap 212).

47 See section 14(1)(b), CLC Act 1935 (amended 2005) (SA) (see Annex B(1)).

48 Even where the parent of the victim is himself a child: see discussion later below.

49 See section 14(3), CLC Act 1935 (amended 2005) (SA) (see Annex B(1)).

50 See clause 4(2) and (4) of the English Law Commission’s proposed offence (see Annex D).

*contact*” with him at the time of the unlawful act.<sup>51</sup> (These concepts are analysed in Chapter 3 of this paper.) We note that this approach was also adopted as the basis for the New Zealand Law Commission’s proposed offence of “*failure to protect a child or vulnerable adult from risk of serious harm*”,<sup>52</sup> with the additional express provision that “*the defendant may be a person who is a staff member of any hospital, institution, or residence where the victim resides.*” This proposed offence was enacted in section 195A of the New Zealand Crimes Act 1961.<sup>53</sup>

7.30 In order to ensure that all appropriate cases will be covered by the Hong Kong offence, we recommend that the enacted UK offence provisions on “*member of the same household*” should be incorporated as an alternative basis for liability under the model for Hong Kong. We do not propose to follow the New Zealand model to its full extent by adding an express reference to “*a staff member of any hospital, institution, or residence where the victim resides*”, but we note that this would not preclude a domestic helper, for example, or a staff member in an elderly care home, from being charged with the offence in appropriate cases.<sup>54</sup>

#### **Recommendation 6**

**We recommend that the concept of “*duty of care*” to the victim used in section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005), and “*member of the same household*” who has “*frequent contact*” with the victim used in section 5 of the Domestic Violence, Crime and Victims Act 2004 in the United Kingdom, should be used as alternative bases for liability under the Hong Kong offence.<sup>55</sup>**

#### ***Minimum age of the defendant***

7.31 As to the age of the defendant, we observed that under the offence model proposed by the English Law Commission, the defendant had to be “*at least 16 years old*” before he could be liable under the offence.<sup>56</sup>

51 See sections 5(1)(a) and 5(4), DVCV Act 2004 (UK) (see Annex C).

52 See clause 195A(2)(a), (4) and (5) of the New Zealand Law Commission's proposed offence (see Annex G), discussed in New Zealand Law Commission report (Nov 2009, Rep 111), above, at paras 5.24, 5.25 and 5.30.

53 See Annex F of this paper.

54 I.e., depending on the circumstances of the case (and provided all the other elements of the offence are established) as owing a duty of care and/or being a member of the same household as the victim.

55 Our suggested draft of the relevant provisions appears at Annex A of this paper as a new draft section 25A(1)(b)(i) and (ii) in the Offences against the Person Ordinance (Cap 212).

56 See clause 2(3)(a), at Annex D of this paper.

(This contrasts with the minimum age of criminal responsibility in the United Kingdom which is 10 years of age.<sup>57</sup>)

7.32 Under the enacted UK provisions, if the defendant was not the mother or father of the victim, he may not be charged with the offence of causing or allowing the death of a child *“if he [the potential defendant] was under the age of 16 at the time of the act that caused V’s death”*.<sup>58</sup> The legislation also provides that someone under 16 years of age, other than the victim’s mother or father, could not reasonably have been expected to take steps to protect the victim from risk of serious harm.<sup>59</sup> The implication is that the victim’s mother or father, even if under 16, may be charged with the offence. This would be the case even in situations where the young parent may have suffered abuse themselves at the hands of other defendant(s).

7.33 In contrast, the New Zealand offence model specifies that *“a person may not be charged with an offence under this section if he or she was under the age of 18 at the time of the act or omission”*.<sup>60</sup>

7.34 As we saw in Chapter 4, the South Australian legislation contains no express provision stipulating the minimum age of defendants under the offence of criminal neglect (though this would still be subject to the minimum age of criminal responsibility in South Australia, which is 10 years of age).<sup>61</sup> The relevant parliamentary debate, which explains the intent of the provisions in this respect, states:

*“It does not matter that the parent is a child. Parents are not absolved of responsibility for the care of their children just because they are children themselves. Even if a guardian is appointed, we still expect a child-parent to assume the day-to-day care and protection of the child. Equally, it does not matter that the person who has assumed responsibility for the care of a child or a vulnerable adult is a child. In either case, establishing a duty of care to the victim is only the first step in establishing liability, and, as will be explained, this offence has other elements that allow a court to recognise the difference in awareness and power between children and adults.”<sup>62</sup> [Emphasis added.]*

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57 Apart from in Scotland, where the relevant age is eight years. See, respectively, section 50, Children and Young Persons Act 1933 (UK) and section 41, Criminal Procedure (Scotland) Act 1995. It should also be noted that the former rebuttable presumption at common law, that children aged between 10 and 14 years were incapable of committing a criminal offence (*“doli incapax”*), was abolished in 1998 in England and Wales: see section 34, Crime and Disorder Act 1998 (UK).

58 See section 5(3)(a), DVCV Act 2004 (UK), set out in Annex C of this paper.

59 See subsections 5(3)(b) and 5(1)(d)(ii), DVCV Act 2004 (UK), set out in Annex C of this paper.

60 See section 195A(3) of the Crimes Act 1961 (NZ) (set out in Annex F of this paper) which is based on clause 195A(3) of the New Zealand Law Commission’s proposed offence (see Annex G) and New Zealand Law Commission report (Nov 2009, Rep 111), above, at para 5.30.

61 See section 5, Young Offenders Act 1993 (SA).

62 See South Australian Hansard debates, House of Assembly, 12 Oct 2004, at 334, *per* The Hon M J Atkinson (Attorney General).

Referring to possible defences under the provisions, the parliamentary debate notes:

*“Another defence might be that the accused did take steps to protect the victim that were reasonable in the circumstances. A defence like this for a child-accused may be that although the steps taken by the accused might not seem appropriate by adult standards, they are perfectly reasonable for a child of the accused’s age and circumstances.*

*Another defence might be that it would have been unreasonable to expect the accused to take any steps to protect the victim. This might be because the accused was under duress, for example, in circumstances of extreme domestic violence. It might be because the accused is a child and the other suspect an adult who exerted authority over that child.”<sup>63</sup>*

7.35 Having considered these issues, our preference is for the simpler South Australian model, where no minimum age for the defendant is stipulated, but where defences are available to young defendants in appropriate cases. (This would be subject, of course, to the law on the minimum age of criminal responsibility in Hong Kong, which is specified to be 10 years of age.<sup>64</sup>)

### **Recommendation 7**

**We recommend that no minimum age for the defendant should be stipulated in the Hong Kong offence, in line with the approach in section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005).<sup>65</sup>**

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63 Same as above.

64 See section 3, Juvenile Offenders Ordinance (Cap 226). This means that a child under the age of 10 is presumed to be incapable of committing a crime (*“doli incapax”*). This presumption is conclusive for a child under 10. For a child who is 10 years or over but under 14, this presumption may be rebutted by the prosecution on proof *“beyond reasonable doubt not only that [the child] caused an actus reus with mens rea but also he knew that the particular act was not merely naughty or mischievous, but seriously wrong”* : see Law Reform Commission of Hong Kong, *The Age of Criminal Responsibility in Hong Kong* (Report, May 2000), at 6 to 7.

The LRC report’s recommendations, to increase the minimum age of criminal responsibility from (then) seven to 10 years while retaining the common law presumption of *doli incapax* for children aged 10 to under 14 years, were implemented in section 2 of the Juvenile Offenders (Amendment) Ordinance 2003 (Ord No 6 of 2003).

65 Our suggested draft offence appears at Annex A of this paper as a new draft section 25A in the Offences against the Person Ordinance (Cap 212).

## The actions which constitute the offence

### *An unlawful act or neglect*

7.36 One of the first elements of the offence of criminal neglect under section 14 of the South Australian provisions (ie, 2005 version) is that the victim dies or suffers serious harm “*as a result of an unlawful act*”.<sup>66</sup> The term “*act*” is defined as including an omission and a course of conduct, and an act is “*unlawful*” if it “*constitutes an offence*” or “*would constitute an offence if committed by an adult of full legal capacity*”.<sup>67</sup>

7.37 This is similar to the enacted UK model to the extent that it defines “*unlawful act*” in broad terms, as an act that “*constitutes an offence*”<sup>68</sup> or “*would constitute an offence but for being the act of*” a person under the age of 10, or a person entitled to rely on the defence of insanity.<sup>69</sup> It differs markedly from the approach taken by the English Law Commission, however, which specified in its draft legislation a list of offences which may have been committed against the victim by the defendant or others on which the Commission's proposed offences of “*cruelty contributing to death*” or “*failure to protect a child*” might be based.<sup>70</sup>

7.38 The New Zealand Law Commission's proposals referred to the defendant knowing that the victim was at risk of “*death, serious injury, or sexual assault as the result of an unlawful act by another person or an omission by another person to perform a statutory duty*”.<sup>71</sup> The New Zealand offence subsequently enacted refers to the defendant knowing that the victim is at risk “*of death, grievous bodily harm, or sexual assault*” as the result of “*an unlawful act of another person*” or “*an omission by another person to discharge or perform a legal duty if, in the circumstances, that omission is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies*.”<sup>72</sup>

7.39 Having reviewed these differing approaches, we have concluded that in principle, the simpler South Australian legislative provisions (in their original 2005 form) are to be preferred. We would amend these provisions in

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66 Section 14(1)(a), CLC Act 1935 (amended 2005) (SA), set out in Annex B(1) of this paper. (It is noted though that in South Australia this is now subject to the amendment made to delete the term “*unlawful*” in the 2018 Amendment Act assented to on 2 August 2018 and came into force on 6 September 2018. See discussion in Chapter 4.)

67 Section 14(4), CLC Act 1935 (amended 2005) (SA), set out in Annex B(1) of this paper. This is now subject to the amendment made to delete “*unlawful*” in the 2018 Amendment Act. See discussion in Chapter 4.

68 See section 5(5)(a), DVCV Act 2004 (UK), set out in Annex C of this paper.

69 Though this latter part of the definition does not apply in the case of an act of the defendant – see section 5(5)(b), DVCV Act 2004 (UK), set out in Annex C of this paper.

70 See clauses 1A, 2(1)(c) and Schedule 1 of the draft Offences Against Children Bill, in the English Law Commission report (Sep 2003, Law Com No 282), above, at Appendix, set out in Annex D to this paper.

71 See clause 195A(1)(a) of the New Zealand Law Commission's proposed offence (see Annex G).

72 See section 195A(1)(a) of the Crimes Act 1961 (NZ) set out in Annex F of this paper.

two respects, however. First, we consider that the words “*or neglect*” should be added immediately after the reference to “*unlawful act*” in the proposed Hong Kong legislation. This is to ensure that the offence would extend to apply in cases where the serious harm to the victim was caused by neglect, whether or not that neglect was “*unlawful*” by virtue of statutory duties of care imposed, such as in respect of children under section 27 of the Offences against the Person Ordinance (Cap 212). In this way, the offence may cover, for example, a case of neglect of a vulnerable person who is elderly where serious harm has resulted, even though there is no equivalent to section 27 in respect of the elderly.

7.40 Secondly, in the definition of an “*unlawful*” act, we would amend the reference to “*if committed by an adult of full legal capacity*” to “*if committed by a person of full legal capacity*”, to cover the situation of a child of 10 years of age (the minimum age of criminal responsibility) or over, but under 18 years of age, committing the relevant unlawful act.

#### **Recommendation 8**

**We recommend that the concept and definitions relating to “*unlawful act*” used in section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005)<sup>73</sup> should be adopted in the Hong Kong offence, subject to the following amendments:**

- (a) the addition of the words “*or neglect*” after “*unlawful act*” in the first sub-section of the offence provision;<sup>74</sup>**
- (b) the replacement of the phrase “*an adult of full legal capacity*” with “*a person of full legal capacity*” in the definition of an “*unlawful act*”.<sup>75</sup>**

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73 As in sections 14(1)(a) and (4), CLC Act 1935 (amended 2005) (SA), set out in Annex B(1) of this paper. We are aware of the amendments made by the 2018 Amendment Act in South Australia to, *inter alia*, delete the term “*unlawful*” in section 14. We note, however, that these reforms were necessitated in part because of the absence of a general child neglect offence in South Australia akin to Hong Kong’s section 27 of the Offences against the Person Ordinance (Cap 212), (discussed above and in Chapter 2), and so do not consider that a similar reform to delete the term “*unlawful*” would be required for Hong Kong. For details of the 2018 Amendment Act, see discussion in Chapter 4.

74 See our suggested draft of the relevant provision at Annex A of this paper as a new draft section 25A(1)(a) in the Offences against the Person Ordinance (Cap.212).

75 Our suggested draft of the relevant provisions appears at Annex A of this paper as a definition in new draft section 25A(6) in the Offences against the Person Ordinance (Cap 212).

## ***Defendant's awareness of risk of serious harm***

7.41 Section 14(1)(c) of the South Australian model provides that “*the defendant was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act.*”<sup>76</sup>

7.42 Similar provisions appear in the UK enacted model and the English Law Commission's proposed model. The UK enacted model provides that the defendant was, or ought to have been, aware of the risk of serious physical harm being caused by the unlawful act, and the act occurred in circumstances of the kind that the defendant foresaw or ought to have foreseen.<sup>77</sup> The English Law Commission's proposed offence states that the defendant “*is aware or ought to be aware that there is a real risk that an offence ... might be committed [and] the offence is committed in circumstances of the kind that [the defendant] anticipated or ought to have anticipated.*”<sup>78</sup>

7.43 As noted earlier, the relevant wording of the New Zealand enacted offence (based on the New Zealand Law Commission's proposed model<sup>79</sup>) states that the defendant “*knows*” that the victim is at risk of death, grievous bodily harm, or sexual assault as the result of an unlawful act, or omission to discharge a legal duty, by another person.<sup>80</sup> This is significant, as unlike the other offence models, this implies that the mental element which must be proven under the New Zealand offence (for both manslaughter by unlawful act and gross negligence manslaughter) is a subjective one (ie, the prosecution must prove in every case that the defendant was *actually* aware of the risk, not merely that a reasonable person would consider that he *ought* to have been aware<sup>81</sup>).

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76 This is in line with the common law test for criminal negligence for manslaughter by an unlawful and dangerous act, as noted in the Hansard debates on the South Australian legislation: see South Australian Hansard debates, House of Assembly, 12 Oct 2004, at 334, *per* The Hon M J Atkinson (Attorney General). Though see our comments in footnote 73 above on the reform of section 14 to delete the term “*unlawful*” – which we do not consider to be appropriate for the proposed Hong Kong offence.

77 Section 5(1)(d)(i) and (iii), DVCV Act 2004 (UK) (see Annex C). See also *R v Khan and Others* [2009] 4 All ER 544 (CA), at paras 38 and 39, discussed in Chapter 3.

78 See clause 2(1)(a) and (d) of the draft Offences Against Children Bill in the English Law Commission report (Sep 2003, Law Com No 282), above, at Appendix, set out in Annex D to this paper.

79 See clause 195A(1)(a) of the New Zealand Law Commission's proposed offence (see Annex G).

80 See section 195A(1)(a) of the Crimes Act 1961 (NZ) set out in Annex F of this paper.

81 This was the common law position in Hong Kong with respect to manslaughter by gross negligence where a duty of care is owed to the victim before the Court of Appeal decision in the case of *HKSAR v Lai Chun Ho and Another* (CAQL 1/2018)(16 Nov 2018), [2018] HKCA 858. The Court of Appeal held that “*the breach of the duty by the defendant being capable of being characterised as gross negligence and therefore a crime’ is to be proved on the objective reasonable man test only, in accordance with the terms of [that] judgement. The prosecution is not required to prove that the defendant was subjectively aware of the obvious and serious risk of death to the deceased*” (at para 67). (See also the discussion under ‘Manslaughter’, above, in Chapter 2.)

7.44 Under the South Australian provisions, the prosecution must prove that the act that killed or harmed the victim was one that the defendant was aware, or should have been aware, posed an objective risk of serious harm to the victim.<sup>82</sup> The court need not find that the accused foresaw the *particular* unlawful act that killed or harmed the victim, as the charge of criminal neglect will apply even though the death or serious harm “*was caused by an unlawful act of a different kind from any that had occurred before*” of which the defendant should have been aware.<sup>83</sup>

7.45 Having reviewed the different offence models, we consider that the formulation set out in the South Australian offence model is to be preferred, although we do not think that the word “*appreciable*” needs to be included in the provision to qualify the word “*risk*”. (This is because the fact that the risk should be “*appreciable*” is already implied by the earlier words in the provision “*the defendant was, or ought to have been, aware*” that there was a risk.)

7.46 On the issue of the appreciability of the risk, it is important to note also that the more an accused person’s ability to appreciate the risk is diminished by, for example, disability or youth, the less likely it is that he or she will be convicted of the offence.<sup>84</sup>

#### **Recommendation 9**

##### **We recommend:**

- (a) that section 14(1)(c) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005)<sup>85</sup> should be adopted in the Hong Kong offence, subject to the substitution of the words “*a risk*” for “*an appreciable risk*” in the provision; and**
- (b) in line with Recommendation 8 above, that the words “*or neglect*” should be added after “*unlawful act*” in sub-section (1)(c) of the new provision.<sup>86</sup>**

82 South Australian Hansard debates, House of Assembly, 12 Oct 2004, at 334, *per* The Hon M J Atkinson (Attorney General). Though see our comments in para 7.21 above on the reform of section 14 to delete the term “*serious*” from “*serious harm*” – which we do not consider to be appropriate for the proposed Hong Kong offence. See discussion in Chapter 4.

83 Same as above.

84 Same as above.

85 Set out in Annex B(1) of this paper.

86 Our suggested draft of the relevant provision appears at Annex A of this paper as a new draft section 25A(1)(c) in the Offences against the Person Ordinance (Cap 212).

***Defendant's failure to take steps was so serious that a criminal penalty is warranted***

7.47 A further element of the South Australian offence, which is inextricably linked with the element discussed above, is that set out in section 14(1)(d). This states that *“the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant’s failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.”*<sup>87</sup>

7.48 This aspect of the offence applies to those who may have stood by and allowed the harm to be inflicted on the victim. It is based on the assumption that in the circumstances, the defendant could have and should have tried to protect the victim from the risk of serious harm that the defendant should have been aware of. It is not an excuse for the defendant to argue that he did not realise that by intervening he could have averted the danger. *“A person can fall short of the standard of care required by the criminal law by not perceiving the need to take action to avert danger to others.”*<sup>88</sup> Accordingly, unless there is credible evidence to contrary, the court may infer the relevant *“failure to take steps”* on the part of the defendant in a situation where a reasonable person would anticipate that, without intervention, the victim was at risk of harm.<sup>89</sup>

7.49 The equivalent provision under the UK enacted offence is that, *“D [the defendant] failed to take such steps as he could reasonably have been expected to take to protect the victim from the risk [of serious physical harm]”*.<sup>90</sup> Under the English Law Commission’s proposed offence, the relevant provision states, *“R [the defendant] fails to take such steps as it would be reasonable to expect R to take to prevent the commission of the offence”*.<sup>91</sup> In both the proposed and enacted New Zealand offence models, the formulation is that the defendant *“fails to take reasonable steps to protect the victim from that risk [of death, serious harm or sexual assault]”*.<sup>92</sup>

7.50 Regarding what must be proved, it has been observed that *“the jury will need to be satisfied that there was a grossly negligent failure to take reasonable steps to protect the victim from harm. What constitutes ‘reasonable steps’ will be a matter for the jury to determine, in the circumstances of each case.”*<sup>93</sup> (We note that steps such as obtaining appropriate medical attention for the victim and/ or telephoning the police to alert them of potential risk of harm that might be inflicted on the victim have

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87 As noted in South Australian Hansard debates, House of Assembly, 12 Oct 2004, at 334, *per* The Hon M J Atkinson (Attorney General).

88 Same as above.

89 Same as above.

90 Section 5(1)(d)(ii) and (iii), DVCV Act 2004 (UK) (see Annex C).

91 See clause 2(1)(b) of the draft Offences Against Children Bill, in the English Law Commission report (Sep 2003, Law Com No 282), above, at Appendix, set out in Annex D to this paper.

92 See section 195A(1)(b) of the Crimes Act 1961 (NZ) (see Annex F) and clause 195A(1)(b) of the New Zealand Law Commission’s proposed offence (see Annex G).

93 New Zealand Law Commission report (Nov 2009, Rep 111), above, at para 5.31,

been held overseas to be reasonable steps in the circumstances of some cases.<sup>94</sup>) In terms of a possible defence under this head, a defendant might argue that his failure to take steps, or the steps that he did take, could be considered reasonable in the circumstances. This may be applicable, for example, where the defendant was also being subjected to extreme domestic violence, or where the defendant was a child and the other suspect was an adult who exerted authority over the defendant.<sup>95</sup>

7.51 We propose that a provision incorporating this element of the failure to protect offence should be introduced in Hong Kong. Our preference is for the formulation set out in the South Australian model. One minor change we would make is to add a qualifying word “*such*” before “*harm*” in the provision, to relate this back to the “*serious harm*” which would be caused to the victim under the preceding element.

#### **Recommendation 10**

**We recommend that:**

- (a) section 14(1)(d) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005)<sup>96</sup> should be adopted in the Hong Kong offence; and**
- (b) the word “*such*” should be added before “*harm*” in the new provision.<sup>97</sup>**

## **Evidential matters**

### ***Reasonable doubt as to who committed the unlawful act or neglect***

7.52 We now consider what might be viewed as the ‘operative’ provision of the offence model, to provide the basis for conviction of those charged with the offence of failure to protect, whether or not they have committed the “*unlawful act or neglect*”.<sup>98</sup>

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94 See in the UK, *R v Khan and Others* [2009] 4 All ER 544 (CA), at paras 34 and 35 (discussed in Chapter 3), and in South Australia, see *R v N-T And C* [2013] SASC 200, at para 31 (discussed in Appendix III).

95 See South Australian Hansard debates, House of Assembly, 12 Oct 2004, at 334, *per* The Hon M J Atkinson (Attorney General). Even if these factors may not lead to a full defence against the charge of criminal neglect, it is likely that they would provide mitigation in sentencing for the offence. See also *R v Khan and Others* [2009] 4 All ER 544 (CA), at paras 33 to 35 (discussed in Chapter 3).

96 Set out in Annex B(1) of this paper.

97 Our suggested draft of the relevant provision appears at Annex A of this paper as a new draft section 25A(1)(d) in the Offences against the Person Ordinance (Cap 212).

98 It should be noted that both the model proposed by the New Zealand Law Commission and the model subsequently enacted, adopted a different approach to the UK and South Australian

7.53 As we have seen in the previous discussions, section 5(1)(d) of the UK enacted offence states:

- “(d) *either D was the person whose act caused the death or serious physical harm or—*
- (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),*
  - (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and*
  - (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.”*

Subsection (2) then goes on to state:

- “(2) *The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.”*

7.54 Section 14(2) of the South Australian legislation provides:

“(2) *If a jury considering a charge of criminal neglect against a defendant finds that—*

- (a) there is reasonable doubt as to the identity of the person who committed the unlawful act that caused the victim's death or serious harm; but*
- (b) the unlawful act can only have been the act of the defendant or some other person who, on the evidence, may have committed the unlawful act,*

*the jury may find the defendant guilty of the charge of criminal neglect even though of the opinion that the unlawful act may have been the act of the defendant.”*

7.55 During the passage of the South Australian legislation through parliament, this provision was described by some as “a *fairly confusing clause*.”<sup>99</sup> A key to understanding the provision is to note that when a person is charged with criminal neglect, “*the assumption is that the unlawful act that*

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models discussed in this chapter, by providing two different offences in sections 195 and 195A of the Crimes Act 1961 (NZ). Section 195 is directed at a person who has committed an unlawful act or failed to discharge a legal duty which is “*likely to cause unnecessary suffering, injury, adverse effects to health, or any mental disorder or disability*” to the victim. In contrast, section 195A is intended to apply to bystanders who do not intervene to protect a victim who is “*at risk of death, grievous bodily harm or sexual assault*.” See Annexes F and G and the detailed discussion of these offences in Chapter 5 of this paper.

99 See South Australian Hansard debates, House of Assembly, 9 Dec 2004, at 1305, *per* Mrs Redmond.

*killed or harmed the victim was committed by someone else.*<sup>100</sup> The relevant parliamentary debate sets out the intent behind the provision in more detail:

*“In cases where it is impossible to tell which of two or more people killed or harmed the victim, but it is clear that one of them did, it would be possible for both people to escape conviction for criminal neglect by repudiating that assumption. The accused could simply point to the reasonable possibility that it was he or she, and not someone else, who killed or harmed the victim. To prevent this perverse outcome, the Bill makes it clear that a person accused of criminal neglect cannot escape conviction by saying there was a reasonable possibility that he or she was the author of the unlawful act.”*<sup>101</sup>

#### *Suggested modifications in the provisions of the offence for Hong Kong*

7.56 We endorse the basic approach of the legislation and recommend the introduction of a provision with similar underlying intent for Hong Kong. However, we have found the wording of section 14(2) of the South Australian offence model, particularly its last few lines, to be obscure and possibly confusing. In the course of our deliberations, we have put forward and considered a number of closely based variations on the provision, but have concluded that a more simple and straight-forward version is required. This is because, in our view, the defendant should be 'caught' under the offence of failure to protect on the basis of the prosecution establishing the key elements of duty of care, appreciable risk and failure to take steps to prevent serious harm to the victim. It would be not only a *“perverse outcome”*, but also an unusual argument for the defence to put forward in the first place that the defendant could not be liable for having failed to take steps to protect the victim because he actually committed *“the unlawful act”* (murder, for example) *“or neglect”* itself. Therefore, our preferred formulation, in place of the wording of section 14(2) of the South Australian offence model, is set out below.

*“In proceedings for an offence under subsection (1), it is not necessary for the prosecution to prove who did the unlawful act or neglect mentioned in subsection (1)(a).”*

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100 Same as above, 30 June 2004, at 2625, *per* The Hon M J Atkinson (Attorney General).

101 Same as above, 30 June 2004, at 2625 to 2626, *per* The Hon M J Atkinson (Attorney General).

## Recommendation 11

**We recommend that a provision along the following lines should be adopted in the Hong Kong offence<sup>102</sup> in place of the wording set out in section 14(2) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005):<sup>103</sup> “*In proceedings for an offence under subsection (1), it is not necessary for the prosecution to prove who did the unlawful act or neglect mentioned in subsection (1)(a).*”**

### ***Human rights issues***

7.57 As we saw in Chapter 3 of this paper, serious reservations have been expressed from a human rights perspective about both the English Law Commission's proposed model for a failure to protect offence and the enacted United Kingdom offence of causing or allowing the death of a child.

7.58 As was noted in Chapter 3, under the English Law Commission's proposed offence, any person “*who had responsibility for the child at the relevant time*” was considered to have a “*statutory responsibility*” to assist both the police and the court to give an account for the death or injury of the child, “*by providing as much information as the person is able to give about whether and, if so, by whom and in what circumstances the offence was committed.*”<sup>104</sup> While this approach was not adopted in the enacted UK offence, important changes were introduced in section 6 of the Domestic Violence, Crime and Victim's Act 2004 to some of the rules of evidence in cases where charges of murder or manslaughter were tried along with the enacted section 5 offence of “*causing or allowing the death of a child*”.

7.59 As we saw in Chapter 3, the first of these changes was to allow the court to draw adverse inferences against the defendant where he fails to give evidence or refuses to answer questions. The second change was that where a “*case to answer*” is established on the charge of causing or allowing the death of a child, the prosecution can defer answering whether there is a case to answer on the charge of murder or manslaughter until the conclusion of the defence case. The result is that the court will have the opportunity to hear all the evidence before being required to make a decision as to whether the charge of murder or manslaughter should be left to the jury. As has been noted, the intention of these provisions is to “*flush out the defendant in a ‘who did it?’ type of case.*”<sup>105</sup>

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102 Our suggested draft of the relevant provision appears at Annex A of this paper as a new draft section 25A(4) in the Offences against the Person Ordinance (Cap 212).

103 Set out in Annex B(1) of this paper.

104 See clause 4(2) and (4) of the English Law Commission's proposed offence (see Annex D).

105 R Ward, “Protecting the Victims of Crime – Part 2” (2005) *New Law Journal* 1218, at 1220.

7.60 However, these procedural and evidential innovations of the enacted offence in particular have been alleged to “*undermine the presumption of innocence to an unacceptable degree.*”<sup>106</sup> It was largely for this reason that the Sub-committee has decided to adopt the South Australian offence provisions, rather than either of the UK models, as the offence model for Hong Kong. (We note that the New Zealand offence models we have reviewed also contain no such procedural innovations.<sup>107</sup>)

7.61 Though the South Australian offence provisions lack the evidential and procedural reforms of the enacted UK offence, similar objections were aired, however, during the passage of the South Australian legislation, which was alleged to be “*a radical departure from existing principles of our criminal justice system*” in that it “*dissolves the principle that the identity of an accused must be ascertained beyond reasonable doubt before a conviction is possible.*”<sup>108</sup> Concerns were expressed that the new offence could encourage the criminalisation of innocent people because “*persons potentially liable will seek to cast blame upon each other, leaving both liable to conviction for criminal neglect and potentially resulting in innocent party suffering conviction on that charge while the perpetrator avoids conviction for the substantive offence.*”<sup>109</sup> Views were also expressed that the introduction of the new offence could lead to “*prosecutors taking, as it were, the easy option; that is, not actually trying to go full throttle on finding the actual perpetrator and prosecuting the real offence but, rather, taking the other option of laying the charge of criminal neglect against both parties.*”<sup>110</sup>

7.62 In proposing legislation for Hong Kong based on the South Australian offence model, we have carefully considered the human rights issues which arise in this area and endorse the observations made by the Attorney General for South Australia during the passage of their Bill. The Attorney General said that under the new offence, carers who failed to take reasonable steps available to them in the circumstances to protect a child or vulnerable adult in their care from harm were, in certain circumstances, not innocent and could be guilty of the offence of criminal neglect.<sup>111</sup> If each of two suspects owed a duty of care to the victim and each could be shown to have failed to take steps to protect the victim (when he or she should have

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106 See, for example, the submission of JUSTICE, “Domestic Violence, Crime and Victims Bill - Briefing for Grand Committee Stage in the House of Lords” (Jan 2004), at para 13.

See also the commentary in “The Domestic Violence, Crime and Victims Act 2004”, *Criminal Law Review* (Feb 2005) 83, at 84.

107 As observed earlier, the New Zealand model adopted a different approach to the UK and South Australian models by providing two different offences, one directed at a person who has committed an unlawful act or failed to discharge a legal duty which is “*likely to cause unnecessary suffering, injury, adverse effects to health, or any mental disorder or disability*” to the victim (section 195), and the other (section 195A) directed at bystanders who do not intervene to protect a victim who is “*at risk of death, grievous bodily harm or sexual assault.*” See Annexes F and G and the detailed discussion of these offences in Chapter 5 of this paper.

108 South Australian Hansard debates, House of Assembly, 9 Dec 2004, at 1306, *per* Mr Hanna.

109 Same as above, 8 Dec 2004, at 1257, *per* Mrs Redmond (referring to comments from the South Australia Law Society’s Criminal Law Committee).

110 Same as above.

111 South Australian Hansard debates, House of Assembly, 9 Dec 2004, at 1308, *per* The Hon M J Atkinson (Attorney General).

been aware that the victim was at an appreciable risk of harm), then each one is the perpetrator of the offence of criminal neglect.<sup>112</sup>

*“Of course, one of them must have done the unlawful act that killed or harmed the victim, but this law is not concerned with that. It allows each of these people to be convicted of a new offence that is different from the offence of committing the unlawful act itself. No injustice is done to the suspect who did not commit the unlawful act if the elements of the offence of criminal neglect are established beyond reasonable doubt against him or her. No injustice is done to the person who did commit the unlawful act. There is no criminalisation of innocent people; there is no shifting of any onus of proof; and there is no diminution of a right to silence.”<sup>113</sup>*

7.63 The Attorney General had noted earlier in the debates on the passage of the Bill that although the Bill did not change the current law about the right to silence, *“it was important to recognise that the right to silence does not affect the principle that where the relevant facts are peculiarly within the knowledge of the accused, his or her failure to give evidence enables an inference of guilt to be more readily drawn.”<sup>114</sup>* It was also observed that a court may take an accused's failure to give evidence into account when evaluating the evidence against him or her where there are matters that explain or contradict that evidence and which are within his or her sole knowledge and unavailable from any other source.<sup>115</sup> It was, however, acknowledged that *“the incentive to tell what happened is crucial to this new offence. The reason joint caregivers are often acquitted for homicide is not that neither of them killed the victim, but because they are the only ones who know what happened and they choose not to tell.”<sup>116</sup>* It was also acknowledged that the incentive may be as much to tell a lie as to tell the truth, particularly when the relationship between the suspects is fragile or transitory.<sup>117</sup>

7.64 This highlighted the role of the prosecution under the South Australian offence. On this, the Attorney General stated:

*“The Bill does not attempt to alleviate the difficult task prosecutors have in deciding which version of events is more credible or in deciding whether to give immunity from prosecution. It aims to give prosecutors an alternative lesser charge in cases in which, otherwise, the only possible charge is murder or manslaughter or an offence of causing serious harm, and, in so doing, to encourage suspects to break their*

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112 Same as above.

113 Same as above.

114 South Australian Hansard debates, House of Assembly, 12 Oct 2004, at 335, *per* The Hon M J Atkinson (Attorney General).

115 Same as above.

116 Same as above.

117 Same as above.

*silence. That the silence may be a guilty silence is something prosecutors must always be alert to, and this law won't change that.*<sup>118</sup>

7.65 For these reasons, we are satisfied that the reform model we recommend in this paper provides adequate protections for the accused and does not breach fundamental tenets of the criminal justice system such as the accused's right of silence.

## Maximum sentence for the offence

7.66 In Hong Kong, the current penalty for murder is a mandatory life sentence<sup>119</sup> and for manslaughter, a maximum penalty of life imprisonment.<sup>120</sup> Similar maximum penalties for these offences apply in the United Kingdom, South Australia and New Zealand.<sup>121</sup>

7.67 For cruelty and neglect of a child under section 27 of the Offences against the Person Ordinance (Cap 212), the maximum penalties are 10 years' imprisonment for offences on indictment at the serious end<sup>122</sup> and three years' imprisonment if the charge laid is for a less serious, summary offence. For "*shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm*" to a person under section 17 of the Offences against the Person Ordinance (Cap 212), the maximum penalty in Hong Kong is imprisonment for life. For the 'lesser' wounding offence under section 19 of the Ordinance, the maximum penalty is three years' imprisonment.

7.68 Under the English Law Commission's draft Bill, the maximum penalty proposed where the defendant committed the "*cruelty contributing to death*" offence was 14 years' imprisonment, and seven years' imprisonment where the lesser offence of failing to protect the child was committed.<sup>123</sup> Under the enacted UK offence, the maximum penalty stipulated is 14 years for causing or allowing the victim's death, and 10 years for causing or allowing

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118 Same as above.

119 See section 2, Offences against the Person Ordinance (Cap 212), though a discretion is available to the court if the defendant is under 18 years of age.

120 See section 7, Offences against the Person Ordinance (Cap 212).

121 See: for the UK, sections 4 and 5 of the Offences against the Person Act 1861; for South Australia, sections 11 and 13(1) of the Criminal Law Consolidation Act 1935; and for New Zealand, section 102 of the Sentencing Act 2002 (for murder, which provides that a sentence of life imprisonment "*must be*" imposed unless this would be "*manifestly unjust*") and section 177(1), Crimes Act 1961 (for manslaughter).

122 As noted previously in the chapter, we wish to draw to the Government's attention the comments of the judge in a recent tragic Hong Kong case discussed in Chapter 2 (see esp para 2.140) in which the judge called for maximum penalty under section 27 of the Offences against the Person Ordinance (Cap 212) to be considered for reform, as the judge considered that an increased penalty was needed to deal with the most serious cases of non-fatal child abuse: see *HKSAR v Wong Wing-man, Mandy alias Wang Xuexin and Ling Yiu-chung, Rocky* [2018] HKCFI 1484; HCCC 76/2017, per Hon Zervos J (as he then was).

123 See clauses 1A(2) and 2(2), respectively, of the English Law Commission's proposed provisions, set out in Annex D of this paper.

serious physical harm.<sup>124</sup> For the New Zealand offence model, the New Zealand Law Commission proposed a maximum penalty of 10 years' imprisonment for either the 'perpetrator' or the 'bystander' offences and this was adopted in the subsequent enacted offences.<sup>125</sup> In South Australia, the maximum penalties for the criminal neglect offence were originally: 15 years' imprisonment where the victim has died and 5 years' imprisonment where the victim has suffered serious harm.<sup>126</sup> These penalties in South Australia have been increased to life imprisonment and 15 years' imprisonment, respectively, from 6 September 2018.<sup>127</sup>

### ***Cases involving the death of the victim***

7.69 In the course of considering this issue of the maximum penalties to be imposed, we carefully considered a number of alternatives. In cases involving the death of the victim, we concluded that the maximum penalty should be 20 years' imprisonment, to clearly reflect the seriousness of this offence.

#### **Recommendation 12**

**We recommend that where the victim dies as a result of the unlawful act or neglect, the maximum penalty for the offence should be 20 years' imprisonment.**<sup>128</sup>

### ***Cases involving the serious harm of the victim***

7.70 In cases involving the serious harm, but not the death of the victim, we concluded that the maximum penalty should be 15 years' imprisonment, to clearly reflect the seriousness of this offence. (We note that in some cases the injuries inflicted, particularly on very young and therefore extremely vulnerable children, may be so severe as to leave the child in a severely brain-damaged or even permanent vegetative state. For this reason, we have proposed a high maximum penalty even where the injuries to the

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124 See section 5(7) and (8) of the DVCV Act 2004 (UK), at Annex C of this paper.

125 See, respectively, sections 195 and 195A of the Crimes Act 1961 (NZ). The section 195 offence is directed at a person who has committed an unlawful act or failed to discharge a legal duty which is "likely to cause unnecessary suffering, injury, adverse effects to health, or any mental disorder or disability" to the victim. In contrast, section 195A is intended to apply to bystanders who do not intervene to protect a victim who is "at risk of death, grievous bodily harm or sexual assault." See Annexes F and G and the detailed discussion of these offences in Chapter 5 of this paper.

126 See sections 14(1), CLC Act 1935 (amended 2005) (SA), set out in Annex B(1) of this paper.

127 See discussion of the 2018 Amendment Act, assented to on 2 August 2018 and came into force on 6 September 2018, discussed in Chapter 4.

128 Our suggested draft of the relevant provisions appears at Annex A of this paper as a new draft section 25A(5)(a) in the Offences against the Person Ordinance (Cap 212).

victim are not fatal, so that in extreme cases the court may impose a sentence fully reflecting the gravity of the offence.)

### **Recommendation 13**

**We recommend that where the victim suffers serious harm as a result of the unlawful act or neglect, the maximum penalty for the offence should be 15 years' imprisonment.<sup>129</sup>**

## **Other procedural matters**

### ***Venue for trial***

7.71 One of the issues we have considered is the appropriate venue for trial for cases of failure to protect. Given its seriousness, we consider that the offence of failure to protect should be an indictable offence only, and should not be heard summarily in the Magistrates' court.<sup>130</sup> For cases involving serious harm to the victim, we consider that the prosecution should retain the discretion to bring these proceedings either in the District Court or the High Court. However, for cases involving the death of the victim, we consider that these proceedings should be triable only in the High Court.<sup>131</sup>

### **Recommendation 14**

**We recommend that:**

- (a) the offence of failure to protect should be an indictable offence;**
- (b) cases of failure to protect should not be heard summarily in the Magistrates' court;**
- (c) cases of failure to protect involving the serious harm to the victim should be triable in either the District Court or the High Court;**

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129 Our suggested draft of the relevant provisions appears at Annex A of this paper as a new draft section 25A(5)(b) in the Offences against the Person Ordinance (Cap 212).

130 This restriction on venue for trial is imposed by an offence being listed in Part I of the Second Schedule to the Magistrates Ordinance (Cap 227): see section 92 of the Ordinance.

131 This restriction on venue for trial is imposed by an offence being listed in Part III of the Second Schedule to the Magistrates Ordinance (Cap 227): see section 88 of the Ordinance.

- (d) cases of failure to protect involving the death of the victim should be triable in the High Court only; and
- (e) appropriate consequential amendments should be made to Parts I and III of the Second Schedule to the Magistrates Ordinance (Cap 227) to give effect to this recommendation.<sup>132</sup>

### ***Whether the offence should be an “excepted offence”***

7.72 One of the issues we have considered in this context is whether this offence should be classified as an “*excepted offence*” for the purposes of Schedule 3 of the Criminal Procedure Ordinance (Cap 221). If the offence were to be so classified, any defendant found guilty of the offence would not be eligible to receive a suspended sentence by way of penalty.<sup>133</sup> After due deliberation, we have come to the view that the offence of failure to protect should *not* constitute an excepted offence, as there may be special circumstances in some cases where a suspended sentence may be considered appropriate.<sup>134</sup>

### **Concluding remarks**

7.73 At the heart of this reference has been the dilemma of how to achieve a proper balance between protecting the fundamental human rights of vulnerable victims on the one hand, and on the other, protecting the right to a fair trial of those allegedly involved in their deaths or serious harm.<sup>135</sup> We trust that the offence we propose achieves that balance by targeting the wrong in failing to offer sufficient protection to the victim, “*without resting on the fiction that because both carers were present and it was unclear who*

132 For a discussion of the types of amendments required, see Amanda Whitfort, *Criminal Procedure in Hong Kong: A Guide for Students and Practitioners* (2nd ed, 2012, LexisNexis Butterworths), at 44 to 47.

133 It should be noted, however, that the Hong Kong Law Reform Commission issued a consultation paper in June 2013 on *Excepted Offences under Schedule 3 to the Criminal Procedure Ordinance (Cap 221)*, proposing the repeal of the classification of excepted offences set out in Schedule 3 to Cap 221.

134 For example, where the defendant is himself a child, and/or where the defendant has been subjected to violent abuse by other defendants in the case. We note also that the Law Reform Commission published a report in February 2014 (which is still under consideration by the Government) proposing the repeal of excepted offences listed in Schedule 3 to Cap 221. See report at: <https://www.hkreform.gov.hk/en/publications/rexceptedoff.htm>

135 This reflects the comments of Prof Mary Hayes commenting on the UK enacted offence in section 5 of the Domestic Violence, Crime and Victims Act 2004: see Mary Hayes, “Criminal trials where a child is a victim: extra protection for children or a missed opportunity?” (2005) *Child and Family Law Quarterly* 307, at 317.

*committed the offence [that killed the victim], that both are therefore guilty of it.*<sup>136</sup>

7.74 As we have commented earlier, the offence we recommend in this paper is comprised of several elements, each of which must be proved beyond reasonable doubt before a person can be held liable. This represents a high evidentiary threshold for the prosecution. The offence is not targeted at accidents. It is targeted at cases where serious harm has been inflicted on the victim in circumstances where preventative steps should have been taken, and the failure to have taken steps warrants criminal sanction. Furthermore, we have not proposed the introduction of any of the evidentiary or procedural reforms adopted under the UK model which may have been seen as impinging on the accused's right of silence.

7.75 Those caring for children or vulnerable persons should be responsible for harm suffered by them if those carers knew or should have known about the abuse and could have taken steps to prevent it (for example, by leaving with the victim or reporting the abuse to the authorities).<sup>137</sup>

*"The assumption should be that the adult who was not literally a hostage - not literally coerced at every available second - could have acted to end abuse. Although the adult might have found herself or himself in circumstances such that protection of the child seemed impossible, the child is still a child. No matter how weak the [parent or carer], she [or he] is in a much better position than the child to prevent abuse and owes a duty of care to [the victim]."*<sup>138</sup>

7.76 It is therefore our hope that the proposed offence will provide a strong incentive to those living with and/or caring for children and vulnerable adults to ensure that they are adequately protected if they are at risk of harm.<sup>139</sup>

## Further issues and observations

7.77 In the next chapter, we note some further matters which we would like to bring to the attention of the Government. Although not strictly within our terms of reference, these are important issues regarding the protection of children and vulnerable adults. In particular, we discuss issues concerning the reporting of abuse, and include for reference a comparative analysis of reporting requirements in other jurisdictions. We also highlight

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136 See CMV Clarkson and Sally Cunningham (ed), *Criminal Liability for Non-Aggressive Death* (2008, Ashgate), at 138.

137 See comment by M Becker, "Double binds facing mothers in abusive families: Social support systems, custody outcomes and liability for acts of others" (1995) *University of Chicago Law School Roundtable* 2:13, 21, referred to in CMV Clarkson and Sally Cunningham (ed) (2008), above, at 139.

138 Same as above.

139 See CMV Clarkson and Sally Cunningham (ed) (2008), at 138.

child protection-related reform proposals made earlier by the Law Reform Commission in the course of its work on other law reform topics, which no doubt the Government will carefully consider.

## Chapter 8

# Issues related to reporting of abuse and other observations

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### Introduction

8.1 In addition to reviewing the local and comparative law and procedure relevant to formulating the new offence of “*failure to protect*”, we have also taken account during our study of certain other, broader issues relating to the protection of children and other vulnerable persons.

8.2 One such issue concerns obligations on the reporting of abuse – ie, how these obligations operate (whether voluntary or mandatory), what are their implications and how effective are they. Although not strictly within our terms of reference, this is closely allied to the idea underlying our reform proposals – that those in a position to protect the vulnerable from harm should take reasonable steps to do so. We therefore include here, and in Appendix VI, research information on reporting obligations in Hong Kong and in other jurisdictions, as well as some general analysis on relevant issues. We trust that the Government and other organisations involved will find this information useful in considering how to further develop policies in this complex area.

8.3 Before proceeding to look at reporting obligations, we first take the opportunity to revisit below reform proposals related to child protection and the protection of vulnerable adults which have been put forward previously by the Hong Kong Law Reform Commission (LRC) – some of which have yet to be implemented – to bring these proposals once again to the Government’s and the public’s attention.

### Earlier relevant LRC reform proposals

#### ***Protection of the vulnerable in the context of family law proceedings***

8.4 The LRC report on *Child Custody and Access*,<sup>1</sup> published in March 2005, was the final in a series of four reports under the LRC’s reference on guardianship and custody of children.<sup>2</sup> The main focus of the report’s 72 recommendations was on the introduction of a new shared

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1 HKLRC, report on *Child Custody and Access* (Mar 2005), available at: <https://www.hkreform.gov.hk/en/publications/raccess.htm>

2 The three earlier reports were: *Guardianship of Children* (Jan 2002), *International Parental Child Abduction* (Apr 2002) and *The Family Dispute Resolution Process* (March 2003).

parental responsibility model into Hong Kong's family law, to replace the current “*custody and access*” model of court orders in divorce proceedings. Because of the potential impact of these changes where domestic violence may be a factor in the divorce, Chapter 11 of the report contained 13 recommendations on “*Special consideration for cases involving family violence*.”<sup>3</sup>

8.5 While some of the 72 recommendations in the report have been implemented, we note that many have not. We understand that this is principally because of opposition from within the community to the proposed new shared parental responsibility model for court orders.<sup>4</sup>

#### *A review of Hong Kong's general law on domestic violence*

8.6 Recommendation 33 in the LRC's *Child Custody and Access* report proposed that the Administration should review the law relating to domestic violence and introduce reforms to improve its scope and effectiveness. Recommendation 34 proposed the introduction of a broad, all-encompassing definition of domestic violence along the lines of (then) section 3 of the New Zealand Domestic Violence Act 1985. (We note that since those proposals, there have been two major amendments to the then Domestic Violence Ordinance (Cap 189), in 2008 and 2009, resulting in the current provisions of the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189), with its extended injunctive relief from domestic violence and extended scope to cover same-sex relationships.<sup>5</sup>)

#### *Statutory checklist of factors*

8.7 Recommendation 3 in the LRC report proposed the introduction of a statutory checklist of factors to assist the judge in exercising his discretion in considering what is in the best interests of the child when determining [custody and access] proceedings involving children. One of the factors on the checklist proposed by the LRC for the court to consider related to “*any family violence involving the child or a member of the child's family*”.<sup>6</sup> While not yet implemented in statutory form, we note that a checklist of factors broadly along the lines of that proposed by the LRC is, nonetheless, being utilised by the courts in Hong Kong.<sup>7</sup>

#### *On-going training for those handling cases involving family violence*

8.8 In Recommendation 39 of the LRC report, the LRC proposed that there should be “*on-going training and raising of awareness levels in*

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3 HKLRC (Mar 2005), above, at 243 to 267.

4 For the latest position on implementation of the recommendations in the LRC report, see: <https://www.hkreform.gov.hk/en/implementation/index.htm#49>

5 See Anne Scully-Hill, “Domestic Violence in Hong Kong”, Chapter 14 in Philippa Hewitt (ed), *Family Law and Practice in Hong Kong* (2nd ed, 2014).

6 Recommendation 3(v): see HKLRC (Mar 2005), above, at 200.

7 Eg, *SMM v TWM (Relocation of Child)* [2010] HKFLR 308, [2010] 4 HKLRD 37. *P v P (Children Custody)* [2006] HKFLR 305 at paras 52 and 53.

*relation to the effect of domestic violence on children and residential parents for all the disciplines engaged in the Family Justice System, including the legal profession and the judiciary.*<sup>8</sup>

8.9 In addition to the legal profession and the judiciary, on-going training on family violence issues is especially important for frontline persons who may come across cases of family violence in their work, such as teachers, social workers, doctors, nurses and the police – so as to promote early identification and intervention in abuse cases (see the discussion later in this chapter on reporting obligations). We note that the Social Welfare Department (SWD) organises different training programmes for frontline professionals to enhance their knowledge in handling domestic violence, including child abuse, spouse/cohabitant battering, elderly abuse, sexual violence and suicides, and to strengthen their capabilities in risk assessment, violence prevention and post-trauma counselling.<sup>9</sup>

8.10 As well as enhancing the training of professionals and frontline workers who handle family violence cases, it is obviously important to promote public education in this area as well, so as to raise awareness within the community of the need to report cases of abuse, to help with early intervention to protect the vulnerable. We understand the SWD has a number of ongoing public education initiatives on this.<sup>10</sup>

#### *Long-term research*

8.11 Recommendation 41 in the LRC report on *Child Custody and Access* proposed that long-term research should be undertaken on the effects on children of witnessing and/or being the victims of domestic violence, and that there should be detailed collection and evaluation of information arising from court proceedings in these cases.

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8 Recommendation 39: see HKLRC (Mar 2005), above, at 266.

9 Paper for discussion on 23 Jan 2018 at meeting of Legislative Council House Committee Subcommittee on Children's Rights: Rights of Children affected by Domestic Violence (LC Paper No. CB(4) 504/17-18(01)) by Labour and Welfare Bureau, Education Bureau, Social Welfare Department, Hong Kong Police Force, Department of Health and Hospital Authority. Available at: [https://www.legco.gov.hk/yr16-17/english/hc/sub\\_com/hs101/papers/hs10120180123cb4-504-1-e.pdf](https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs101/papers/hs10120180123cb4-504-1-e.pdf)

We understand the SWD also deploys staff to provide training in child protection on courses for frontline service personnel organised by the Education Bureau, the Hospital Authority, the Department of Health and NGOs: see same as above.

10 See same as above. I.e:

(1) since 2002, the SWD has promoted the “*Strengthening Families and Combating Violence*” publicity campaign, through which territory-wide and district-based publicity and public education programmes are organised to raise public awareness of the importance of family cohesion and prevention of domestic violence, as well as to encourage people in need to seek early assistance;

(2) the SWD has produced in recent years a series of three animation videos to encourage parents to help their children develop resilience against adversity, and to avoid hurting them with corporal punishment and verbal abuse;

(3) SWD planned to launch in 2017-18 a series of television and radio Announcements of Public Interest, and to display banners and posters to promote the message of protection of children and against child abuse; and

(4) the District Social Welfare Officers of the SWD also organise education programmes relating to combating domestic violence and protection of children.

8.12 However, such research would need be undertaken having regard to the data protection issues noted in the report, so a careful balance would need to be struck between the interests of data subjects in keeping their personal information as private as possible, and the goal of facilitating the important socio-legal research proposed in this recommendation.<sup>11</sup>

#### *Other relevant recommendations*

8.13 *Children in care.* Where statutory protection is required for a child or juvenile, social workers of the SWD or police officers may apply for a care or protection order under the Protection of Children and Juveniles Ordinance (Cap 213) (PCJO). The PCJO empowers the court to grant a supervision order or appoint a legal guardian in respect of such a child or juvenile.<sup>12</sup> It also provides certain powers to detain children who appear to be in need of care or protection in place of refuge or hospital.<sup>13</sup> The powers set out in the PCJO apply where a child requires “*care or protection*” and has been or is being assaulted, ill-treated, neglected or sexually abused; whose health, development or welfare has been, is being, or appears likely to be neglected or avoidably impaired; or is beyond control, to the extent that harm may be caused to him or others.<sup>14</sup>

8.14 In terms of the ill-treatment, what is required as a basis for the intervention:

*“[I]s something more than commonplace human failure or inadequacy, but conduct does not have to be intentional or deliberate. For parent’s right to be taken away, it is enough that the harm, or likelihood of harm, was attributable to them. There must be a deficiency in parental care rather than in parental character, but character remains relevant to the extent that it might affect the quality of parenting.”<sup>15</sup>*

8.15 Where the care of a child is shared between a number of individuals and the child has suffered harm or abuse, in the context of care and protection proceedings, there is no need to prove or identify the particular individuals responsible:<sup>16</sup>

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11 Recommendations 41 (long-term research) and 40 (privacy issues): see HKLRC (Mar 2005), above, at 266 to 267.

12 Paper for discussion on 23 Jan 2018 at meeting of Legislative Council House Committee Subcommittee on Children’s Rights: Rights of Children affected by Domestic Violence (LC Paper No. CB(4) 504/17-18(01)) by Labour and Welfare Bureau, Education Bureau, Social Welfare Department, Hong Kong Police Force, Department of Health and Hospital Authority, at para. 6. Available at: [https://www.legco.gov.hk/yr16-17/english/hc/sub\\_com/hs101/papers/hs10120180123cb4-504-1-e.pdf](https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs101/papers/hs10120180123cb4-504-1-e.pdf)

13 Sections 34E and 34F of the Protection of Children and Juveniles Ordinance (Cap 213).

14 Section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213).

15 Keith Hotten, Azan & Shaphan Marwah, *Hong Kong Family Court Practice* (2nd ed, 2015), at para 5.152.

16 Same as above, at para 5.153.

*“If the identification of the perpetrator is not possible, the court should state that as its conclusion rather than straining to identify a particular person. If it is not possible to identify a particular perpetrator on the balance of probabilities, it is still important to identify the pool of possible perpetrators.”<sup>17</sup>*

8.16 The LRC report on *Child Custody and Access* considered the position of children subject to care and protection orders under the PCJO, and made a series of recommendations for reform, including with regard to the powers of the Director of Social Welfare under the Ordinance.<sup>18</sup>

8.17 *Judicial guidelines to supplement legislative reforms.* In Recommendation 36, the LRC proposed that there should be guidelines for the judiciary at all levels, setting out the approach which the court should adopt when domestic violence is put forward as a reason for denying or limiting parental contact to children.<sup>19</sup>

8.18 *More information to be available to the court.* The LRC proposed that consideration should be given to allowing the courts hearing contact applications to have access to the criminal records of parents insofar as they may be relevant to issues of domestic violence, and to be kept informed of concurrent proceedings against perpetrators of domestic violence.<sup>20</sup>

8.19 *Privacy issues.* In Recommendation 40, the LRC proposed that the Administration should consider a review of data protection arrangements for victims of family abuse, having regard to the potential susceptibility of the family justice system to disclose location information, etc, of victims.<sup>21</sup>

### ***Protection of the vulnerable in the giving of evidence in court proceedings***

8.20 As noted earlier in this Consultation Paper,<sup>22</sup> one of the LRC’s recommendations in its 2009 report on *Hearsay in Criminal Proceedings*<sup>23</sup> was to empower the court with a discretion to admit hearsay evidence of a declarant who is unfit to be a witness because of his or her age, physical or mental condition, provided the court is satisfied with the reliability of the evidence.<sup>24</sup> The Government has followed up on the recommendations in the LRC report, and the Evidence (Amendment) Bill 2018 was gazetted on 22 June 2018 and was introduced into LegCo on 4 July 2018. As noted

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17 Same as above.

18 Recommendations 55 to 67, HKLRC (Mar 2005), above, at 290 to 302.

19 Same as above, at 263 to 264.

20 Recommendation 37, same as above, at 265.

21 Same as above, at 266.

22 See Chapter 2, above, at paras 2.173 to 2.174.

23 HKLRC report on *Hearsay in Criminal Proceedings* (Nov 2009), The report is available at: <https://www.hkreform.gov.hk/en/publications/rcrimhearsay.htm>

24 See HKLRC (Nov 2009), above, Recommendation 25, at 130 to 133.

previously, the Government anticipates that this reform will be conducive to protecting the special needs and interests of vulnerable persons.<sup>25</sup>

### ***Protection of the vulnerable in the context of sexual offences***

8.21 There are a number of statutory sexual offences in the Crimes Ordinance (Cap 200) aimed at the protection of vulnerable persons, including children and mentally incapacitated person. They include: intercourse with a girl under 13 (section 123), intercourse with a girl under 16 (section 124), intercourse with a mentally incapacitated person (section 125), abduction of unmarried girl under 16 (section 126), abduction of an unmarried girl under 18 for sexual intercourse (section 127), and abduction of a mentally incapacitated person from parent or guardian for sexual act (section 128).<sup>26</sup> There is also further protection against child sexual abuse in the Prevention of Child Pornography Ordinance (Cap 579).

8.22 In November 2016, the LRC's Review of Sexual Offences Sub-committee published a consultation paper making preliminary proposals for the reform of the law concerning sexual offences involving children, persons with mental impairment and young persons over whom others hold a position of trust.<sup>27</sup> The paper is the second of a series of consultation papers intended to cover the overall review of the substantive sexual offences.<sup>28</sup>

8.23 The proposals in the Consultation Paper include a uniform age of consent of 16 years in Hong Kong and the creation of a range of new sexual offences involving children and persons with mental impairment which are gender-neutral and provide improved protection to these vulnerable people. These sexual offences are largely concerned with the protective principle, that is to say, the protection of certain categories of vulnerable persons from sexual abuse or exploitation. The main recommendations contained in the Consultation Paper are:

- (i) there should be a uniform age of consent in Hong Kong of 16 years of age, which should be applicable irrespective of gender and sexual orientation;
- (ii) offences involving children and young persons should be gender-neutral with two separate types of offences, one

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25 See Legislative Council Brief, Department of Justice (20 June 2018), at para 24, available at: [http://www.legco.gov.hk/yr17-18/english/bills/brief/b201806221\\_brf.pdf](http://www.legco.gov.hk/yr17-18/english/bills/brief/b201806221_brf.pdf)

26 Other offences include buggery by a man with a mentally incapacitated person ("MIP") (section 118E, Crimes Ordinance (Cap 200)), gross indecency by man with male MIP (section 118I, Crimes Ordinance (Cap 200)), and sexual intercourse with patients (section 65(2), Mental Health Ordinance (Cap 136)).

27 HKLRC Review of Sexual Offences Sub-committee's consultation paper on *Sexual Offences Involving Children and Persons with Mental Impairment* (Nov 2016), available at: <http://www.hkreform.gov.hk/en/publications/sexoffchild.htm>

28 The other consultation papers issued by the Review of Sexual Offences Sub-committee on the substantive sexual offences were: *Rape and Other Non-consensual Sexual Offences* (Sep 2012) and *Miscellaneous Sexual Offences* (May 2018).

involving children under 13 and the other involving children under 16, and capable of being committed by either an adult or a child;

- (iii) the question of whether offences involving children aged between 13 and 16 should be of absolute liability should be a matter for consideration by the Hong Kong community;
- (iv) consensual sexual activity between persons who are aged between 13 and 16 should remain to be criminalised while recognising the existence of prosecutorial discretion;
- (v) the creation of a range of new offences involving children which are gender-neutral, and which provide wider protection to children;
- (vi) the creation of a new offence of sexual grooming to protect children against paedophiles who might groom them by communicating with them on a mobile phone or on the internet to gain their trust and confidence with the intention of sexually abusing them;
- (vii) the creation of a range of new offences involving persons with mental impairment which would be gender-neutral and provide improved protection; and
- (viii) the question of whether there be legislation to deal with conduct involving abuse of a position of trust in respect of young persons aged 16 or above but under 18 should be a matter for consideration by the Hong Kong community.

8.24 The LRC is currently completing a final report on its review of the substantive sexual offences.

## **Reporting of abuse**

### ***Introduction***

8.25 Evidence suggests that the severity of child abuse (and, it may be assumed, abuse of other vulnerable persons) tends to escalate over time, *“making the early detection and intervention crucial in preventing victims from suffering severe abuses.”*<sup>29</sup>

8.26 Anecdotal evidence suggests that some common sources of reporting of child abuse in Hong Kong are by teachers in schools and neighbours of families where abuse is suspected. Other common sources of

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<sup>29</sup> See Phil W S Leung, William CW Wong, Catherine S K Tang and Albert Lee, “Attitudes and child abuse reporting behaviours among Hong Kong GPs” (2010) *Family Practice*; 0:1 to 7, at 1.

reporting include by social workers, police, doctors and nurses. While we understand that the reporting of child abuse cases has increased in recent years with more public awareness, it has been observed that reported instances of abuse “are likely to represent a serious underestimation, as low as 1-2% of total cases.”<sup>30</sup>

### *Types of reporting*

8.27 As we will see below, and in Appendix VI, in some jurisdictions mandatory duties to report abuse are laid down in statute, though the scope and emphasis of the legislation may vary.<sup>31</sup> In other jurisdictions, such as Hong Kong, the reporting of abuse, while advocated as policy, is voluntary not mandatory.<sup>32</sup>

8.28 A “*mandatory reporting duty*” requires a report to be made in every case where there are suspicions or knowledge of child abuse or neglect (ie, there is limited professional discretion in whether or not to report). The action taken under the duty is limited to reporting, and the duty would be discharged once a report has been made. There are likely to be sanctions for a failure to report.<sup>33</sup>

8.29 Other conceptual models in this area include “*duty to act*” and “*differential response*.”<sup>34</sup> A duty to act is a specific duty in a criminal statute requiring all persons subject to the duty to disclose a serious indictable offence which they know or believe to have been committed. The duty would continue to apply after the report has been made. If further action is needed to protect a vulnerable person, a duty to act would require this action to be taken, and places responsibility on those subject to the duty to decide what action is appropriate. There are likely to be sanctions for a failure to properly carry out the duty.<sup>35</sup>

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30 Leung, Wong, Tang and Lee (2010), above, at 2.

31 See, for example, the relevant legislation in the states and provinces in the USA, Canada and Australia, discussed in Benjamin P Mathews and Maureen C Kenny, “Mandatory reporting legislation in the USA, Canada and Australia: a cross-jurisdictional review of key features, differences and issues” (2008) *Child Maltreatment*, 13(1), 50 to 63.

32 See also, for example, in New Zealand and the United Kingdom, discussed below and in Appendix VI.

33 Ben Mathews & Donald Bross, *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect*, *Child Maltreatment: Contemporary Issues in Research and Policy 4* (2015, Springer), at 11 to 12.

34 See discussion in Ben Mathews, “Chapter 1: Mandatory Reporting Laws: Their Origin, Nature, and Development over Time”, in Mathews & Bross (2015), above, at 6.

35 There may be, in any event, a common law duty to report or act in some circumstances. See Keith Hotten, Azan & Shaphan Marwah, *Hong Kong Family Court Practice*, (2nd ed, 2015), at para 5.161:

*“Identifying and taking appropriate action on suspected abuse is also important because failure to do so may constitute a breach of duty by a parent or a relevant professional involved in a child’s welfare (eg, police officer, teacher, social worker, medical professional). Although there the existence and extent of any persons’ duties will depend upon the circumstances, it is likely that there is a common law duty to report suspected abuse.”*

8.30 Under the differential response approach, child protective service systems are given the flexibility to respond to screened-in reports of child maltreatment in more than one way, depending on the initial level of risk. Once a case has been screened in, a second screening then occurs to determine the type of child protective service response the family will receive.<sup>36</sup>

8.31 Moderate to high risk reports that include allegations of severe physical or sexual abuse, imminent risk of harm to a child, or a high likelihood of court involvement are assigned a traditional investigation and are processed through the child protection system in the same manner as any other investigations. In contrast, low to moderate risk reports, defined in a variety of ways (but generally more often involving neglect and emotional abuse, and sometimes based on poverty needs), can receive a family assessment instead of an investigation.<sup>37</sup> The focus of this assessment is on provision of services to the child's caregivers and the child.<sup>38</sup>

#### *Overview of child abuse reporting in other jurisdictions*

8.32 In 2007, the International Society for Prevention of Child Abuse and Neglect (ISPCAN) sought information from 161 countries about various matters, including the presence of legislative or policy-based child abuse reporting duties.<sup>39</sup> Of the 72 countries which responded, 49 indicated the presence of such duties in law or policy, and 12 indicated the presence of voluntary reporting by professionals.<sup>40</sup>

8.33 The study observed that Brazil, Denmark, Finland, France, Hungary, Israel, Malaysia, Mexico, Norway, South Africa and Sweden have created “quite general” legislative reporting duties.<sup>41</sup> Saudi Arabia has also introduced the mandatory reporting laws which have been judged to produce a positive effect on case identification.<sup>42</sup> In contrast, legislatures in the states and provinces across the US, Canada and Australia, “have given detailed attention to the development of these laws over several decades, and the laws in these jurisdictions continue to evolve in response to new phenomena and evidence of successes and failures in child protection systems.”<sup>43</sup>

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36 Mathews & Bross (2015), above, at 429 to 430.

37 Same as above.

38 Same as above, at 11 to 12 and 429 to 430.

39 See Mathews & Kenny (2008), above, at 50, citing D Daro (ed), *World Perspectives On Child Abuse* (2007, 7th ed, Chicago, IL: International Society for Prevention of Child Abuse and Neglect).

40 Same as above.

41 Same as above.

42 Mathews & Bross (2015), above, at 14.

43 Mathews & Kenny (2008), above. The writers go on to observe: “These legislative differences exemplify the contested normative terrain in which these laws operate. Law and policy concerning the detection and reporting of, and the responses to, abuse and neglect is theoretically and practically complex, and exists alongside political, economic, social and cultural forces in each society.”

8.34 The issue of whether to impose a mandatory duty to report suspected abuse and neglect is a controversial one. On the one hand, the early reporting of suspected abuse can lead to positive action to end the suffering of a child or vulnerable person at risk, and bring those responsible to account. On the other, well-meaning but mistaken reporting of abuse (for example, when genuine accidental injuries or other medical problems have occurred) can have devastating social and legal consequences for the family involved.

8.35 Some jurisdictions, such as the United Kingdom and New Zealand, have chosen *not* to enact mandatory reporting laws. Mathews and Kenny observe that this appears to be “*for reasons including the perceived danger of over reporting of innocent cases, which is seen as adversely affecting the interests of children and families, and as diverting scarce resources from already known deserving cases.*”<sup>44</sup>

8.36 A more detailed discussion of mandatory reporting – its ‘pros and cons’ and implications – is set out later below, and further information on the approaches to reporting in a number of common law jurisdictions is included in Appendix VI. We first set out below a description of the voluntary reporting system which operates in Hong Kong.

### ***Voluntary reporting: the current position on reporting of abuse cases in Hong Kong***

#### *Introduction*

8.37 As stated above, Hong Kong currently has no mandatory reporting system for child abuse and abuse of vulnerable persons.<sup>45</sup> Detailed guidelines for *voluntary* reporting of child abuse and elder abuse cases are, however, contained in procedural guides published by the Social Welfare Department (SWD), ie, the *Procedural Guide for Handling Child Abuse Cases*<sup>46</sup> and the *Procedural Guidelines for Handling Elder Abuse Cases*.<sup>47</sup> These provide guidance on handling suspected abuse cases and the level of cooperation among relevant department/units (including social service units, the police, medical personnel, the Housing Department, etc), so as to provide the victim with the most appropriate services and care, and to prevent the recurrence of abuse.

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44 Same as above.

45 See Leung, Wong, Tang and Lee (2010), above, at 1. See also G Fung, Hong Kong Police, “Legal and judicial aspects: crime detection, law enforcement and extradition”, paper presented at *UNESCO Expert Meeting on Sexual abuse of children, child pornography and paedophilia on the internet: an international challenge*, Paris, 18 to 19 January 1999 (CII-98/CONF.605/13 (E)), at 2.

46 SWD, *Procedural Guide for Handling Child Abuse Cases* (Revised 2015), available at: [https://www.swd.gov.hk/en/index/site\\_pubsvc/page\\_family/sub\\_fcwprocedure/id\\_1447/](https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/id_1447/); and [http://www.swd.gov.hk/doc/fcw/proc\\_guidelines/childabuse/Procedural%20Guide%20for%20Handling%20Child%20Abuse%20Cases\(Revised%202015\)\\_updated%20May%202017\\_EN.pdf](http://www.swd.gov.hk/doc/fcw/proc_guidelines/childabuse/Procedural%20Guide%20for%20Handling%20Child%20Abuse%20Cases(Revised%202015)_updated%20May%202017_EN.pdf)

47 SWD, *Procedural Guidelines for Handling Elder Abuse Cases* (Revised 2006), available at: [https://www.swd.gov.hk/en/index/site\\_pubsvc/page\\_elderly/sub\\_csselderly/id\\_serabuseelder/](https://www.swd.gov.hk/en/index/site_pubsvc/page_elderly/sub_csselderly/id_serabuseelder/)

8.38 The SWD has also published *Procedural Guidelines for Handling Adult Sexual Violence Cases*, and, if the suspected abuse case involves spouse battering, the *Procedural Guide for Handling Intimate Partner Violence Cases*.<sup>48</sup> In relation to mentally impaired persons, SWD has published *Guidelines for Handling Mentally Handicapped/Mentally Ill Adult Abuse Cases*.<sup>49</sup>

#### *SWD's Procedural Guide for Handling Child Abuse Cases*

8.39 The Procedural guide on child abuse cases, most recently revised in 2015, explains how the different aspects of Hong Kong's child protection system are integrated,<sup>50</sup> sets out a "*Checklist for identifying possible child abuse*" (which includes lists of "*indicators*" and "*characteristics*" of child abuse), and a "*Guide to risk assessment*" to help with assessing the likely level of risk (whether "*low*", "*intermediate*" or "*high*") for a particular child reported to be the suspected victim of abuse.<sup>51</sup>

8.40 To assist those making reports, the Procedural guide on child abuse cases includes targeted guidelines (comprised in separate chapters) for those groups of professionals most likely to be in situations to observe and report on child abuse. Specific reporting guidelines (and information on the follow-up procedures which would apply to a reported case) are included for social workers, clinical psychologist, doctors, nurses and para-medical staff of hospitals or clinics, personnel in schools and kindergartens, police and others.<sup>52</sup>

8.41 For example, Chapter 20 of the Procedural guide is directed at those working in Hospital Authority hospitals or clinics. Paragraph 20.1 states:

*"Medical Officers (MOs), nurses and para-medical staff of hospital / clinic of the Hospital Authority should familiarize themselves with the procedures of handling suspected child abuse. They should be alert to the signs of child abuse by making reference to the Indicator of Possible Child Abuse & Guide to Risk Assessment in Chapter 2. If a child has symptoms or signs which indicate that sexual abuse may have taken place, the MOs, nurses and para-medical staff should follow the Guide to People Working with Children Who Disclose Sexual Abuse at Appendix IV and Guidance for Paediatric Wards, A&E and Staff involved with Child Abuse at Appendix XVI."*

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48 SWD, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011), available at: [https://www.swd.gov.hk/en/index/site\\_pubsvc/page\\_family/sub\\_fcwprocedure/](https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/)

49 SWD, *Guidelines for Handling Mentally Handicapped/Mentally Ill Adult Abuse Cases* (July 2012), available at: <https://www.swd.gov.hk/doc/rehab/vrs/abuse%20guidelines.pdf> (in Chinese only).

50 See generally SWD *Procedural guide on Child Abuse* (Rev 2015), above.

51 See Chapter 2 of the SWD *Procedural guide on Child Abuse* (Rev 2015), above.

52 See Chapters 14 to 26 of the SWD *Procedural guide on Child Abuse* (Rev 2015), above.

8.42 Paragraph 20.4 notes that “*Medical Co-ordinators on Child Abuse (MCCA)*”, working closely with “*medical social workers (MSW)*” and others, are designated in the paediatric departments within the Hospital Authority hospitals to handle child abuse cases, including receiving referrals from doctors and staff of possible child abuse.<sup>53</sup>

8.43 Principles emphasised in the Procedural guide on child abuse cases are that:

- in handling child abuse cases, the safety, needs, welfare and rights of the children should always come first;
- any symptom or report of suspected child abuse must be taken seriously and the related investigation should be conducted as soon as possible;
- all relevant parties should collaborate and share the responsibility for protection of children at relevant stages of the case development; and
- where necessary, the information collected with regard to suspected abuse incidents should be shared as soon as possible with other concerned parties to ensure effective protection of the children.<sup>54</sup>

8.44 In relation to confidentiality of medical information, the Procedural guide on child abuse cases notes that in exceptional cases (such as for the investigation of cases of suspected child abuse) disclosure may be justified. In all circumstances, however, professionals should disclose the least amount of directly relevant confidential information necessary to achieve the desired purpose, and precautions should be taken to ensure and maintain confidentiality of the information transmitted to other parties.<sup>55</sup>

8.45 *Sources of reporting.* The Procedural guide on child abuse cases observes in Chapter 7 that suspected child abuse cases may be identified:

- “(a) *through direct approach in person or by telephone call from the child, the family or the public;*
- “(b) *by teachers, personnel of kindergartens / schools / day child care service / residential child care centres, Student Guidance*

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53 Para 20.4, SWD *Procedural guide on Child Abuse* (Rev 2015), above. The paragraph goes on to state: “*Working closely with medical social workers (MSW), nurses, clinical psychologists, psychiatrists and other related personnel through their expertise in child protection, the MCCA provide support to the suspected child victims by making their physical, emotional and developmental needs understood.*”

54 Same as above, at Chapter 4.

55 Same as above, especially paras 4.19 to 4.22. Within Chapter 4 there are also separate annexes dealing specifically with confidentiality issues for medical practitioners (Annex I), clinical psychologists (Annex II) and social workers (Annex III).

*Officers / Teachers / Personnel serving in primary schools, school social workers serving in secondary or special schools, children and youth centre workers, medical officers or private practitioners, nursing staff of hospitals / clinics, personnel of government departments or non-governmental organisations, etc.;*

(c) *through information from hotlines.*<sup>56</sup>

8.46 In Chapter 6, the Procedural guide on child abuse cases states that a child “*suspected of being abused may be brought to the attention of any welfare service unit, clinic / hospital, school, police station or other service unit of various government departments as well as non-governmental organisations (NGOs) by an informant or a referrer.*”<sup>57</sup>

8.47 The Procedural guide advises that those reporting suspected child abuse would not be liable if the allegations were subsequently not substantiated.<sup>58</sup>

#### *Education Bureau guidance*

8.48 In addition to the guidance from the SWD, the Education Bureau (EB) has also issued a circular to kindergartens to announce arrangements for the reporting mechanism for absentees in kindergartens. Starting from March 2018, kindergartens must report to the EB on students' absence for seven consecutive school days, if such absence is without reason or under doubtful circumstances. The new reporting mechanism is to raise the awareness of school personnel in identifying child abuse and support kindergartens in early identification of students in need of support or who are suspected child abuse victims, so that early intervention and appropriate support and services can be provided. School personnel noticing any wounds or any signs of child abuse are requested to immediately refer to the SWD's *Procedural Guide for Handling Child Abuse Cases* and make a report to the EB as appropriate, and in parallel, report the situation to the SWD or the Police for assistance.<sup>59</sup>

8.49 The EB issued a further circular<sup>60</sup> on 20 August 2018 to update schools on the procedures and points to note for handling suspected cases of

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56 Same as above, at para 7.3.

57 Same as above, at para 6.1. An “*informant*” is defined as a member of the public (eg, neighbour, relative of the child concerned) who provides information on a suspected child abuse case. A “*referrer*” is a staff member of a government department, NGO, HA or other organisation, who comes across the suspected child abuse case in the course of performing his or her duties: same as above.

58 See question 13, in “Frequently asked questions about the application of the Ordinances relating to child protection and child abuse,” in Annex II to Chapter 3, *SWD Procedural guide on Child Abuse* (Rev 2015), above.

59 Press Releases: “EDB announces new arrangements of reporting mechanism for absentees in kindergartens” (23 Feb 2018): <http://www.info.gov.hk/gia/general/201802/23/P2018022300343p.htm>

60 Education Bureau Circular No 5/2018, “Handling Suspected Cases of Child Abuse and Domestic Violence” (20 August 2018), available at:

child abuse and domestic violence. Schools are advised to keep an eye on the conditions of students for early identification and intervention. The circular notes that schools are also reminded to take appropriate measures to provide assistance to the children concerned and their families in accordance with the *Procedural Guide for Handling Child Abuse Cases (Revised 2015)* and the *Procedural Guide for Handling Intimate Partner Violence Cases (Revised 2011)*. An “Overview of Identifying Possible Child Abuse” is attached to the circular to assist school personnel to spot any physical or behavioural indicators of child abuse. The circular also mentions the procedures of handling child sexual abuse cases and domestic violence cases. It is also noted that in the course of handling suspected child abuse cases or domestic violence cases, schools/designated personnel involved are required to adhere strictly to the principle of confidentiality.

8.50 If the parents or guardians are suspected of being involved in the abuse, schools do not need to ask the prior consent of parents when making a referral of a suspected child abuse case to the school social worker, caseworker or to the Family and Child Protective Services Units of the Social Welfare Department. In circumstances that suggest a criminal offence may have been committed, and the case is a severe one or the life of the child concerned is being threatened so that immediate action is needed (such as serious physical abuse), schools should report the case to the police by phone as early as possible.

#### *Research findings on levels of reporting in Hong Kong*

8.51 A detailed study was published in 2010 on the reporting behaviours of general medical practitioners (“GPs”) in Hong Kong who had encountered child abuse cases.<sup>61</sup> At the outset of the paper documenting the study, the authors observe:

*“GPs, the first professional group from whom parents may seek help for their injured children, can play a significant role in prevention. Arguably, doctors have moral and legal responsibilities to report these cases to relevant governmental authorities or social welfare organizations in order to provide early interventions for victims and perpetrators and prevent further abuse.”<sup>62</sup>*

8.52 The study found that underreporting was common among local GPs.<sup>63</sup> Perceived barriers associated with a lower likelihood of making a report included, amongst others: “*lack of sufficient evidence*”, “*reporting may*

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<https://applications.edb.gov.hk/circular/upload/EDBC/EDBC18005E.pdf>

61 See Leung, Wong, Tang and Lee (2010), above.

62 See Leung, Wong, Tang and Lee (2010), above, at 1.

63 The study found that approximately half the GPs who responded had encountered at least one child abuse case in their history of practice, but of these, 40% had never reported. One-third made reports for every suspected case. Nearly 25% of the GPs reported encountering suspected sexual abuse cases. Of these, nearly half reported all cases, while 40% had reported none. See Leung, Wong, Tang and Lee (2010), above, at 3.

*produce more harm than good to the family*”, *“reporting may produce more harm than good to the child.”*<sup>64</sup> Significantly, a higher proportion of GPs who had received child abuse training made reports than those without such training.<sup>65</sup>

8.53 In addition to indicating that there was some support for the introduction of mandatory reporting in Hong Kong (at least among *“many scholars and professionals”*<sup>66</sup>) the authors of the GP study suggested<sup>67</sup> strategies to promote reporting behavior, including providing clearer guidance, mandatory training and ensuring *“sensitive handling by relevant organizations such as SWD and NGOs to maintain confidentiality of the identity of reporters.”* Leung, Wong, Tang and Lee also recommend that *“more research on a multidisciplinary approach is required to explore an optimally beneficial reporting system for the children in Hong Kong.”*<sup>68</sup>

### ***Mandatory reporting duty***

*What is mandatory reporting?*

8.54 Under a policy of *“mandatory”* (or *“mandated”*) reporting in the child protection context, certain designated professionals are obliged to report cases of suspected child abuse and neglect (often including physical, sexual and psychological abuse) to the authorities. These designated professionals are usually those who work frequently with children; for example:

- teachers
- nurses
- doctors
- police, and
- social workers.<sup>69</sup>

8.55 Under a mandatory reporting system, these professionals are usually required to report on specified types of abuse encountered during their work where they have a *“reasonable suspicion”* or *“reasonable belief”* that there has been abuse or neglect of a child.<sup>70</sup>

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64 See Leung, Wong, Tang and Lee (2010), above, at 4.

65 Same as above.

66 Same as above, at 2.

67 Same as above, at 6 to 7.

68 Same as above, at 7.

69 Dr Benjamin P Mathews and Dr Donald C Bross, “Does the Protection of Children’s Rights to Safety Require a System of Mandatory Reporting of Abuse and Neglect? An Argument” (2008), paper presented at *XVIIth ISPCAN International Congress on Child Abuse and Neglect*, September 7-10 2008, Hong Kong: available at: <http://eprints.qut.edu.au/14857/>

70 Benjamin P Mathews and Maureen C Kenny, “An Analysis of Mandatory Reporting Legislation in the USA, Canada and Australia: Features, Differences and Issues for Legislators” (2008),

8.56 The objective of imposing mandatory reporting requirements is to use the expertise of these professionals to increase the discovery of cases of abuse and neglect so that they can be brought to the attention of relevant agencies as early as possible, so as to assist and protect the child.<sup>71</sup> The UK Government has explained the rationale for mandatory reporting as follows:

*“The rationale for [this option] is that earlier reporting of child abuse and neglect would lead to swifter interventions that would prevent an escalation into even more serious cases of child abuse or neglect. In theory, this is because requiring reports about child abuse and neglect to be made to the relevant authorities would result in more cases of abuse being identified, and at an earlier point in a child’s life than a system which allows more discretion. It then follows that such a system would ensure that those best placed to make judgements about whether abuse and/ or neglect is occurring (i.e. children’s social workers) would make these judgements, because discretion is removed from others who might not be trained to the same extent.”<sup>72</sup>*

#### *Features of mandatory reporting systems*

8.57 Mathews and Kenny note that the statutory provisions of the mandatory reporting systems in the US, Canada and Australia “*exhibit many common features*” but also may individually differ in significant respects.<sup>73</sup> The key features of the legislation usually include:

- defining which persons are required to make reports;
- identifying what state of knowledge, belief or suspicion a reporter must have before the reporting duty is activated, ie, “*requiring a ‘reasonable’ suspicion or belief of abuse or neglect, or some synonymous variation of this, and therefore not requiring knowledge of abuse or neglect*”;<sup>74</sup>
- specifying that reporters are not to conduct their own investigation but are simply required to report their suspicions according to the law;
- defining the types of abuse and neglect that attract the duty to report, or stating that a child suspected to be “*in need of protection*” must have their case reported, with key phrases then

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paper presented at *XVIIth ISPCAN International Congress on Child Abuse and Neglect*, September 7-10 2008, Hong Kong (“Mathews & Kenny (2008) (IPSCAN)”). Available at: <http://eprints.qut.edu.au/14856/>

71 Mathews & Bross (2008), above. See also Mathews & Kenny (2008) (IPSCAN), above.

72 See UK Home Office, *Impact Assessment on Reporting and Acting on Child Abuse and Neglect: Government Consultation* (Oct 2015), at 28. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539618/Impact\\_Assessment\\_-\\_Consultation\\_Stage\\_web\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/539618/Impact_Assessment_-_Consultation_Stage_web_.pdf)

73 Mathews & Kenny (2008), above, at 51.

74 Same as above.

further defined;<sup>75</sup>

- penalties for failure to report according to the duty will be stipulated, although these are largely intended to encourage reporting rather than police it;
- a guarantee of confidentiality is provided concerning the reporter's identity;
- the reporter is conferred with immunity from any legal liability arising from a report made in good faith;
- practical requirements will be detailed regarding when and how the report is to be made, and to whom;
- *"a final key element of the legislation is to enable any person to make a report in good faith even if not required to do so, and to provide confidentiality and legal immunity for these persons."*<sup>76</sup>

#### *Arguments in favour of mandatory reporting*

8.58 In arguing the case for mandatory reporting, Mathews and Bross highlight the vulnerability of children. They observe that in most cases, the abuse and neglect are inflicted by the child's parents or caregivers or other adults known to the child, consequently the perpetrators rarely seek assistance and the child is rarely able to seek assistance for himself. Mathews and Bross stress that the harmful consequences of child abuse and neglect can sometimes be fatal, and even when not, may negatively affect a child (physically, psychologically and behaviourally) for a lifetime. They argue that the law therefore needs to make special provision to protect the rights of the most vulnerable in these types of situations.<sup>77</sup>

8.59 In terms of benefits, a mandatory reporting duty could:

- increase awareness of the importance of reporting child abuse and neglect, both by those under a duty to report and the general public;
- lead to more cases of child abuse and neglect being identified, and at an earlier point in a child's life than is currently the case;
- create a higher risk environment for abusers or potential abusers because the number of reports being made would be likely to increase; and

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75 They note also that: *"Often, the degree of abuse or neglect which requires a report will be defined (hence also attempting to define extents of abuse and neglect that do not require reports). Further definitions of types of abuse and neglect may be detailed, and these may include not only exposure to harm, but exposure to risk of future harm."* See Mathews & Kenny (2008), above, at 52.

76 Same as above.

77 Mathews & Bross (2008), above.

- ensure that those best placed to make judgements about whether abuse and/or neglect is happening – social workers – do so. Practitioners (ie, those who work with children in any capacity) have not always been able to confidently conclude when a child is being abused or neglected or is at risk of abuse or neglect. Requiring a wide range of practitioners to report would enable these difficult cases to be examined by social workers.<sup>78</sup>

8.60 In those jurisdictions where mandatory reporting systems are in place, it appears that not only has the number of cases reported substantially increased, but the “*mandated reporters*” (for example, teachers, police, nurses, doctors and welfare officers) “*make the majority of all substantiated reports of child abuse and neglect.*”<sup>79</sup> Mathews and Bross argue that: “*Mandatory reporting may in fact contribute to declines in incidence of serious child abuse.*”<sup>80</sup> Citing a 2005 US study, they observe: “*It has been estimated that due to increased reporting, investigation and treatment services, annual child deaths in the USA have fallen from 3,000-5,000 to about 1,100.*”<sup>81</sup>

8.61 More recently, Mathews and Bross have stated the view that mandatory reporting laws have indisputably resulted in the identification of many more cases of severe child maltreatment than would otherwise have been revealed. The overall effect on child protection and child welfare must be viewed as positive. First, they state, the laws do result in more reports, at least initially, and a substantial proportion of these result in substantiated cases and other outcomes which assist the child. Second, the presence of a reporting law (and associated mechanisms, eg, reporter training) influences case identification by a specified reporter group. Third, the known presence of a reporting law can influence what would otherwise be a reluctance to report.<sup>82</sup>

8.62 The Australian Government has commented that:

- mandatory reporting is a strategy that acknowledges the prevalence, seriousness and often hidden nature of child abuse and neglect, and enables early detection of cases that otherwise may not come to the attention of agencies;
- mandatory reporting requirements reinforce the moral responsibility of community members to report suspected cases of child abuse and neglect. The laws help to create a culture that is more child-centred and that will not tolerate serious abuse and neglect of vulnerable children;

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78 See UK Home Office (Oct 2015), above, at 28.

79 Mathews & Bross (2008), above.

80 Same as above.

81 Mathews & Bross (2008), above, citing D Besharov (2005) “Over reporting and underreporting of child abuse and neglect are twin problems”, in D Loseke, R Gelles & M Cavanaugh (eds), *Current controversies on family violence* (2nd ed, Thousand Oaks, CA), 285 to 298.

82 Mathews & Bross (2015), above, at Chapter 1, at 16 to 17.

- the introduction of mandatory reporting and accompanying training efforts aim to enable professionals to develop an awareness of cases of child abuse and create conditions that require them to report those cases and protect them as reporters. Research has found that mandated reporters make a substantial contribution to child protection and family welfare.<sup>83</sup>

*Arguments against mandatory reporting*

8.63 A mandatory reporting system could, however, also:

- result in an increase in unsubstantiated referrals. Unsubstantiated referrals may unnecessarily increase state intrusion into family life and make it harder to distinguish real cases of abuse and neglect.<sup>84</sup> Appropriate action may not be taken in every case as a result;
- lead to a diversion of resources from the provision of support and services for actual cases of child abuse and neglect, into assessment and investigation;
- result in poorer quality reports as there might be a perverse incentive for all those who may be covered by the duty (from police officers to school caterers) to pass the buck. This might mean the children are less protected than in the current system;
- focus professionals' attention on reporting rather than on improving the quality of interventions wherever they are needed. This might encourage behaviour where reporting is driven by the process rather than focusing on the needs of the child;
- lead to those bound by the duty feeling less able to discuss cases openly for fear of sanctions, hinder recruitment and lead to experienced, capable staff leaving their positions;
- dissuade children from disclosing incidents for fear of being forced into hostile legal proceedings;
- undermine confidentiality for those contemplating disclosure of abuse. Victims may be more reluctant to make disclosures if they know that it will result in a record of their contact being made; and
- have limited impact on further raising awareness of child abuse and neglect given other media and Government awareness

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83 Child Family Community Australia Resource Sheet, *Mandatory Reporting of Child Abuse and Neglect*, (Sep 2017), available at: <https://aifs.gov.au/cfca/publications/mandatory-reporting-child-abuse-and-neglect>

84 In 2013 to 14, South Australia (the first Australian state to introduce mandatory reporting) had over 44,000 referrals. Only 44% of these were 'screened in' (accepted) and only 15% were investigated. South Australia is reviewing mandatory reporting.

raising efforts.

8.64 Opposition to mandatory reporting laws is often based on a range of arguments, in particular that unsubstantiated reports “*invade privacy and harm those on whom suspicion wrongly falls.*”<sup>85</sup> Opponents consider that mandatory reporting may lead to inflation of unwarranted reports, “*causing huge economic waste and diverting resources from known deserving cases.*”<sup>86</sup> It is also argued that laws on mandatory reporting have been extended too far; that they were originally created “*only for a perceived few cases of physical abuse, not the more varied types of abuse and neglect we now know of.*”<sup>87</sup>

8.65 It has also been stated that mandatory reporting is not a perfect system of case-finding.<sup>88</sup> Even with mandatory reporting laws in place, cases of abuse can evade the attention of authorities for a number of reasons.<sup>89</sup> Leung, Wong, Tang and Lee note that in practice, even where suspected reported abuse is a legal responsibility, as in the US and Australia, “*many medical professionals fail to do so despite potential criminal and civil penalties.*”<sup>90</sup> Mathews and Bross comment that reporters may not report due to feared misdiagnosis or low confidence in child protection services. Many ‘unsubstantiated’ cases will be abusive but lack sufficient evidence to be considered ‘substantiated’. Also, many cases will simply not be perceived by, or even made present before, a mandated reporter.<sup>91</sup> Leung, Wong, Tang and Lee observe that even where mandatory reporting laws are in place, common barriers to reporting include a lack of knowledge and training on identifying child abuse, lack of knowledge on reporting laws and process, professionals’ concerns regarding maintaining anonymity and a reluctance to get involved in litigation.<sup>92</sup>

8.66 The UK government, following a recent public consultation on the subject, has commented:

*“It is difficult to be definitive about the effectiveness (or not) of mandatory reporting. Such a duty would likely increase the volume of reports made to children’s social care. In theory, this might help to identify abuse more quickly to enable swifter preventative and protective action. However, the increased volume of reports might overwhelm the child protection system.*”

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85 Mathews & Bross (2008), above.

86 Same as above.

87 Same as above. The writers note that some critics have even gone so far as to claim that the mandatory reporting laws now in place should be abandoned: see, for example, G Melton (2005), “Mandated reporting: A policy without reason” (2005) *Child Abuse & Neglect*, 29(1), 9 to 18.

88 Mathews & Bross (2008), above.

89 Same as above.

90 Leung, Wong, Tang and Lee (2010), above, at 1. They observe that 43% of GPs in Australia and 28% of paediatricians in the US did not report suspected cases of child abuse they encountered.

91 Mathews & Bross (2008), above.

92 Leung, Wong, Tang and Lee (2010), above, at 1.

*This might mean that an increased number of unsubstantiated reports (ie, reports of children at risk that were later not confirmed as such) detracts from cases where children need help and protection, meaning that the system becomes slower to help these children. While mandatory reporting could encourage a stronger reporting culture, this might not necessarily be positive if that means that professionals ‘pass the buck’ and report to children’s social care rather than trying to take preventative/protective action themselves. Mandatory reporting could also dissuade children from disclosing incidents for fear of being forced into legal proceedings.”<sup>93</sup>*

### *Counter-arguments to criticisms of mandatory reporting*

8.67 In answer to these objections to establishing mandatory reporting laws, Mathews and Bross list the following arguments:<sup>94</sup>

- most abuse and neglect occurs in the family. The welfare of the child within the family needs to be protected and reporting laws promote this goal;
- without the laws, many more cases of abuse will not be disclosed and more children will die;
- the occurrence of ‘unsubstantiated reports’ is a poor argument against the laws, *“as many of these do involve abuse, and are prime candidates for early intervention”*,<sup>95</sup>
- many *“unwarranted reports”* are not even made by mandated reporters, but by other citizens;
- the claimed benefits from abolishing (or presumably, not having) the laws are unproven and would incur far greater loss.

8.68 Mathews and Bross also argue that any deficiencies in the system lie not with the reports, *“but poorly funded child protection services and the quality of post-report responses. Methods of intake, screening and assessment can improve. Service provision needs to improve.”*<sup>96</sup> They also comment that, in order to improve the efficacy of the mandatory reporting system itself: *“Laws, reporter training and public education can better define what should and should not be reported. This may involve reassessing the*

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93 See UK Home Office (Oct 2015), above, at 9. See also similar ambivalent comment in HM Government: *Reporting and acting on child abuse and neglect: Government Consultation* (Jul 2016), at Annex D, 20 and 28. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539615/Reporting\\_and\\_acting\\_on\\_child\\_abuse\\_and\\_neglect\\_-\\_annexes\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539615/Reporting_and_acting_on_child_abuse_and_neglect_-_annexes_web.pdf)

94 Mathews & Bross (2008), above.

95 Same as above, citing the 2007 study by B Drake & M Jonson-Reid, “A response to Melton based on the best available data” (2007) *Child Abuse & Neglect*, 31, at 343 to 360.

96 Mathews & Bross (2008), above.

*scope of the [mandatory reporting] laws.*<sup>97</sup>

8.69 More recently, Mathews and Bross note that:

- close to half of all reports are made by non-mandated reporters;
- a large proportion are multiple reports about the same children;
- many reports are screened out and are not investigated, hence resulting in very little burden;
- the substantiated rate of investigated cases is significantly higher; and
- the bulk of the economic cost involved in child protection is absorbed by foster care and residential care, accounting for at least half of the entire systemic cost.

8.70 These and other arguments have been considered recently by five major government child protection inquiries in Australia when contemplating the merits and parameters of mandatory reporting. The five recent inquiries have occurred in New South Wales (Wood 1997), South Australia (Layton 2003), New South Wales (Wood 2008), Victoria (Cummins et al. 2012), and Queensland (Carmody 2013). According to Mathews and Bross, these inquiries have consistently supported mandatory reporting laws as a necessary component of social policy to identify and respond to child abuse and neglect.<sup>98</sup>

*Mandatory reporting duty: areas for improvement*

8.71 Mathews and Bross cited a finding of the New South Wales Wood inquiry in 2008 that, rather than abolishing the reporting laws, the system needed greater effectiveness in reporting and more appropriate treatment of cases, including by use of a differential response pathway. It was considered that, in addition, amendments to the mandatory reporting provisions should be made to promote reports only being made about the kinds of case the system aimed to receive, namely, cases of significant abuse or harm.<sup>99</sup>

8.72 Mathews and Bross note the following areas where mandatory reporting may be improved:

- research needs to identify what educational measures are most effective in preparing reporters for their role;
- child protection systems need to interact effectively with reporters, providing feedback on reports and their outcomes;

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97 Same as above.

98 Same as above, at 19.

99 Same as above, at 20.

- there are also areas of undesirable reporting practice: poverty *per se* should not be reported, and low levels of neglect and lawful corporal punishment that is clearly disciplinary in intention and not producing clear injuries should not be reported;
- better reporter training and public education are essential;
- refinement of reporting laws is well-worth implementation: if necessary, if carefully constructed, and if supported by principle and data;
- investigation and differential response pathways are likely both needed but require ongoing monitoring to ensure principled and efficient operation;
- marginalised groups such as the homeless, and refugees, should be dealt with particular sensitivity if they are the subject of a report; and
- child protection systems should be better resourced, so they can fulfil their remit.<sup>100</sup>

*Different considerations for vulnerable adults in some cases*

8.73 It has been observed, for example in Australia, that in contrast to child abuse cases, different considerations may apply to mandatory reporting for cases involving vulnerable adults. The Australian Law Reform Commission (ALRC) has commented that:

*“Older people must not be treated like children, and the ALRC considers that professionals should not be required to report all types of elder abuse. Elder abuse is a broad category, and older people should generally be free to decide whether to report abuse they have suffered to the police or a safeguarding agency or not report the abuse at all. However, although not recommended in this report, there is a case for requiring professionals to report serious abuse of particularly vulnerable adults. ... However, although there may be a case for mandatory reporting of some types of serious abuse of at-risk adults, given the widespread concerns about mandatory reporting policies, the ALRC does not recommend that such laws be introduced at this time. Instead, as discussed above, clear protocols should be created setting out when it might be appropriate for professionals to report abuse to safeguarding agencies.”<sup>101</sup>*

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100 Same as above.

101 Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (2017, ALRC Report 131), at paras 14.189 and 14.197. Available at: <https://www.alrc.gov.au/publications/elder-abuse-report>

## ***Our observations on reporting of abuse***

8.74 As stated at the outset of this chapter, we have presented this material on reporting obligations for the information of the public and for those who may make future policy in this area.

8.75 On the question of mandatory reporting, we note from the previous discussion, and from the information set out in Appendix VI, that the relevant overseas models represent a range in approaches, particularly in relation to the scope of cases required to be reported and by whom.<sup>102</sup> It is also apparent that the issues involved and considerations to be applied in formulating such systems are highly complex, if such systems are to fully meet their objectives *“to detect cases of abuse and neglect at an early stage, protect children [and other vulnerable persons], and facilitate the provision of services to children and families.”*<sup>103</sup>

8.76 In this regard, we note the useful list of *“Issues for consideration”* drawn up by Mathews and Kenny in 2008 for *“legislatures ... designing mandatory reporting legislation.”*<sup>104</sup> The issues they cite, should such matters come up for consideration, are as follows.

1. Are mandated reporters limited to selected occupations (and if so, which), or is the reporting duty imposed on all citizens?
2. What types of abuse (physical, emotional, sexual) and neglect are required to be reported?
3. What level of suspicion is required to activate the reporting duty (and how is this expressed)?
4. Within the three major types of abuse, are reports required of suspected abuse from all sources, or from selected perpetrators such as parents and caregivers (and how is this to be clearly expressed)?
5. Are any ‘new’ types of abuse required to be reported, and if so, which?
6. Are the types of abuse that are required to be reported defined to indicate the extent of harm required to be suspected to have been suffered (and if so, how), or does the reporting obligation apply to any occurrence of the abuse?

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102 For a useful comparative analysis of these differences in approach, see Mathews & Kenny (2008), above.

103 Mathews & Kenny (2008), above, at 50 Abstract.

104 Mathews & Kenny (2008), above, at 62.

7. Are reports required only of past or present abuse, or are reports also required of suspected risk of future abuse (and if so, under what circumstances)?

To these, we would suggest the following further heads of inquiry:

8. To what extent, if at all, should penalties be imposed for failure to comply with the mandatory duty?
9. Should child victims of abuse be able to recover compensation for harm they have been proved to have suffered as a result of the failure to report abuse?
10. Should there be any specified circumstances where liability may be incurred in cases where a report is incorrectly made and causes harm to be suffered by a person or persons wrongly accused of child abuse?

8.77 For members of the public, while the material above relates largely to policy makers and frontline persons involved professionally in the protection of children and other vulnerable persons, it is important that members of the public are aware of the role they too can play. By taking simple steps to bring possible cases of abuse to the attention of the authorities (like making a telephone call to SWD or the police), a crucial early intervention can take place to protect the victim, support the family, and prevent an escalation of harm and suffering.

8.78 For members of the victim's family and other carers under a duty to protect the victim, we saw in Chapter 3 the types of "*reasonable steps*" which should be taken, including:

- reporting suspicions of abuse to the police;
- contacting social services (perhaps through websites and helplines which are available for those seeking further advice);
- making sure that the child or vulnerable person is treated promptly and appropriately for any injuries or illnesses which they may suffer;
- explaining concerns to their family medical practitioner or health visitor;
- contacting their teacher, head teacher or school nurse;
- contacting relevant child welfare organisations and/or NGOs;
- contacting grandparents, an aunt or uncle, or other responsible adult member of the family;

- exploring concerns with neighbours or others who may have contact with the person who is at risk.<sup>105</sup>

8.79 The most vulnerable in society often cannot speak for themselves, so we must speak for them.

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105 See Chapter 3, above, at para 3.60, citing UK Ministry of Justice, Criminal Law & Legal Policy Unit, "Domestic Violence, Crime and Victims (Amendment) Act 2012" (Circular No 2012/03, June 2012), at para 25.

## Chapter 9

### Summary of recommendations

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(The recommendations below are to be found in Chapter 7 of this report, on *Our proposed reform model for Hong Kong*.)

#### OVERVIEW OF PROPOSED NEW OFFENCE OF “FAILURE TO PROTECT”

##### Recommendation 1

We recommend<sup>1</sup> the introduction of a new offence of “*Failure to protect a child or vulnerable person where the child’s or vulnerable person’s death or serious harm results from an unlawful act or neglect*”, to be broadly based on section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended by the Criminal Law Consolidation (Criminal Neglect) Amendment Act 2005).

#### LEGISLATIVE APPROACH

##### Recommendation 2

*(Title and location of the offence)*

Subject to the views of the Law Draftsman, we recommend<sup>2</sup> that the new offence of “*Failure to protect a child or vulnerable person where the child’s or vulnerable person’s death or serious harm results from an unlawful act or neglect*” should be comprised in a new section of the Offences against the Person Ordinance (Cap 212) and should be located earlier in the Ordinance than section 27 of that Ordinance, to indicate the more serious nature of the proposed new offence.

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1 See discussion in Chapter 7, above, at paras 7.3 to 7.5. The suggested draft text of our proposed offence is at Annex A of this paper.

2 See discussion in Chapter 7, above, at paras 7.7 to 7.9.

### **Recommendation 3**

*(Impact on section 27, Offences against the Person Ordinance (Cap 212))*

**We recommend:**<sup>3</sup>

- (a) subject to (b) below, the retention in its current form of section 27 of the Offences against the Person Ordinance (Cap 212); and**
- (b) that the Government undertake a review of the maximum penalty applicable under section 27(1)(a) of the Offences against the Person Ordinance (Cap 212) with a view to increasing it as appropriate.**

### **SCOPE OF THE OFFENCE OF FAILURE TO PROTECT**

#### **Recommendation 4**

*(Victim is a child or vulnerable person)*

**We recommend**<sup>4</sup> **that under the new offence of failure to protect:**

- (a) the scope of “*victim*” should include “*a child or a vulnerable person*”;**
- (b) “*child*” should be defined as “*a person under 16 years of age*”; and**
- (c) “*vulnerable person*” should be defined as “*a person aged 16 years or above whose ability to protect himself or herself from an unlawful act or neglect is significantly impaired for any reason, including but not limited to, physical or mental disability, illness or infirmity*”.**

#### **Recommendation 5**

*(Includes cases of death or serious harm)*

**We recommend**<sup>5</sup> **that the offence of failure to protect should apply in cases involving either the death of the victim, or where the victim has suffered serious harm.**

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3 See discussion in Chapter 7, above, at paras 7.10 to 7.11.

4 See discussion in Chapter 7, above, at paras 7.13 to 7.19.

5 See discussion in Chapter 7, above, at paras 7.20 to 7.25.

We are not in favour of the inclusion of a statutory definition of “*serious harm*” within the terms of the offence.<sup>6</sup>

## **THE RANGE OF THOSE POTENTIALLY LIABLE FOR THE OFFENCE**

### **Recommendation 6**

*(Defendant had a “duty of care” to the victim or was a “member of the same household” and had “frequent contact” with the victim)*

We recommend<sup>7</sup> that the concept of “*duty of care*” to the victim used in section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005), and “*member of the same household*” who has “*frequent contact*” with the victim used in section 5 of the Domestic Violence, Crime and Victims Act 2004 in the United Kingdom, should be used as alternative bases for liability under the Hong Kong offence.

### **Recommendation 7**

*(Minimum age of the defendant)*

We recommend<sup>8</sup> that no minimum age for the defendant should be stipulated in the Hong Kong offence, in line with the approach in section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005).

## **THE ACTIONS WHICH CONSTITUTE THE OFFENCE**

### **Recommendation 8**

*(An unlawful act or neglect)*

We recommend<sup>9</sup> that the concept and definitions relating to “*unlawful act*” used in section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005) should be adopted in the Hong Kong offence, subject to the following amendments:

- (a) the addition of the words “*or neglect*” after “*unlawful act*” in the first sub-section of the offence provision;

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6 See discussion in Chapter 7, above, at para 7.25.

7 See discussion in Chapter 7, above, at paras 7.26 to 7.30.

8 See discussion in Chapter 7, above, at paras 7.31 to 7.35.

9 See discussion in Chapter 7, above, at paras 7.36 to 7.40.

- (b) the replacement of the phrase “*an adult of full legal capacity*” with “*a person of full legal capacity*” in the definition of an “*unlawful act*”.

### Recommendation 9

*(Defendant’s awareness of risk of serious harm)*

We recommend:<sup>10</sup>

- (a) that section 14(1)(c) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005) should be adopted in the Hong Kong offence subject to the substitution of the words “*a risk*” for “*an appreciable risk*” in the provision; and
- (b) in line with Recommendation 8 above, that the words “*or neglect*” should be added after “*unlawful act*” in subsection (1)(c) of the new provision.

### Recommendation 10

*(Defendant’s failure to take steps was so serious that a criminal penalty is warranted)*

We recommend<sup>11</sup> that:

- (a) section 14(1)(d) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005) should be adopted in the Hong Kong offence; and
- (b) the word “*such*” should be added before “*harm*” in the new provision.

## **EVIDENTIAL MATTERS**

### Recommendation 11

*(Reasonable doubt as to who committed the unlawful act or neglect)*

We recommend<sup>12</sup> that a provision along the following lines should be adopted in the Hong Kong offence in place of the wording set out in

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10 See discussion in Chapter 7, above, at paras 7.41 to 7.46.

11 See discussion in Chapter 7, above, at paras 7.47 to 7.51.

12 See discussion in Chapter 7, above, at paras 7.52 to 7.56.

section 14(2) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005):

*“In proceedings for an offence under subsection (1), it is not necessary for the prosecution to prove who did the unlawful act or neglect mentioned in subsection (1)(a)”*

## **MAXIMUM SENTENCE FOR THE OFFENCE**

### **Recommendation 12**

*(Cases involving the death of the victim)*

**We recommend<sup>13</sup> that where the victim dies as a result of the unlawful act or neglect, the maximum penalty for the offence should be 20 years’ imprisonment.**

### **Recommendation 13**

*(Cases involving the serious harm of the victim)*

**We recommend<sup>14</sup> that where the victim suffers serious harm as a result of the unlawful act or neglect, the maximum penalty for the offence should be 15 years’ imprisonment.**

## **OTHER PROCEDURAL MATTERS**

### **Recommendation 14**

*(Venue for trial)*

**We recommend<sup>15</sup> that:**

- (a) the offence of failure to protect should be an indictable offence;**
- (b) cases of failure to protect should not be heard summarily in the Magistrates’ court;**
- (c) cases of failure to protect involving the serious harm to the victim should be triable in either the District Court or the High Court;**

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13 See discussion in Chapter 7, above, at para 7.69.

14 See discussion in Chapter 7, above, at para 7.70.

15 See discussion in Chapter 7, above, at para 7.71.

- (d) cases of failure to protect involving the death of the victim should be triable in the High Court only; and**
- (e) appropriate consequential amendments should be made to Parts I and III of the Second Schedule to the Magistrates Ordinance (Cap 227) to give effect to this recommendation.**

# **ANNEXES**

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**(Proposed new offence for Hong Kong)<sup>1</sup>**

Offences against the Person (Amendment) Bill

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**A Bill**

**To**

Amend the Offences against the Person Ordinance to provide for an offence of failure to protect a child or vulnerable person where the child's or vulnerable person's death or serious harm results from an unlawful act or neglect.

Enacted by the Legislative Council.

**1. Short title and commencement**

- (1) This Ordinance may be cited as the Offences against the Person (Amendment) Ordinance.
- (2) This Ordinance comes into operation on a day to be appointed by the [...] by notice published in the Gazette.

**2. Offences against the Person Ordinance amended**

The Offences against the Person Ordinance (Cap. 212) is amended as set out in section 3.

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<sup>1</sup> These draft provisions are possible amendments to the Offences against the Person Ordinance (Cap.212) and are included to assist in explaining the proposals in this consultation paper. They are not the final version for the legislative process if legislation were to be introduced to give effect to the proposals.

### 3. Section 25A added

After section 25—

**Add**

#### “25A. Failure to protect child or vulnerable person

- (1) A person (*defendant*) commits an offence if—
  - (a) a child or vulnerable person (*victim*) dies or suffers serious harm as a result of an unlawful act or neglect;
  - (b) when the unlawful act or neglect occurred, the defendant—
    - (i) had a duty of care to the victim; or
    - (ii) was a member of the same household as the victim and in frequent contact with the victim;
  - (c) the defendant was, or ought to have been, aware that there was a risk that serious harm would be caused to the victim by the unlawful act or neglect; and
  - (d) the defendant failed to take steps that the defendant could reasonably be expected to have taken in the circumstances to protect the victim from such harm and the defendant’s failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.
- (2) For subsection (1)(b)(i), the defendant has a duty of care to the victim only if the defendant—
  - (a) is a parent or guardian of the victim; or
  - (b) has assumed responsibility for the victim’s care.
- (3) For subsection (1)(b)(ii)—
  - (a) the defendant is to be regarded as a *member of the same household as the victim* if, despite not living in that household, the defendant visits it so often and for such periods of time that it is reasonable to regard the defendant as a member of it; and
  - (b) if the victim lives in different households at different times, *the same household as the victim* refers to the household in which the victim was living when the unlawful act or neglect mentioned in subsection (1)(a) occurred.
- (4) In proceedings for an offence under subsection (1), it is not necessary for the prosecution to prove who did the unlawful act or neglect mentioned in subsection (1)(a).
- (5) A person convicted of an offence under subsection (1) is liable on conviction on indictment to—
  - (a) if the victim dies— imprisonment for 20 years; or
  - (b) if the victim suffers serious harm— imprisonment for 15 years.

(6) In this section—

*act* includes—

- (a) an omission; and
- (b) a course of conduct;

*child* means a person under 16 years of age;

*unlawful act* means an act that—

- (a) constitutes an offence; or
- (b) would constitute an offence if done by a person of full legal capacity;

*vulnerable person* means a person aged 16 years or above whose ability to protect himself or herself from an unlawful act or neglect is significantly impaired for any reason, including but not limited to, physical or mental disability, illness or infirmity.”.

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**South Australia's Criminal Law Consolidation  
(Criminal Neglect) Amendment Act 2005 (extract)**

**14—Criminal liability for neglect where death or serious harm results from unlawful act**

- (1) *A person (the **defendant**) is guilty of the offence of criminal neglect if—*
- (a) *a child or a vulnerable adult (the **victim**) dies or suffers serious harm as a result of an unlawful act; and*
  - (b) *the defendant had, at the time of the act, a duty of care to the victim; and*
  - (c) *the defendant was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act; and*
  - (d) *the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.*

*Maximum penalty:*

- (a) *where the victim dies—imprisonment for 15 years; or*
  - (b) *where the victim suffers serious harm—imprisonment for 5 years.*
- (2) *If a jury considering a charge of criminal neglect against a defendant finds that—*
- (a) *there is reasonable doubt as to the identity of the person who committed the unlawful act that caused the victim's death or serious harm; but*
  - (b) *the unlawful act can only have been the act of the defendant or some other person who, on the evidence, may have committed the unlawful act,*

*the jury may find the defendant guilty of the charge of criminal neglect even though of the opinion that the unlawful act may have been the act of the defendant.*

(3) *For the purposes of this section, the defendant has a duty of care to the victim if the defendant is a parent or guardian of the victim or has assumed responsibility for the victim's care.*

(4) *In this section—<sup>1</sup>*

**act includes—**

- (a) *an omission; and*
- (b) *a course of conduct;*

**child** *means a person under 16 years of age;*

**serious harm** *means—*

- (a) *harm that endangers, or is likely to endanger, a person's life; or*
- (b) *harm that consists of, or is likely to result in, loss of, or serious and protracted impairment of, a part of the body or a physical or mental function; or*
- (c) *harm that consists of, or is likely to result in, serious disfigurement;*

**unlawful—***an act is unlawful if it—*

- (a) *constitutes an offence; or*
- (b) *would constitute an offence if committed by an adult of full legal capacity;*

**vulnerable adult** *means a person aged 16 years or above whose ability to protect himself or herself from an unlawful act is significantly impaired through physical or mental disability, illness or infirmity.*

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1 While it does not affect our recommendations, we note that in 2016, the term “*mental disability*” in the original 2005 provision was amended to “*cognitive impairment*” pursuant to the Statutes Amendment (Attorney-General’s Portfolio) Act 2016 (see discussion in Chapter 4, above). That amendment also introduced the following definition of “*cognitive impairment*” in section 14(4):

**“cognitive impairment** *includes—*

- (a) *a developmental disability (including, for example, an intellectual disability, Down syndrome, cerebral palsy or an autistic spectrum disorder);*
- (b) *an acquired disability as a result of illness or injury (including, for example, dementia, a traumatic brain injury or a neurological disorder);*
- (c) *a mental illness; ...”.*

**South Australia's Criminal Law Consolidation  
(Children and Vulnerable Adults) Amendment Act 2018<sup>1</sup>**

*An Act to amend the Criminal Law Consolidation Act 1935.*

**Contents**

*Part 1— Preliminary*

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- 2 *Commencement*
- 3 *Amendment provisions*

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- 5 *Insertion of section 13B*  
*13B Interpretation*
- 6 *Amendment of section 14— Criminal neglect*
- 7 *Insertion of section 14A*  
*14A Failing to provide food etc in certain circumstances*
- 8 *Repeal of section 30*

***The Parliament of South Australia enacts as follows:***

***Part 1— Preliminary***

**1 *Short title***

*This Act may be cited as the Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018.*

**2 *Commencement***

*This Act will come into operation on a day to be fixed by proclamation.*

**3 *Amendment provisions***

*In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.*

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1 Which received assent on 2 August 2018 and came into operation on 6 September 2018.

**Part 2 - Amendment of Criminal Law Consolidation Act 1935**

**4 Substitution of heading to Part 3 Division 1A**

*Heading to Part 3 Division 1A— delete the heading and substitute:*

**Division 1A— Criminal neglect etc**

**5 Insertion of section 13B**

*Before section 14 insert:*

**13B— Interpretation**

(1) *In this Division—*

**act** *includes—*

- (a) *an omission; and*
- (b) *a course of conduct;*

**child** *means a person under 16 years of age;*

**cognitive impairment** *includes—*

- (a) *a developmental disability (including, for example, an intellectual disability, Down syndrome, cerebral palsy or an autistic spectrum disorder);*
- (b) *an acquired disability as a result of illness or injury (including, for example, dementia, a traumatic brain injury or a neurological disorder);*
- (c) *a mental illness;*

**vulnerable adult** *means a person aged 16 years or above who is significantly impaired through physical disability, cognitive impairment, illness or infirmity.*

(2) *Subject to subsection (3), in this Division the following terms and phrases have the same meaning as in Division 7A:*

- (a) **cause**;
- (b) **harm**.

(3) *For the purposes of this Division, a reference to **harm** will be taken to include detriment caused to the physical, mental or emotional wellbeing or development of a child or vulnerable adult (whether temporary or permanent).*

(4) *For the purposes of this Division, a defendant has a **duty of care** to a victim if the defendant is a parent or guardian of the victim or has assumed responsibility for the victim's care.*

**6 Amendment of section 14— Criminal neglect**

- (1) Section 14— delete “serious harm” wherever occurring and substitute in each case:

*harm*

- (2) Section 14— delete “unlawful” wherever occurring

- (3) Section 14(1), penalty provision— delete the penalty provision and substitute:

*Maximum penalty:*

(a) *where the victim dies— imprisonment for life; or*

(b) *in any other case— imprisonment for 15 years.*

- (4) Section 14(3) and (4)— delete subsections (3) and (4) and substitute:

(3) *If a defendant is charged with an offence against this section in respect of a course of conduct—*

(a) *it is not necessary to prove that the defendant was, or ought to have been, aware that there was an appreciable risk that harm would be caused to the victim by each act making up the course of conduct; and*

(b) *the information need not—*

(i) *allege particulars of each act with the degree of particularity that would be required if the act were charged as an offence under a different section of this or any other Act; or*

(ii) *identify particular acts or the occasions on which, places at which or order in which acts occurred; or*

(iii) *identify particular acts as causing, wholly or partly, particular harm to the victim.*

- (4) *A defendant may be charged with an offence against this section in respect of a course of conduct even if some of the acts making up the course of conduct occurred before the commencement of this section.*

**7. Insertion of section 14A**

*After section 14 insert:*

**14A Failing to provide food etc in certain circumstances**

*If—*

- (a) a person is liable to provide necessary food, clothing or accommodation to a child or vulnerable adult; and*
- (b) the person, without lawful excuse, fails to provide that food, clothing or accommodation,*

*that person is guilty of an offence.*

*Maximum penalty: Imprisonment for 3 years.*

**8. Repeal of section 30**

*Section 30— delete the section*

**South Australia's Criminal Law Consolidation Act 1935<sup>1</sup>**  
**(extract) (as at 6 September 2018)**

**Division 1A—Criminal neglect etc**

**13B—Interpretation**

(1) *In this Division—*

**act** *includes—*

- (a) *an omission; and*
- (b) *a course of conduct;*

**child** *means a person under 16 years of age;*

**cognitive impairment** *includes—*

- (a) *a developmental disability (including, for example, an intellectual disability, Down syndrome, cerebral palsy or an autistic spectrum disorder);*
- (b) *an acquired disability as a result of illness or injury (including, for example, dementia, a traumatic brain injury or a neurological disorder);*
- (c) *a mental illness;*

**vulnerable adult** *means a person aged 16 years or above who is significantly impaired through physical disability, cognitive impairment, illness or infirmity.*

(2) *Subject to subsection (3), in this Division the following terms and phrases have the same meaning as in Division 7A:*

- (a) **cause;**
- (b) **harm.**

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<sup>1</sup> Incorporating the amendments in the Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018 which came into operation on 6 September 2018

- (3) *For the purposes of this Division, a reference to **harm** will be taken to include detriment caused to the physical, mental or emotional wellbeing or development of a child or vulnerable adult (whether temporary or permanent).*
- (4) *For the purposes of this Division, a defendant has a **duty of care** to a victim if the defendant is a parent or guardian of the victim or has assumed responsibility for the victim's care.*

#### **14—Criminal neglect**

- (1) *A person (the **defendant**) is guilty of the offence of criminal neglect if—*
  - (a) *a child or a vulnerable adult (the **victim**) dies or suffers harm as a result of an act; and*
  - (b) *the defendant had, at the time of the act, a duty of care to the victim; and*
  - (c) *the defendant was, or ought to have been, aware that there was an appreciable risk that harm would be caused to the victim by the act; and*
  - (d) *the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.*

*Maximum penalty:*

- (a) *where the victim dies—imprisonment for life; or*
  - (b) *in any other case—imprisonment for 15 years.*
- (2) *If a jury considering a charge of criminal neglect against a defendant finds that—*
    - (a) *there is reasonable doubt as to the identity of the person who committed the act that caused the victim's death or harm; but*
    - (b) *the act can only have been the act of the defendant or some other person who, on the evidence, may have committed the act,*

*the jury may find the defendant guilty of the charge of criminal neglect even though of the opinion that the act may have been the act of the defendant.*

(3) *If a defendant is charged with an offence against this section in respect of a course of conduct—*

(a) *it is not necessary to prove that the defendant was, or ought to have been, aware that there was an appreciable risk that harm would be caused to the victim by each act making up the course of conduct; and*

(b) *the information need not—*

(i) *allege particulars of each act with the degree of particularity that would be required if the act were charged as an offence under a different section of this or any other Act; or*

(ii) *identify particular acts or the occasions on which, places at which or order in which acts occurred; or*

(iii) *identify particular acts as causing, wholly or partly, particular harm to the victim.*

(4) *A defendant may be charged with an offence against this section in respect of a course of conduct even if some of the acts making up the course of conduct occurred before the commencement of this section.*

#### **14A—Failing to provide food etc in certain circumstances**

*If—*

(a) *a person is liable to provide necessary food, clothing or accommodation to a child or vulnerable adult; and*

(b) *the person, without lawful excuse, fails to provide that food, clothing or accommodation,*

*that person is guilty of an offence.*

*Maximum penalty: Imprisonment for 3 years.*

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**(UK enacted model)**  
**sections 5, 6 and 6A of**  
**Domestic Violence, Crime and Victims Act 2004<sup>1</sup>**

**Section 5** of the 2004 Act states:

*Causing or allowing a child or vulnerable adult to die or suffer serious physical harm*

**5 The offence**

- (1) A person (“D”) is guilty of an offence if–
- (a) a child or vulnerable adult (“V”) dies or suffers serious physical harm as a result of the unlawful act of a person who–
    - (i) was a member of the same household as V, and
    - (ii) had frequent contact with him,
  - (b) D was such a person at the time of that act,
  - (c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and
  - (d) either D was the person whose act caused the death or serious physical harm or–
    - (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),
    - (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
    - (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.
- (2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.

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<sup>1</sup> As amended by the Domestic Violence, Crime and Victims (Amendment) Act 2012, enacted in March 2012. The relevant changes (related to the extension of the offence to cover cases of “serious physical harm”) came into force on 2 July 2012 (SI 2012/1432).

- (3) *If D was not the mother or father of V–*
- (a) *D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused the death or serious physical harm;*
  - (b) *for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.*
- (4) *For the purposes of this section–*
- (a) *a person is to be regarded as a “member” of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it;*
  - (b) *where V lived in different households at different times, “the same household as V” refers to the household in which V was living at the time of the act that caused the death or serious physical harm.*
- (5) *For the purposes of this section an “unlawful” act is one that–*
- (a) *constitutes an offence, or*
  - (b) *would constitute an offence but for being the act of–*
    - (i) *a person under the age of ten, or*
    - (ii) *a person entitled to rely on a defence of insanity.*

*Paragraph (b) does not apply to an act of D.*

- (6) *In this section–*
- “act” includes a course of conduct and also includes omission;*
  - “child” means a person under the age of 16;*
  - “serious” harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861 (c. 100);*
  - “vulnerable adult” means a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.*
- (7) *A person guilty of an offence under this section of causing or allowing a person's death is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.*
- (8) *A person guilty of an offence under this section of causing or allowing a person to suffer serious physical harm is liable on conviction on indictment to imprisonment for a term not exceeding 10 years or to a fine, or both.*

**Section 6** of the 2004 Act states:

**6 Evidence and procedure in cases of death: England and Wales**

- (1) *Subsections (2) to (4) apply where a person (“the defendant”) is charged in the same proceedings with an offence of murder or manslaughter and with an offence under section 5 in respect of the same death (“the section 5 offence”).*
- (2) *Where by virtue of section 35(3) of the Criminal Justice and Public Order Act 1994 (c. 33) a court or jury is permitted, in relation to the section 5 offence, to draw such inferences as appear proper from the defendant’s failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether he is guilty—*
  - (a) *of murder or manslaughter, or*
  - (b) *of any other offence of which he could lawfully be convicted on the charge of murder or manslaughter,**even if there would otherwise be no case for him to answer in relation to that offence.*
- (3) *The charge of murder or manslaughter is not to be dismissed under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (c. 37) (unless the section 5 offence is dismissed).*
- (4) *At the defendant’s trial the question whether there is a case for the defendant to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the section 5 offence, before that earlier time).*
- (5) *An offence under section 5 of causing or allowing a person’s death is an offence of homicide for the purposes of the following enactments—*
  - sections 24 and 25 of the Magistrates' Courts Act 1980 (c. 43) (mode of trial of child or young person for indictable offence);*
  - section 51A of the Crime and Disorder Act 1998 (sending cases to the Crown Court: children and young persons);*
  - section 8 of the Powers of Criminal Courts (Sentencing) Act 2000 (c. 6) (power and duty to remit young offenders to youth courts for sentence).*

**A new section 6A** of the 2004 Act states:

**6A Evidence and procedure in cases of serious physical harm: England and Wales**

- (1) *Subsections (3) to (5) apply where a person (“the defendant”) is charged in the same proceedings with a relevant offence and*

*with an offence under section 5 in respect of the same harm (“the section 5 offence”).*

- (2) In this section “relevant offence” means–*
  - (a) an offence under section 18 or 20 of the Offences against the Person Act 1861 (grievous bodily harm etc);*
  - (b) an offence under section 1 of the Criminal Attempts Act 1981 of attempting to commit murder.*
- (3) Where by virtue of section 35(3) of the Criminal Justice and Public Order Act 1994 a court or jury is permitted, in relation to the section 5 offence, to draw such inferences as appear proper from the defendant's failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether the defendant is guilty of a relevant offence, even if there would otherwise be no case for the defendant to answer in relation to that offence.*
- (4) The charge of the relevant offence is not to be dismissed under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (unless the section 5 offence is dismissed).*
- (5) At the defendant's trial the question whether there is a case for the defendant to answer on the charge of the relevant offence is not to be considered before the close of all the evidence (or, if at some earlier time the defendant ceases to be charged with the section 5 offence, before that earlier time).*

**(English Law Commission's proposed model)  
(Offences Against Children Bill)<sup>1</sup>**

PART 1

OFFENCES

**1 Cruelty contributing to death**

*In the Children and Young Persons Act 1933 (c. 12), after section 1 (cruelty to persons under sixteen), insert-*

**1A Cruelty contributing to death**

- (1) *A person is guilty of an offence if-*
- (a) *he commits an offence under section 1 against a child or young person ("C");*
  - (b) *suffering or injury to health of a kind which was likely to be caused to C by the commission of that offence occurs; and*
  - (c) *its occurrence results in, or contributes significantly to, C's death.*
- (2) *A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.*

**2 Failure to protect a child**

- (1) *A person ("R") is guilty of an offence if-*
- (a) *at a time when subsection (3) applies, R is aware or ought to be aware that there is a real risk that an offence specified in Schedule 1 might be committed against a child ("C");*
  - (b) *R fails to take such steps as it would be reasonable to expect R to take to prevent the commission of the offence;*

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<sup>1</sup> English Law Commission report, *Children: Their Non-accidental Death or Serious Injury (Criminal Trials)* (Sep 2003, Law Com No 282), at 79 (Appendix).

- (c) *an offence specified in Schedule 1 is committed against C; and*
  - (d) *the offence is committed in circumstances of the kind that R anticipated or ought to have anticipated.*
- (2) *A person guilty of an offence under this section is liable-*
  - (a) *on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both;*
  - (b) *on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both.*
- (3) *This subsection applies if R-*
  - (a) *is at least 16 years old;*
  - (b) *has responsibility for C; and*
  - (c) *is connected with C.*
- (4) *R is connected with C if-*
  - (a) *they live in the same household;*
  - (b) *they are related; or*
  - (c) *R looks after C under a child care arrangement.*
- (5) *R and C are related if they are relatives within the meaning of Part 4 of the Family Law Act 1996 (c. 27).*
- (6) *R looks after C under a child care arrangement if R-*
  - (a) *looks after C (whether alone or with other children) under arrangements made with a person who lives in the same household as, or is related to, C; and*
  - (b) *does so wholly or mainly in C's home.*
- (7) *It does not matter whether R looks after C for reward or on a regular or occasional basis. ...*

## PART 2

### INVESTIGATION AND TRIAL

#### *Responsibility to provide information*

#### **4 The statutory responsibility**

- (1) *This section applies if a serious offence has been committed against a child or there are reasonable grounds for suspecting that such an offence has been committed.*
- (2) *Any person who had responsibility for the child at the relevant time also has the responsibility imposed by this section (“the statutory responsibility”).*
- (3) *“The relevant time” means -*
  - (a) *the time when the offence was committed (if known); or*
  - (b) *any time during the period within which the offence could have been committed.*
- (4) *The statutory responsibility is responsibility for assisting*
  - (a) *the police in any investigation of the offence, and*
  - (b) *the court in any proceedings in respect of the offence,*

*by providing as much information as the person is able to give about whether and, if so, by whom and in what circumstances the offence was committed.*

#### **5 Investigations by the police**

- (1) *This section applies if a constable -*
  - (a) *is investigating a serious offence against a child; and*
  - (b) *reasonably suspects that a person whom he is questioning in connection with the offence (“A”) is subject to the statutory responsibility in relation to the offence.*
- (2) *If A is being questioned under caution, the constable must inform A of his suspicion -*
  - (a) *when he cautions A; or*
  - (b) *as soon as he forms that suspicion (if later).*

- (3) *When giving that information, the constable must explain*
  - (a) *the nature of the statutory responsibility; and*
  - (b) *the effect of subsections (5) and (6).*
- (4) *If A is not being questioned under caution, the constable may nevertheless give A -*
  - (a) *the information mentioned in subsection (2); and*
  - (b) *an explanation of the nature of the statutory responsibility and the effect of subsection (5).*
- (5) *A is not obliged to answer a question put to him by a constable investigating an offence merely because he is, or may be, subject to the statutory responsibility in relation to the offence.*
- (6) *But if section 34(2) of the Criminal Justice and Public Order Act 1994 (c. 33) (circumstances in which inferences may be drawn from failure to mention facts) applies in relation to a failure by A to mention any fact, a court, judge or jury may, in deciding whether it is proper to draw an inference under that provision, take into account any evidence that A was given the information and explanations mentioned in subsections (2) and (3).*

## **6 Responsibility of witness in criminal proceedings**

- (1) *This section applies if a person (“W”) -*
  - (a) *is a witness in criminal proceedings for a serious offence against a child; but*
  - (b) *is not a person charged with an offence in those proceedings.*
- (2) *If the court is of the opinion that W is subject to the statutory responsibility in relation to the offence, it may -*
  - (a) *inform W of its opinion; and*
  - (b) *explain to W the nature of that responsibility and the effect of this section.*
- (3) *If the court acts under subsection (2), it may take into account that W was given that information and explanation in determining -*
  - (a) *whether W's behaviour as a witness has amounted to contempt of court; and*

- (b) *if it has, what punishment to impose.*
- (4) *This section does not --*
  - (a) *oblige W to answer any question which W is entitled to refuse to answer as a result of any enactment or on the ground of privilege; or*
  - (b) *affect the court's power, in the exercise of its general discretion, to excuse a witness from answering a question.*

### *Special procedure*

## **7 Special procedure during trial**

- (1) *This section applies if --*
  - (a) *a person is, or two or more persons are, charged with a serious offence against a child; and*
  - (b) *at the conclusion of the evidence for the prosecution, it has been proved to the court that three conditions are met.*
- (2) *The first condition is that the offence charged or any alternative offence has been committed (but it is not necessary for it to have been proved which of those offences was committed).*
- (3) *The second is that --*
  - (a) *the number of persons who could have committed the offence charged or any alternative offence is known; and*
  - (b) *those persons can be described, whether by reference to their names, their personal characteristics or their relationship to one another or to other persons.*
- (4) *The third is that --*
  - (a) *if there is only one accused, he is subject to the statutory responsibility in relation to the offence charged; or*
  - (b) *if there are two or more accused, at least one of them is subject to that responsibility in relation to the offence charged.*

- (5) *If the court is satisfied, in respect of the accused, or an accused, that he could not have committed the offence charged or any alternative offence -*
- (a) *the court must acquit him of the offence charged or direct his acquittal; and*
  - (b) *he may not be convicted of any alternative offence.*
- (6) *Subsection (7) applies if, after the court has acted under subsection (5)*
- (a) *one or more persons remain accused of the offence charged; and*
  - (b) *the third condition continues to be met.*
- (7) *A submission that the accused, or an accused, does not have a case to answer in relation to the offence charged or an alternative offence may not be made at any time before the conclusion of the evidence for the accused or all of the accused.*
- (8) *If the court considers at the conclusion of the evidence for the accused, or all of the accused, that no court or no jury properly directed could properly convict the accused, or an accused, of the offence charged -*
- (a) *the court must acquit him of that offence or direct his acquittal; and*
  - (b) *if the court is of the same opinion in relation to an alternative offence, he may not be convicted of that offence.*
- (9) *This section does not affect --*
- (a) *any power a court may have to acquit or direct the acquittal of an accused otherwise than on a submission made on his behalf; or*
  - (b) *any power a court may have to discharge a jury or otherwise prevent a trial continuing.*
- (10) *“Alternative offence”, in relation to an offence charged, means any other offence of which the accused could lawfully be convicted on that charge.*

*Inferences from silence*

**8 Inferences from accused's silence**

(1) *The Criminal Justice and Public Order Act 1994 (c. 33) is amended as follows.*

(2) *In section 35 (effect of accused's silence at trial), after subsection (7), insert -*

(8) *This section does not apply if section 35A applies.*

(3) *After section 35, insert --*

**35A Effect of accused's silence at trial in special cases**

(1) *This section applies if a person is on trial for a serious offence against a child and, at the conclusion of the evidence for the prosecution -*

(a) *it has been proved to the court that the conditions in section 7(2) to (4) of the Act of 2004 (conditions for application of special procedure) apply in relation to the offence;*

(b) *section 7(7) of that Act (restriction on submissions of no case) applies in relation to the offence; and*

(c) *the court is of the opinion that the accused is subject to the statutory responsibility in relation to the offence.*

(2) *But this section does not apply if -*

(a) *the accused's guilt is not in issue, or*

(b) *it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence.*

(3) *The court shall, at the conclusion of the evidence for the prosecution, satisfy itself that the accused is aware -*

(a) *that the court is of the opinion that he is subject to the statutory responsibility in relation to the offence;*

- (b) *of the nature of that responsibility;*
  - (c) *that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence;*
  - (d) *that, if he chooses not to give evidence or, having been sworn, refuses, without good cause, to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from that failure or refusal; and*
  - (e) *that, in deciding whether it is proper to draw an inference, the court or jury may, if it is of the opinion that he is subject to the statutory responsibility in relation to the offence, take that into account.*
- (4) *If the accused -*
- (a) *fails to give evidence, or*
  - (b) *refuses, without good cause, to answer any question,*
- the court or jury may, in determining whether the accused is guilty of the offence charged or any other offence of which he could lawfully be convicted on that charge, draw such inferences as appear proper from the failure or refusal.*
- (5) *If the court or jury is of the opinion that the accused is subject to the statutory responsibility in relation to the offence charged -*
- (a) *it must consider any explanation which has been given in evidence for the failure or refusal; but*
  - (b) *it is not necessary for it to be satisfied, before drawing an inference (whether in relation to that offence or any other offence of which he could lawfully be convicted on that charge), that he could be properly convicted, on the basis of the other evidence against him, if no such inference were drawn.*
- (6) *Subsections (4) and (5) of section 35 apply for the*

*purposes of this section as they apply for the purposes of section 35.*

(7) *In this section -*

- (a) *“the Act of 2004” means the Offences Against Children Act 2004; and*
- (b) *“serious offence against a child” and “statutory responsibility” (in relation to such an offence) have the same meaning as in Part 2 of that Act.*

## **SCHEDULE 1**

### **SPECIFIED OFFENCES FOR PURPOSES OF SECTION 2**

*The following are the specified offences for the purposes of section 2 –*

- (a) *murder,*
- (b) *manslaughter,*
- (c) *an offence under section 18 or 20 of the Offences against the Person Act 1861 (c. 100) (wounding and causing grievous bodily harm),*
- (d) *an offence under section 23 or 24 of that Act (administering poison),*
- (e) *an offence under section 47 of that Act (assault occasioning actual bodily harm),*
- (f) *an offence under section 1 of the Sexual Offences Act 1956 (c. 69) (rape),*
- (g) *an offence under section 14 or 15 of that Act (indecent assault),*
- (h) *attempting to commit any such offence.*

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**(Extract from (UK) Children and Young Persons Act 1933)**

**Section 1 Cruelty to persons under sixteen**

- (1) *If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats (whether physically or otherwise), neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated (whether physically or otherwise), neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (whether the suffering or injury is of a physical or a psychological nature), that person shall be guilty of an offence, and shall be liable –*
- (a) *on conviction on indictment, to a fine or alternatively, or in addition thereto, to imprisonment for any term not exceeding ten years;*
  - (b) *on summary conviction, to a fine not exceeding £400 pounds, or alternatively, or in addition thereto, to imprisonment for any term not exceeding six months.*
- (2) *For the purposes of this section –*
- (a) *a parent or other person legally liable to maintain a child or young person, or the legal guardian of a child or young person, shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that behalf;*
  - (b) *where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the infant) while the infant was in bed with some other person who has attained the age of sixteen years, that other person shall, if he was, when he went to bed or at any later time before the suffocation, under the influence of drink or a prohibited drug, be deemed to have neglected the infant in a manner likely to cause injury to its health.*

- (2A) *The reference in subsection (2)(b) to the infant being “in bed” with another (“the adult”) includes a reference to the infant lying next to the adult in or on any kind of furniture or surface being used by the adult for the purpose of sleeping (and the reference to the time when the adult “went to bed” is to be read accordingly).*
- (2B) *A drug is a prohibited drug for the purposes of subsection (2)(b) in relation to a person if the person's possession of the drug immediately before taking it constituted an offence under section 5(2) of the Misuse of Drugs Act 1971.*
- (3) *A person may be convicted of an offence under this section –*
- (a) *notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person;*
  - (b) *notwithstanding the death of the child or young person in question.*

### **Section 17 Interpretation of Part I**

- (1) *For the purposes of this Part of this Act, the following shall be presumed to have responsibility for a child or young person –*
- (a) *any person who –*
    - (i) *has parental responsibility for him (within the meaning of the Children Act 1989); or*
    - (ii) *is otherwise legally liable to maintain him; and*
  - (b) *any person who has care of him.*
- (2) *A person who is presumed to be responsible for a child or young person by virtue of subsection (1)(a) shall not be taken to have ceased to be responsible for him by reason only that he does not have care of him.*

**(New Zealand enacted model)**

**(See sections 6 and 7, Crimes Amendment Act (No 3) 2011)**

**6 New sections 150A to 152 substituted**

*Sections 150A to 152 are repealed and the following sections substituted:*

**150A Standard of care applicable to persons under legal duties or performing unlawful acts**

- (1) *This section applies in respect of—*
- (a) *the legal duties specified in any of the sections 151, 152 ...; and*
  - (b) *an unlawful act referred to in section 160 [culpable homicide] where the unlawful act relied on requires proof of negligence or is a strict or absolute liability offence.*
- (2) *For the purposes of this Part, a person is criminally responsible for omitting to discharge or perform a legal duty, or performing an unlawful act, to which this section applies only if, in the circumstances, the omission or unlawful act is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies or who performs that unlawful act.*

**151 Duty to provide necessaries and protect from injury**

*Every one who has actual care or charge of a person who is a vulnerable adult<sup>1</sup> and who is unable to provide himself or herself with necessaries is under a legal duty—*

- (a) *to provide that person with necessaries; and*
- (b) *to take reasonable steps to protect that person from injury.*

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<sup>1</sup> The term “vulnerable adult” is defined in section 2(1) of the Crimes Act 1961 (as amended by virtue of section 4(1) of the Crimes Amendment Act (No 3) 2011) as “a person [who is] unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person.”

**152 Duty of parent or guardian to provide necessities and protect from injury**

*Every one who is a parent, or is a person in place of a parent, who has actual care or charge of a child under the age of 18 years is under a legal duty—*

- (a) to provide that child with necessities; and*
- (b) to take reasonable steps to protect that child from injury.*

**7 New sections 195 and 195A substituted**

*Section 195 is repealed and the following sections are substituted:*

**195 Ill-treatment or neglect of child or vulnerable adult**

- (1) Every one is liable to imprisonment for a term not exceeding 10 years who, being a person described in subsection (2), intentionally engages in conduct that, or omits to discharge or perform any legal duty the omission of which, is likely to cause suffering, injury, adverse effects to health, or any mental disorder or disability to a child or vulnerable adult (the **victim**) if the conduct engaged in, or the omission to perform the legal duty, is a major departure from the standard of care to be expected of a reasonable person.*
- (2) The persons are—*
  - (a) a person who has actual care or charge of the victim; or*
  - (b) a person who is a staff member of any hospital, institution, or residence where the victim resides.*
- (3) For the purposes of this section and section 195A, a **child** is a person under the age of 18 years.*

**195A Failure to protect child or vulnerable adult**

- (1) Every one is liable to imprisonment for a term not exceeding 10 years who, being a person described in subsection (2), has frequent contact with a child or vulnerable adult (the **victim**) and—*
  - (a) knows that the victim is at risk of death, grievous bodily harm, or sexual assault as the result of—*
    - (i) an unlawful act by another person; or*
    - (ii) an omission by another person to discharge or perform a legal duty if, in the circumstances, that omission is a major departure from the standard of care expected of a reasonable*

- person to whom that legal duty applies; and*
- (b) fails to take reasonable steps to protect the victim from that risk.*
- (2) The persons are—*
- (a) a member of the same household as the victim; or*
  - (b) a person who is a staff member of any hospital, institution, or residence where the victim resides.*
- (3) A person may not be charged with an offence under this section if he or she was under the age of 18 at the time of the act or omission.*
- (4) For the purposes of this section,—*
- (a) a person is to be regarded as a member of a particular household, even if he or she does not live in that household, if that person is so closely connected with the household that it is reasonable, in the circumstances, to regard him or her as a member of the household:*
  - (b) where the victim lives in different households at different times, **the same household** refers to the household in which the victim was living at the time of the act or omission giving rise to the risk of death, grievous bodily harm, or sexual assault.*
- (5) In determining whether a person is so closely connected with a particular household as to be regarded as a member of that household, regard must be had to the frequency and duration of visits to the household and whether the person has a familial relationship with the victim and any other matters that may be relevant in the circumstances.*

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**(New Zealand Law Commission's proposed model)<sup>1</sup>**

**10 New section 150A substituted**

*Section 150A is repealed and the following section substituted:*

**150A Standard of care applicable to persons under legal duties or performing unlawful acts**

- (1) *This section applies in respect of—*
- (a) *the statutory duties specified in any of the sections 151, 152 ... and 195A; and*
  - (b) *unlawful acts referred to in sections ... or 160 [culpable homicide] where the unlawful act relied on requires proof of negligence or is a strict or absolute liability offence.*
- (2) *For the purposes of this Part, a person is criminally responsible for omitting to perform a statutory duty, or performing an unlawful act, to which this section applies only if, in the circumstances, the omission or unlawful act is a major departure from the standard of care expected of a reasonable person to whom that statutory duty applies or who performs that unlawful act.*

**11 New section 151 substituted**

*Section 151 is repealed and the following section substituted:*

**151 Duty to provide necessaries and protect from injury**

*Every one who has actual care or charge of another person unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from that care or charge and unable to provide himself or herself with necessaries is under a statutory duty—*

- (a) *to provide that person with necessaries; and*

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<sup>1</sup> See clauses 10, 11, 12 and 24 of draft Crimes (Offences Against the Person) Amendment Bill, in New Zealand Law Commission report, *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person* (Nov 2009, Rep 111), at 65 (Appendix B: The draft Bill).

- (b) *to take reasonable steps to protect that person from injury.*

**12 New section 152 substituted**

*Section 152 is repealed and the following section substituted:*

**152 Duty of parent or guardian to provide necessities and protect from injury**

*Every one who is a parent or is a person in place of a parent who has actual care or charge of a child under the age of 18 years is under a statutory duty—*

- (a) *to provide that child with necessities; and*
- (b) *to take reasonable steps to protect that child from injury.*

**24 New section 195 substituted**

*Section 195 is repealed and the following sections are substituted:*

**195 Ill-treatment or neglect of child or vulnerable adult**

- (1) *Every person is liable to imprisonment for a term not exceeding 10 years who, being a person described in **subsection (2)**, intentionally engages in conduct that, or omits to perform any statutory duty the omission of which, is likely to cause unnecessary suffering, injury, adverse effects to health, or any mental disorder or disability to a child or vulnerable adult (the **victim**), if the conduct engaged in or the omission to perform the statutory duty is a major departure from the standard of care to be expected of a reasonable person.*
- (2) *The persons are—*
  - (a) *a person who has actual care or charge of the victim;*  
*or*
  - (b) *a person who is a staff member of any hospital, institution, or residence where the victim resides.*
- (3) *For the purposes of this section and **section 195A**,—*
  - (a) *a **vulnerable adult** is a person unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person:*
  - (b) *a **child** is a person under the age of 18 years.*

**195A Failure to protect child or vulnerable adult from risk of serious harm**

- (1) Every one is liable to a term of imprisonment for a term not exceeding 10 years who, being a person described in **subsection (2)**, has frequent contact with a child or vulnerable adult (the **victim**), and—
  - (a) knows that the victim is at risk of death, serious injury, or sexual assault as the result of an unlawful act by another person or an omission by another person to perform a statutory duty; and
  - (b) fails to take reasonable steps to protect the victim from that risk.
- (2) The persons are—
  - (a) a member of the same household as the victim; or
  - (b) a person who is a staff member of any hospital, institution, or residence where the victim resides.
- (3) A person may not be charged with an offence under this section if he or she was under the age of 18 at the time of the act or omission.
- (4) For the purposes of this section,—
  - (a) a person is to be regarded as a member of a particular household, even if he or she does not live in that household, if that person is so closely connected with the household that it is reasonable, in the circumstances, to regard him or her as a member of the household:
  - (b) where the victim lives in different households at different times, the same household refers to the household in which the victim was living at the time of the act or omission giving rise to the risk of death, serious injury, or sexual assault.
- (5) In determining whether a person is so closely connected with a particular household so as to be regarded as a member of that household, regard must be had to the frequency and duration of visits to the household and whether the person had a familial relationship with the victim and any other matters that may be relevant in the circumstances.

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## **APPENDICES**

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## HONG KONG

### Further cases of abuse of children and vulnerable adults

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#### Introduction

1. In addition to the case examples referred to in Chapter 2 of this paper – where bystander liability may have been a key issue – we set out below details of other cases in Hong Kong involving, first, child abuse, and secondly, abuse of vulnerable adults. The case examples here are presented based on the particular factual circumstances of the case.

#### Child abuse cases

##### **“Shaken baby” cases**

*HKSAR v Ding Yuk Kwan*<sup>1</sup>

2. The father pleaded guilty to ill-treatment of child under section 27 of the OAPO, and admitted that he had shaken his four month-old son, who was crying one afternoon for about half an hour, in order to make him sleep, and subsequently for another 10 minutes when he cried again – during which time the father accidentally dropped the baby onto the floor. The infant son was found to have suffered convulsions, with bruises and haemorrhaging which suggested that he suffered from “*shaken baby syndrome*”. Both parents took the child to the hospital.
3. The injury led to a mild degree of brain atrophy and a mild delay in attaining expected developmental milestones of the son. Ten months after the incident, the results of an examination conducted on the son’s condition were normal, but further observations were necessary.
4. The defendant was sentenced to 20 months’ imprisonment. The appeal against sentence was dismissed and the Court of Appeal observed that the 30 months starting point might be said to have been on the light side.
5. The Court of Appeal referred to the case of *Lam Lui Yin*<sup>2</sup> (discussed earlier, in Chapter 2) noting that there was no manslaughter charge in that

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1 [2009] 1 HKC 36.

case, presumably because it could not be proved at whose individual hands the fatal injury or injuries were caused. The court noted that offences committed contrary to section 27 of the OAPO would vary so greatly in their background and gravity, as well as in the personal circumstances of the perpetrators, that they did not lend themselves to guidelines – so that a comparison with other cases was of limited value.

6. The Court of Appeal was of the view that:

*“One starts by recognising that the maximum term of imprisonment for this offence is one of ten years’ imprisonment, a maximum that was greatly increased by the legislature in 1995, thereby indicating the legislature’s intention that such offences be treated seriously. Some assessment – and the approach is an art – must be made as to where within the range of seriousness the offence at hand lies and then, amongst all the factors that must be taken into account, are primarily the need to protect the vulnerable and the need to deter. That those who have the custody and care of children will suffer stress in the performance of that function is well known but there is a societal imperative that demands, for the protection of children, the exercise of control. A further highly material consideration is the question whether there has been visited upon the child long-term disability or a real danger of it. The court will take into account as well whether the maltreatment is an isolated act or has been constituted by a course of conduct. This is nothing like an exhaustive list of factors but merely an indicator of the more obvious ones.”*

*HKSAR v Lai Hing Fung*(賴慶峰)<sup>3</sup>

7. The defendant and the mother of the victim, who was a baby boy of 3 months’ old, were lovers. The defendant was unemployed and was living on CSSA. The baby was under the care of both the defendant and the mother. The incident was discovered by the Social Welfare Department officer at a home visit. The baby had various old and new injuries inflicted in the range of the last one week to three months. The baby sustained bruises over his face, chest and thighs; and multiple fractures of the ribs.
8. The defendant pleaded guilty to two counts under section 27 of the OAPO and was sentenced to 40 months’ imprisonment after a one-third discount for a guilty plea for each charge; and the sentences were to run concurrently. The court did not believe the defendant’s version of events that he played ‘shake, throw and catch’ with the baby. The court found that the defendant had assaulted the victim because he was annoyed by the baby’s crying, and also to vent his anger against the mother. The

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2 *Secretary for Justice v Lam Lui Yin* [2007] 1 HKLRD 248.

3 香港特別行政區 訴 賴慶峰案 DCCC 1175/2009 (31 Dec 2009).

court also noted that although the mother had dissuaded the defendant from abusing the baby, it was impossible for her not to have known about the baby's condition as they were living together at the same place, yet she had tolerated the abuse of the baby for more than a month.

*HKSAR v John Rodney N Alconaba*<sup>4</sup>

9. The defendant pleaded guilty to ill-treatment of child under section 27 of the OAPO. The defendant admitted that he had shaken his 15 month-old son on several occasions out of annoyance when the baby did not stop crying. The wife saw the defendant playing with the boy by shaking his body fiercely. She was worried and stopped the defendant on that occasion. On another occasion, the force of shaking was so great as to cause the boy to vomit.
10. The defendant and the wife took the boy to hospital. The boy was found to be suffering from "*shaken baby syndrome*". At the time of sentence the boy was exhibiting two areas of disability, namely poorer vision in his left eye, and some weakness in his right hand and arm, although the court considered one could not exclude the possibility that the latter disability might be the result of an accident unconnected to this offence.
11. The court noted that the maximum penalty for this offence was increased to 10 years' imprisonment in 1995 to reflect the public's abhorrence of this sort of offence. While the court accepted that it could be at times stressful for a person who cared for a very young child, it was a stress that all parents suffer from time to time if they themselves were responsible for looking after a child. It provided no excuse for repeatedly assaulting a child as the defendant did. What was more, it was not an isolated incident of loss of control but a course of conduct which the defendant had persisted in on many occasions.
12. The court took account of a reasonably optimistic prognosis, but that did not detract from the fact that the offence which the defendant committed on his own very young son was an offence that society viewed very seriously. The court also noted the fact that the defendant had contacted his wife urgently when the boy displayed his symptoms and the defendant did not ignore those symptoms but took him to a private doctor and ultimately to the hospital. The defendant was sentenced to 16 months' imprisonment.

*HKSAR v Tam Siu San*<sup>5</sup>

13. The defendant's three children under the age of three and her husband were all sick at the material time. The defendant failed to soothe the youngest baby who did not stop crying and coughing. At that moment

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4 DCCC 299/2010 (10 Dec 2010).

5 DCCC 621/2013 (12 Sept 2013).

she became very frustrated and shook the baby. As soon as she and her husband were aware that the baby was not well, they took her to hospital immediately. The defendant pleaded guilty to ill-treatment of a child under section 27 of the OAPO.

14. The defendant was the sole main carer and was under very stressful conditions and some financial hardship, and was apparently suffering from depression at the material time. The court noted that the baby was recovering well and the child's development was normal. The defendant was remorseful and was willing to accept professional care and guidance. Not only was she cooperative, but her husband, the father of these children, was also very cooperative. The Social Welfare Department made it clear that they were preparing the family for a future reunion. The probation officer called it "*an isolated incident*". The court noted that, clearly, the defendant was not going to re-offend. The court sentenced the defendant to 12 months' probation subject to compliance with any condition the probation officer deemed necessary – in particular, any psychiatric or psychological treatment as directed. The court also made it clear to the defendant that the court had the power to re-sentence her if the probation order was breached.

*HKSAR v Tam Hon Wah Ken*<sup>6</sup>

15. The defendant was father of the baby and had been co-habiting with her mother. As the couple was both working, they found a babysitter from a local charitable group to look after their daughter during the day. The defendant would take the girl to the babysitter's home in the morning and the mother would collect her in the evening. The babysitter discovered a bruise mark on the body of the three month-old baby girl. The babysitter told the mother about it later in the evening when she came to pick her up, but was amazed by the apathy of the mother.
16. The matter was then brought to the attention of a social worker and eventually involved the police. The baby girl was subsequently found to have bruises, neck hypertonia, broken ribs and "*shaken baby syndrome*" comprising of symptoms such as brain bleeding, retinal hemorrhage and brain swelling.
17. Apart from the defendant's own version of events, there was no eye-witness in the case who could tell the court what really happened. The father admitted that he had shaken his daughter to stop her crying when his girlfriend was not around. He pleaded guilty to ill-treatment of a child under section 27 of the OAPO.
18. The court noted that the injuries amounted to grievous bodily harm, and the baby was not given any immediate medical help and her suffering was therefore prolonged unnecessarily, although there was no evidence to

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6 DCCC 119/2017 (16 Oct 2017).

suggest that she would suffer any permanent disability. The judge commented that:

*“It hardly needs telling that handling an infant like this requires extreme care; given their fragile constitution, any mishandling would likely result in serious harm to them. This is your first child, you might have difficulties in coping with the problem of infancy through lack of experience, but one thing you should never do is to take it out on the baby whenever you get frustrated with it. ... The court viewed this matter very seriously and in passing sentence, the primary aim is to protect the very young children. I can understand why the defendant did it because of the lack of parenting skills, inability to control emotion etc., but this could never be the excuse.”*

19. The father was sentenced to two years’ imprisonment.

*HKSAR v Siti Aminah*<sup>7</sup>

20. This was an ‘ill-treatment of child’ case under section 27 of the OAPO, where an Indonesian domestic helper caused injuries to a two months-old baby boy under her care.

21. The domestic helper called the mother and said that the baby kept crying, so the mother returned home and found the baby semi-conscious. Upon seeking medical treatment, the baby was diagnosed with more recent injuries (inflicted one to three days before) and older injuries (inflicted one to four weeks before) – namely, subdural and subarachnoid intracranial haematomas and convulsion – and it was suspected that the baby suffered from physical abuse.

22. The doctors opined that the baby appeared to suffer from “*shaken baby syndrome*” and confirmed that the medical findings of the baby’s condition pointed towards a pattern of repetitive, non-accidental, injuries. The defendant was sentenced to 14 months’ imprisonment after a guilty plea.

23. (See also the cases of *HKSAR v Gurung Hem Kumar*<sup>8</sup> and *HKSAR v Kow Chi-Ming and Ng Bik-Fung*,<sup>9</sup> discussed above in Chapter 2.)

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7 TMCC 1738/2017.

8 HCCC 432/2010 (3 March 2011).

9 HCCC 9/2004.

### **Starvation of victim**

*HKSAR v Wong Chi-chung and Cheung Po-shan*<sup>10</sup>

24. An infant died of starvation when less than 4 months' old. At the time of her death, she weighed less than she did at birth. The parents pleaded guilty to manslaughter by gross negligence.
25. The court found the parents to be in gross breach of their natural and fundamental duty to nourish and protect the child, observing that they could not have been unaware of the child's deteriorating condition. The court also expressed the hope that those with the responsibility for these matters would look hard at the facts of this sad case. The defendants were each sentenced to six years' imprisonment.
26. (See also the case of *HKSAR v Wong Wing-man, Mandy alias Wang Xuexin and Ling Yiu-chung, Rocky*<sup>11</sup> – case concerning seven year-old girl victim, Ling Yun Lam, Suki – discussed above in Chapter 2.)

### **Corporal punishment of victim**

*HKSAR v Lam Wai Man*<sup>12</sup>

27. The mother admitted to caning her 21 month-old son when he was naughty and tying him with nylon string to the bed, or into a push-chair to restrain him for as long as two hours.
28. The mother took the victim to see a doctor, in the company of a man of about the same age as herself. The doctor found that the victim was in a semi-conscious state with large bruises over his face and was in a critical condition. The doctor advised that the child should be rushed to hospital for immediate treatment. He said that he would call an ambulance but, at that stage, the male who had arrived with the defendant suddenly grabbed the victim saying that he had a car outside so no ambulance was needed. The doctor naturally assumed that the couple would take the victim to hospital immediately as they had been instructed. In fact, the mother did not follow the doctor's instructions and, instead of taking the victim to hospital for treatment, she took him home. The victim died the next day. Expert opinion showed that the chance of the victim's survival by the time the mother took him to hospital had been significantly reduced to negligible.
29. The mother admitted that she was responsible for looking after her son. She also denied that she had ever seen anyone else who lived in the house ill-treat the victim. The prosecution's case was that, "if the

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10 HCCC 47/2010 (28 May 2010).

11 [2018] HKCFI 1484; HCCC 76/2017.

12 [1999] 3 HKLRD 855.

*defendant was not actually responsible for inflicting the fatal injury, she certainly failed to prevent the injury being inflicted or to alter the circumstances in which the fatal injury came to be inflicted.”* The medical evidence showed that the majority of the injuries were non-accidentally caused, which indicated that the victim had been physically abused over a period of at least one or two weeks.

30. The mother pleaded guilty to a charge of cruelty to a child under section 27 of the OAPO and, at a later point in time, to manslaughter by gross negligence. In passing sentence, the judge was of the view that:

*“this is not just a case of a mother standing by and failing to prevent or to remove a child from the scene of assault by another. It is a case in which [the mother] was pro-active in abusing the boy and [the mother] created or [she] assisted in creating the atmosphere of abuse which this unfortunate child was made to endure. In my judgement, therefore, even if [the mother] did not [herself] inflict all the injuries which were found upon the boy, [the mother] bear[s] significant responsibility for them in any event.”*

31. For the purpose of sentencing, it was assumed that the mother was not the sole assailant of the child and the mother was not sentenced on the basis that she struck the blow which caused the child’s death. The mother was sentenced to six years’ imprisonment for the cruelty charge and eight years’ imprisonment for manslaughter, with one year of the cruelty charge to run consecutively, ie, nine years’ imprisonment in total.
32. On appeal against the sentence, the Court of Appeal noted that legislation had in recent years increased the maximum sentence for ill-treatment or neglect by those in charge of a child from two years to ten years imprisonment in order to enable the courts to be equipped to deal with cases as grave as this one.
33. (See also the cases of *HKSAR v Au Yeung Wing-Yan and Chu Ka-Man*<sup>13</sup> and *HKSAR v Takahashi Koyo and Chu Wing Hon*,<sup>14</sup> discussed above in Chapter 2.)

### ***Non-fatal, but severe abuse***

*HKSAR v Cheung Ka-Lai (張嘉麗)*<sup>15</sup>

34. The defendant was charged with child neglect under section 27(1) of the OAPO leading to injuries of her three month-old infant daughter.

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13 HCCC 67/2003.

14 HCCC 113/2006.

15 香港特別行政區 訴 張嘉麗案[2009] CHKEC 1306; DCCC 485/2009 (6 Oct 2009).

35. In December 2008, the social worker following this case had received an anonymous report alleging that the defendant had abused her daughter and the social worker reported the incident to the police. The defendant asked a friend to take care of her daughter in February 2009 and the friend had told the defendant of injuries on the baby, but the defendant did not do anything. On 12 March 2009, the defendant's mother noticed signs of injuries on the infant's forehead and told the social worker, who told the mother to take the baby to the hospital. The defendant and her mother together took the baby to the hospital, but the defendant fled as soon as they arrived there. A medical examination found a fracture of the infant's right forehead and cracks of her right arm. The defendant was arrested a few days later. She denied child abuse, but said the injuries were caused when she accidentally dropped her daughter on a certain escalator in Mong Kok.
36. The defendant later pleaded guilty to the charge under section 27 of the OAOP and was sentenced to 20 months' imprisonment. The court noted that the defendant's 'story' of the accident was not accepted, as it did not correspond to her reaction when the infant was taken to hospital for examination, yet there was no other evidence before the court to prove the cause of injury. Only the defendant knew the real reason. The actions of the defendant had caused the baby great pain as she was not taken to the hospital for one month. The court indicated that it had a responsibility to protect and prevent harm to children who were not able to protect themselves. The court sentence of 20 months' imprisonment would serve to show that such behaviour was not tolerated, and would also act as a deterrent to other people not to commit acts which would harm children.

### ***"Home-alone" child***

#### *HKSAR v Man Ching-Yee (萬靜儀) and Anor*<sup>16</sup>

37. The two defendants, parents of four daughters, were charged with ill-treatment or neglect by those in charge of a child, etc, contrary to section 27(1) of the OAPO. This followed the sudden death of their youngest daughter, Yok-Nam (若楠), who was two months' old at the time. Both of the parents gave little care to their daughters and seldom stayed at home. After the birth of Yok-Nam, the eldest daughter, On-Kei (安琪), aged eight years, had to take care of her infant sister without being taught what to do. On 1 July 2007, the mother found Yok-Nam bleeding from her nose and mouth when she returned home after midnight. Yok-Nam was pronounced dead at the hospital.
38. The mother admitted that she had left On-Kei and Yok-Nam alone at home on more than ten occasions. The father said in his statement that he was sleeping at home that day and had no knowledge of Yok-Nam's

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16 香港特別行政區 訴 萬靜儀及另一人案 DCCC 893/2008 (12 March 2009).

situation. Both of them admitted that in June 2006 they had left three daughters at home without providing food. Both the mother and the father pleaded guilty to four of the six charges<sup>17</sup> and were sentenced to two years' imprisonment and one year and ten months' imprisonment, respectively.

### ***Involvement of drugs***

39. (See the case of *HKSAR v Ng Man Kwong and Ho Yuk Kuen*<sup>18</sup> discussed above in Chapter 2.)

### ***Defendant with depression***

*HKSAR v Leung Siu Fong*<sup>19</sup>

40. The mother was convicted of manslaughter after trial. The baby was found to have bruises on his cheeks and some of the trauma to his head was inflicted a week or two before death. The sister of the defendant told the psychologist that the defendant would hit and pinch and shake the baby when the baby cried, and that the defendant would hit the baby one or two times every week. The defendant herself attributed the incident to the unstable emotion which she was undergoing because her mood was affected by the conflict between the defendant's husband and her elder sister.

41. The court noted that the injuries indicated that it was not a one-off beating of the child. She had the support of her sisters and mother, and sometimes her husband. There did not seem to have been anything unusual in her background to mitigate what she had done to the baby. One could only explain that she must have been depressed and it affected her mood and therefore resulted in the treatment and death of the baby. The mother was sentenced to eight years' imprisonment.

42. (See also the case of *HKSAR v Lee Fung Yee*,<sup>20</sup> below.)

### ***Attempted suicide and infanticide***

*HKSAR v Lee Fung Yee*<sup>21</sup>

43. The defendant was charged with murder of her 15 year-old son and 13-year-old daughter. The defendant had three children with a man who

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17 The prosecution offered no evidence for the first two charges, so the defendants were acquitted.

18 HCCC 277/2005.

19 HCCC 256/2016 (27 April 2017).

20 [2011] 5 HKLRD 351.

21 [2011] 5 HKLRD 351.

at all material times had another cohabitee (the elder son was taken to the man's home). The defendant subsequently became aware that the man had other women and other children, and she realized that the man was a religious swindler who cheated worshippers. She said she rang her mother, but she flatly refused to help. She said that she felt helpless. She wanted to commit suicide but did not want the boy (younger son) and the girl to be left behind and therefore the defendant decided to kill them too. She gave them each half a sleeping tablet, and put two pots of burning charcoal in the bedroom. This caused so much smoke that a neighbour reported to the caretaker and the fire services and the police were alerted. The defendant claimed to the fire service and the police that she was just burning incense, so they initially left as they found her rational and quite normal. The children died whilst the defendant survived, apparently because she had taken a large dose of sleeping pills which suppressed her breathing and thus her intake of carbon monoxide.

44. The defendant was acquitted of murder but convicted after trial of manslaughter by reason of diminished responsibility. The psychiatrist expressed the opinion that the defendant had been suffering from an adjustment disorder with depressed mood and that the acute, unexpected and provocative shock of the man's promiscuity and disloyalty leading to a complete despair of the future for herself and the victims might have been the single precipitating cause for the tragedy. The trial judge noted that the case was not a spur of the moment event and she had the opportunity to stop, but she deliberately ensured that firemen and the police did not see inside the bedrooms. The trial judge sentenced her to seven years' imprisonment. The Court of Appeal took note that the defendant had been suffering from adjustment disorder and allowed D's appeal against sentence and reduced it to four years' imprisonment. The Court of Appeal was of the view that:

*"The taking of human life, and in the present case two human lives, is of course a very serious matter and what the applicant did would arouse a sense of moral outrage in any society. The court has the duty to protect children from unscrupulous parents. It must be driven home in no uncertain terms that whatever the circumstances, parents have no right to decide whether their children should live or die. It is simply not an option open to any parent. The Judge was right to say it is a question of showing society's abhorrence of a deliberate plan to kill innocent children."*

*HKSAR v Yu So Mee*<sup>22</sup>

45. The defendant, who was the mother with an 8-year-old son, burnt charcoal at home to commit suicide due to financial and family issues. The defendant's sister had received a letter from the defendant in which the defendant stated that she was going to commit suicide. As a result,

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22 *HKSAR v Yu So Mee*, DCCC 510/2009 (21 July 2009).

the defendant's sister made a report to the police and the officers attended the flat. The boy was almost killed. The son did not suffer from any post-traumatic stress or mood disturbances, but was worried about when he could reunite with his mother, whom he trusted as the most reliable parental figure.

46. The mother pleaded guilty to one count of ill-treatment of child under section 27 of the OAPO. Taking into account the peculiar circumstances of the case, the mother was sentenced to 240 hours under a Community Service Order.
47. The court was of the view that the offence of ill-treatment by those in charge of a child is a serious offence. The defendant's son was only 8 years old and he was almost killed by the defendant in her attempt to commit suicide with her son. However, the court considered the facts of the case were very different from those ordinary cases of child abuse. It appeared to the court that the defendant had been a caring and loving mother in the past and she could be a loving and caring mother in the years to come.
48. The judge did not think that a term of imprisonment, be it immediate or a suspended one, served any deterrent purpose. The court considered that, for the rehabilitation of the defendant, it would be better for the defendant to reform herself in an open environment. Whilst the judge observed that a term of immediate imprisonment was the normal sentence for real child abuses, on the facts before the court, the judge was prepared to depart from the normal course, as the court did not see this as a usual child abuse case.

### ***Child victims – institutional setting***

*HKSAR v Leung Pui Ki, Ann (梁佩琪)*<sup>23</sup>

49. The defendant, who was a teacher of a special school for students with severe mental retardation and physical disabilities, sprayed alcohol disinfectant at the faces of several students of a primary one class to warn or stop students from crying. After being sprayed with alcohol disinfectant, some students would cry even more. The defendant's conduct was recorded by video camera in the classroom. The defendant was convicted of 11 charges of wilful assault under section 27(1) of the OAPO after trial and was sentenced to ten months' imprisonment.

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23 香港特別行政區 訴 梁佩琪案 HCMA 14/2016 (15 Sept 2016).

50. The defendant's appeal was dismissed by the Court of First Instance. The court agreed to the interpretation of "wilful assault" in the case of *R v Sheppard*<sup>24</sup> that:

*"The actus reus in a case of willful neglect is simply a failure, for whatever reason, to provide the child whenever it in fact needs medical aid with the medical aid it needs. Such a failure as it seems to me could not be properly described as 'wilful' unless the parent either (1) had directed his mind to the question whether there was some risk (though it might fall far short of a probability) that the child's health might suffer unless he were examined by a doctor and provided with such curative treatment as the examination might reveal as necessary, and had made a conscious decision, for whatever reason, to refrain from arranging for such medical examination; (2) had so refrained because he did not care whether the child might be in need of medical treatment or not."*

51. The court was of the view that the only reasonable inference was that the defendant at least disregarded the consequence of spraying alcohol disinfectant to the face. On the meaning of "likely" to cause such child or young person unnecessary suffering or injury to his health, the court also agreed with the judgment in *Sheppard*, that: "[h]aving regard to the ordinary parent's lack of skill in diagnosis and to the very serious consequences which may result from failure to provide a child with timely medical attention, it should be understood as excluding only what would fairly be described as highly unlikely."

## **Abuse of vulnerable adults**

### ***Elder abuse***

52. See the case of *HKSAR v Tse Kam Fai*,<sup>25</sup> discussed above in Chapter 2.

### ***Abuse involving domestic workers as victims***

#### *HKSAR v Ng Bik Man*<sup>26</sup>

53. The employer in this case was convicted after trial of 'Inflicting grievous bodily harm' on the domestic helper contrary to section 19 of the OAPO by thrusting a hot iron towards her face; and whilst she raised her arm to protect her face, the iron burnt her arm. The employer was sentenced to 7 months' imprisonment.

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24 [1981] AC 394.

25 HCCC 334/2010 (5 July 2011).

26 HCMA 56/2009 (21 May 2009).

54. The court indicated that it gave due weight to the fact that this was an isolated incident arising from momentary anger by a woman of previously good character with young children. However, allowing for those circumstances, to have gone for someone with a hot iron, who thereby suffered grievous bodily harm to their arm in defence of their face, was a wicked act well justifying the term of imprisonment imposed. The court also noted that: “[i]t is a regrettable fact that such conduct described by [the domestic helper] is conduct to which the criminal courts of Hong Kong are not strangers.”

*HKSAR v Tai Chi Wai (戴志偉) and Au Yuk Shan Catherine (區玉珊)*<sup>27</sup>

55. In this case, an Indonesian domestic worker, Kartika Puspitasari, was abused and tortured by her employers, Tai Chi Wai and his wife Au Yuk Shan, over a period of two years. The couple was accused of physically abusing the victim and tying her up. The victim was wounded and injured by hot irons, bicycle chains, a cutter, a coat-hanger and a shoe.

56. The couple was charged with several offences under the OAPO, including counts of inflicting grievous bodily harm with intent (section 19), assault occasioning actual bodily harm (section 39) and wounding with intent (section 17), and were convicted of most of the charges. While the judge was of the view that the victim had exaggerated her testimony, he recognized that the wounds on the victim had been caused by the defendants.

57. Tai was sentenced to three years and three months’ imprisonment and Au was sentenced to five years and six months’ imprisonment. On their failed appeal application, the appeal judge stressed the seriousness of the long-term abuse. It was noted that, as domestic workers are vulnerable to abuse from unscrupulous employers, the court has the responsibility to protect the rights of foreign domestic workers and condemn the brutal behavior of the defendants. The court had to issue a clear signal that Hong Kong as a modern and civilized place with an emphasis on human rights, would not tolerate the inhumane acts done by the defendants to the victim. The defendants’ criminal acts had an extremely serious negative impact on Hong Kong’s image. It was therefore necessary for the court to impose a sentence with deterrent effect.

58. (See also the case of *HKSAR v Law Wan-Tung*<sup>28</sup> – case concerning domestic helper Erwiana Sulistyaningsih as victim – discussed above in Chapter 2.)

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27 香港特別行政區 訴 戴志偉及區玉珊 Catherine 案 [2013] CHKEC 1041 (DCCC 251/2013); CACC 355/2013.

28 [2015] HKEC 242, 2934, 2935, 2938; see DCCC 421/2014 and 651/2014 (10 and 27 February 2015). The defendant’s application for leave to appeal was refused by the Court of Appeal [2016] HKEC 1541 (CACC 86/2015).

59. (Note: This case is more concerned with the law on human trafficking and modern slavery, but contains an interesting discussion on the potential meaning of “*vulnerable*” in the context of domestic worker cases.)
60. The applicant was a Pakistani national who was a member of the Malik caste, which was considered as being inferior to the Rana caste to which the employer and his family belonged. The employer came from a prominent and well-connected family in Punjab, Pakistan. The applicant worked for the employer and his family in Pakistan. Socio-economic and cultural norms led to the employer asserting considerable command and control over the applicant. The employer and his family arranged for the applicant to work for them in Hong Kong. They sponsored his work permit and arranged his transportation to Hong Kong. The applicant had not previously travelled out of Pakistan. Because of his low education and low socio-economic status he was not familiar with the system and structures in Hong Kong. The employer promised the applicant that he would have good working conditions and that he would receive a salary.
61. The applicant was accompanied to Hong Kong in January 2007 by a member of the employer’s family who held the travel and identification documents of the applicant. These documents were kept by the employer while he was in Hong Kong, and the applicant was kept under the control of the employer and his family while in Hong Kong. The applicant was constrained and controlled both psychologically and economically by the employer. All formal arrangements for the applicant’s employment and residence in Hong Kong were organised and arranged by the employer. The applicant had no knowledge of his rights and obligations or of those of his employer. He was placed in a state of dependency on the employer.
62. The applicant was employed as a foreign domestic helper. However, he was required to work in the employer’s trading company (which the applicant agreed to do) and resided at the office premises of the company. He slept on the carpeted floor of one of the offices at the premises. He was required to work long hours, seven days a week. He was given two meals a day and his movements were restricted to the office premises except for office errands. He was able to take breaks, but it was unclear how often these occurred and for how long they lasted. As the applicant resided at the office premises, he was under the direction and control of the employer; his movements were restricted; he had limited enjoyment of privacy; and was unable to live a normal life.
63. The applicant was regularly abused and beaten by the employer. Although he did not sustain serious injuries, he was nevertheless treated in a degrading and abusive manner. The employer and his family

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29 [2018] HKCA 473.

cajoled and deceived the applicant into taking up the employment in Hong Kong. The applicant was deceived about his working conditions (long hours of work and subjection to abuse and beatings) and payment of wages (unpaid for nearly four years). The employer threatened the applicant that serious harm would result to him and his family if he left his employ, and claimed that he owed the employer a large sum of money for having been brought to Hong Kong. The employer tricked the applicant into agreeing not to receive his monthly wage, and put off paying him the full remuneration due to him under the terms of his employment contracts.

64. During the period when the applicant worked for the employer, from May 2007 to December 2010, he made no report or complaint to the police or to any other authorities. He was not aware of his rights or remedies, and in particular he was unaware that his case could amount to one of human trafficking for forced labour. The applicant in early December 2010 requested payment of the monies the employer owed him. The employer arranged the return of the applicant to Pakistan on the basis of him taking a holiday. While the applicant was in Pakistan, the employer terminated his contract and revoked his sponsorship in order to prevent the applicant from returning to Hong Kong to make a claim against him for the unpaid wages.
65. The applicant returned illegally to Hong Kong in April 2012 to claim his unpaid wages from his employer and to report the mistreatment that he had suffered from the employer. The applicant attended the offices of the Immigration Department, the Labour Department and the Police on various occasions and revealed to the officers whom he saw information about the treatment he had received from the employer, and the fact that he had not been paid wages for a period of four years. The applicant also stood trial in the District Court for an offence of robbery against associates of the employer, of which he was acquitted. The court commented that there was a distinct possibility that he was wrongly accused of the crime.
66. When the case was before the Court of Appeal, there were four issues for determination:(1) whether article 4 of the Hong Kong Bill of Rights covers human trafficking for forced labour; (2) whether the applicant was a victim of forced labour; (3) whether the government is in breach of its positive duties under article 4 of the Hong Kong Bill of Rights by not enacting a specific criminal offence to combat forced labour (or human trafficking for forced labour); and (4) whether the government has breached its investigative duty under article 4 in the case of the applicant.
67. The court was referred to authorities under the United Nations (including International Covenant on Civil and Political Rights, UN Human Rights Committee comments and observations, the Palermo Protocol 2000, the Anti-Trafficking Convention 2005 and Forced Labour Convention 1930) and European jurisdictions.

68. The court proceeded to consider the case on the basis that there was indeed a real, not fanciful or negligible, problem of forced labour and human trafficking for forced labour in Hong Kong, particularly amongst the imported labour sector. The size and extent of the problem was yet to be fully explored and investigated.
69. After considering the contemporary situation in Hong Kong, as well as the relevant international developments, the court did not accept that article 4 of the Hong Kong Bill of Rights should be given a generous interpretation to cover human trafficking (as a form of modern slavery) by itself, or human trafficking for forced labour. The court was of the view that article 4 covered slavery and the slave trade in all their forms, servitude, and forced or compulsory labour.
70. The court also found that forced labour in contravention of article 4(3) had clearly been established in this case. Forced or compulsory labour was considered to be: *“all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”* There had to be a causal connection between the menace of a penalty and the performance of forced labour. The court found that there was, first, obviously, the menace of a penalty. Secondly, the threat to kill the applicant if he were ever to run away, was more than sufficient to vitiate the initial consent of the applicant to coming to Hong Kong to work for the employer or his subsequent consent to stay in his employment. As regards causation, the court noted that subjective causation was not required as when one was, almost by definition, dealing with vulnerable people who might be simple, uneducated or unsophisticated, precisely the type of person who required protection of the law. Many of them might, because of social tradition, cultural background, upbringing or religious belief, be ignorant of their rights as a human being, over-submissive or tolerant, and be resigned to what they were made to suffer as simply realities of life. Causal link could not be dependent on what they subjectively felt or thought.
71. The court did not agree that the government had breached its positive duties under article 4 to provide practical and effective protection against forced labour by means of a specific criminal offence. The ineffectiveness of the existing measures might be due to a variety of reasons, such as a lack of awareness on the part of the various authorities and law enforcement agencies concerned, coupled with the absence of a central authority to supervise, coordinate or carry out investigations into possible violations of article 4. Granted there were positive obligations and these were serious obligations under article 4 on the part of the government to combat forced labour, but it did not follow that the only possible way to discharge those duties was to have, amongst other things, a specific criminal offence to penalise forced labour. Rather, when it came to positive duties on the part of the government, a suitable degree of margin of appreciation must be accorded to the government.

72. However the court found that the government had failed in its investigative duty under article 4 in relation to the complaints of the applicant. It was plain that the breach was due not to the absence of any specific criminal offence as such, but rather the lack of training of the officers of the various government authorities involved regarding article 4 violations, and the total lack of central supervision and coordination in terms of investigating and combating such violations. The government's duty is, amongst other things, to have a central authority to supervise and coordinate the work of all relevant authorities. The matters reported to the authorities should have been sufficient to alert them that this was a possible case of forced labour, and prompt them to take appropriate action. It was a positive duty on the part of the government to carry out investigation once it was aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, required to perform forced or compulsory labour within the meaning of article 4. It did not depend on the victim realising or making a complaint that he or she was or had been a victim of a violation of article 4. And this was for very good and obvious reasons, given that in typical cases, one is concerned with vulnerable and unsophisticated people.
73. (Note: In addition to these types of cases, the press has reported that in Hong Kong, there are vulnerable men from India and Pakistan being tricked into arranged marriages and trafficked to Hong Kong where they work as bonded labourers and indentured servants for their in-laws. Many of them are beaten and verbally abused, but too afraid or ashamed to speak out.<sup>30</sup>)

### ***Victims in prison /hospital /care and attention home***

#### ***HKSAR v Leung Shing Chi***<sup>31</sup>

74. In this case, three correctional officers were jointly charged with and convicted after trial of inflicting grievous bodily harm on a Taiwanese visitor while in their custody at Lai Chi Kok Reception Centre, contrary to section 19 of the OAPO, which carried a maximum sentence of three years' imprisonment.
75. The officers were the only persons with the deceased in a room at the material time. The autopsy report showed that 117 bruises were found on various parts of his body. Given the extent and number of injuries, the judge was in no doubt that the defendants had used unnecessary and grossly excessive force in order to subdue the deceased. There was no

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30 "Slave husbands of Hong Kong: the men who marry into servitude" *South China Morning Post* 21 May 2017. Available at: <http://www.scmp.com/week-asia/society/article/2094868/slave-husbands-hong-kong-men-who-marry-servitude>

31 (2014) 17 HKCFAR 889. For more factual details, see also the judgment of CACC 382/2012, and the reasons for verdict and sentence of DCCC 280/2012.

direct evidence of what happened in the consultation room where the deceased was alone with the three defendants. What had happened could only be inferred from the factual evidence and from that of the forensic experts. There was no evidence to find which of the defendants was responsible for which particular injury, but since they were acting in concert both before and after the attack, the judge found all of them to be jointly liable. The judge took a starting point of two years' imprisonment and reduced it by one-third to 16 months' imprisonment on account of the defendants' clear records, contributions to society and on humanitarian grounds.

76. The defendants' appeal against conviction and sentence was dismissed by the Court of Appeal, and the appeal against conviction was further dismissed by the Court of Final Appeal.

77. In the District Court, the judge had stated in this case:

*"The deceased was placed in the care of the defendants by the authority of the law. The law had bestowed the power on the defendants to keep law and order within the confines of the prison, and the responsibility that came with it must be to exercise it sparingly and judiciously. In the confined environment of Lai Chi Kok Reception Centre, where public scrutiny is almost impossible, the society can only rely on the judgment and good sense of the officers in entrusting the power of the Correctional Services Department.*

*In this instance the defendants had crossed the line by such a large margin that the deceased ended up with multiple injuries and losing his life. They had thus betrayed the trust and expectation of the law and the society. Their conduct, if unpunished, would ultimately undermine the confidence of the society on the Correctional Services Department and, indeed, the Criminal Justice System.*

*... The injuries had been so serious that they contributed to the victim's demise. The defendants should consider themselves lucky that they were not charged with manslaughter. Having considered the severity of the injuries and the implication of the loss of public confidence, I found that I have to send a clear message to the society in order to salvage the reputation of the Criminal Justice System: such behavior, even if committed by those working within the system, could not and would not be connived and would be seriously punished."<sup>32</sup>*

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32 [2012] HKEC 2498, at paras 14 to 15 and 24.

## UNITED KINGDOM

### Further cases decided since implementation of 2004 reforms<sup>1</sup>

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#### Introduction

1. In addition to the case examples referred to in Chapter 3 of this paper, we set out below details of other recent cases in the United Kingdom involving, first, child abuse, and secondly, abuse of vulnerable adults. The case examples here are grouped under the key legal issues which are discussed.

#### Child abuse cases

##### *Sentencing*

*R v Akinrele (Olusola Dayo)*<sup>2</sup>

2. Leeya was the daughter of the appellant and Kelly Inman. Leeya was not quite two months-old when she was suddenly rushed to hospital on 18 December 2006 following an emergency call made by Kelly who reported to find Leeya becoming floppy and showing difficulty in breathing. A number of other injuries were also found in Leeya, including 22 fractures to her ribs and a fracture to her skull. She died shortly afterwards on 30 December 2006.
3. There was a rather complicated history to this case. In what was the third and final criminal trial, the appellant's stance was that the fractures found in baby Leeya were the natural consequences of what was called "*temporary brittle bone disease*", whereas Kelly's position was that the appellant had been violent, and their daughter was in his arms when she found Leeya in the floppy condition.

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1       le, the offence of "*Causing or allowing a child or vulnerable adult to die or suffer serious physical harm*" under section 5 of the Domestic Violence, Crime and Victims Act 2004 (and the related evidential and procedural reforms included in sections 6 and 6A of the Act).

2       [2010] EWCA Crim 2972.

4. Kelly had already pleaded guilty to allowing Leeya's death in the second criminal trial; and by the end of the third trial, was found not guilty of murder nor of causing Leeya's death. As regards the appellant, he was found guilty of murder in this final trial.
5. The appellant appealed against his murder conviction, arguing that: (1) the trial judge's summing up was unbalanced and favoured Kelly; he also summed up the medical evidence incorrectly; and showed bias against him; and that (2) the conviction was unsafe in that Kelly's evidence was central to the case against him and yet Kelly had earlier in related family proceedings been found to be an untruthful witness who tailored and manipulated her evidence to advance her best interests.
6. In relation to (1), the Court of Appeal found the various criticisms directed at the summing up of the trial judge unfounded and there was also no bias on his part. In relation to (2), the Court was of the view that the jury could still have safely convicted the appellant on the ample evidence available even if they regarded Kelly's evidence as wholly untruthful and hence without resorting to it. Accordingly, the court dismissed the appeal.

*R v Laura-Jane Vestuto*<sup>3</sup>

7. This sentence appeal concerned an appellant who was the mother of two boys aged 18 months (X) and three years (Y) respectively at the time of the offences. The case against the appellant was that she had dosed the two boys with amitriptyline, an anti-depressant drug with sedative effects, causing X's death and in circumstances amounting to cruelty to Y. She denied such allegation early on in various investigation interviews after X's death in which she allowed suspicion to fall on other family members including X's father. However, she entered a timely guilty plea when charged with one count of causing or allowing the death of a child (contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004) and 1 count of cruelty to a child (contrary to section 1(1) of the Children and Young Persons Act 1933), and was sentenced to 6 years' imprisonment for the section 5 offence together with 12 months' concurrent imprisonment for the cruelty offence. Notably, "*[h]er plea was accepted on the basis that she intended no harm to her sons but that she knew that what she was doing was 'wrong and risky'.*"<sup>4</sup>
8. It was revealed that months before X's death, the appellant had told a neighbour that she had administered medicine to him to help him sleep. In fact, X's grandmother and aunt had noticed that X was sweating profusely in about the two weeks before his death. When they expressed their concern as to X's condition, they were assured by the appellant who lied that she had consulted a doctor who had informed her that the sweating was due to X's teething problems. Post-mortem found that X had died of amitriptyline intoxication, with a fatal dose of

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3 [2010] 2 Cr App R (S) 108.

4 Same as above, at para 2.

amitriptyline 10 times more than the therapeutic dose for an adult found in X's blood. Whilst the exact quantity ingested could not be established, the relevant test indicated a chronic use of the drug over time as opposed to an acute ingestion.

9. On appeal, the Court of Appeal, similarly to the sentencing judge, was of the view that the appellant's conduct was a sustained, determined, persistent course of cruel conduct towards not just one but two helpless children which led to the death of one and potentially that of the other. Additionally, the court observed that the appellant knew of the risk when she started dosing X and Y and she did so for her own selfish purposes to get them to sleep. What was worse was that she continued to do so for weeks or months even after X's sweating caused some alarm to other family members, when she must have known that the children were severely at risk. Having caused the death of X, she further exacerbated the suffering of other family members by allowing them to fall under suspicion that lasted some 15 months. The Court of Appeal was therefore not persuaded that the sentence of 6 years' imprisonment was in any way excessive in view of the whole offending.

*R v Hopkinson (Jessica Marie)*<sup>5</sup>

10. This case concerned the death of baby Kristal who was not quite two months' old when she was found dead as a result of brain injury, probably the result of traumatic, violent shaking. Other older injuries were found including rib fractures, multiple retinal injuries, etc. The defendant and her co-accused were respectively the mother and father of baby Kristal. The prosecution was unable to prove which of the two of them had caused the death of Kristal, and all that could be proved was that one or other of them had inflicted the fatal injuries. There was however considerable evidence that, whichever one of them it was, the other was or ought to have been aware that Krystal was at a serious and significant risk of harm from the other. These facts made a classic case of section 5 of the 2004 Act, with which both were charged (but not with murder or manslaughter).
11. The judge was concerned about the difficulty in sentencing should the jury return guilty verdicts against both defendants, and ruled that he would ask the jury to return special verdicts, a ruling supported by the defendant but not her co-accused nor the Crown which maintained the view that there was insufficient evidence to enable a safe special verdict that one or the other caused the fatal injuries.
12. The jury found the defendant guilty and returned a special verdict that she had unlawfully caused the fatal injuries. Before the jury were able to return a verdict in relation to the co-accused, the judge was alerted of incidences of jury intimidation. The judge decided to discharge the jury, but before doing so, gave a short ruling in which he expressed his

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5 [2014] 1 Cr App R 3.

astonishment of the special verdict returned against the defendant, and commented that, had she been the sole defendant, he would have acceded to a “*no case to answer*” application. The judge certified the case for appeal.

13. On appeal, the Crown agreed that there was no evidence on which the jury could have concluded that the defendant caused the fatal injuries; therefore it did not seek to uphold the defendant’s conviction or the special verdict against her. Additionally, jury intimidation preceded the return of such conviction and special verdict, and for this reason they should not be upheld either. The Court of Appeal agreed and quashed the conviction ordering a new trial.
14. However, the Court of Appeal made it clear that it found the conviction unsafe not because of the personal views of the judge about the jury verdict. It observed that the mere fact that the judge himself disagreed, even if profoundly, with the verdict of the jury does not of itself provide a ground for quashing the convictions. Any such approach would undermine the essential constitutional principle that the responsibility for the verdict rests with the jury.<sup>6</sup>
15. Secondly, the Court of Appeal also observed that the taking of special verdicts has fallen to virtual desuetude. There will be very rare occasions where it may be advisable to seek a special verdict in the context of a murder trial, where there are various alternative defences such as diminished responsibility and loss of control; but even then a special verdict should continue to be a rarity.<sup>7</sup> More importantly, the Court highlighted that a special verdict is particularly inappropriate in the context of section 5, because it was an offence deliberately created to address the inevitable difficulties of proving which of the two defendants was responsible for the death or serious injuries to a child where there are no other candidates and neither is willing to tell the truth.<sup>8</sup>

### ***Other child abuse cases***

*(Note: the details we have on the following three cases are as reported in the press.)*

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6 Same as above, at para 21.  
7 Same as above, at paras 22 and 23.  
8 Same as above, at para 23.

Ayeeshia Jane Smith case<sup>9</sup>

16. Ayeeshia Jane Smith (“AJ”) was only 21 months old when she died on 1 May 2014 in her flat after suffering 16 separate injuries likened to a car crash and a fatal heart laceration – probably caused by a brutal stamping on her chest. The prosecutor in the case told the Birmingham Crown Court that AJ’s mother, Kathryn Smith and her cohabiting partner Matthew Rigby were *“in it together”*. Kathryn was known to have a history of drug abuse, mental health issues and an explosive temper, routinely put her own needs before AJ’s. Her relationship with Matthew was a volatile and violent one, which was evidenced by the fact that weeks before AJ’s death, Matthew had damaged the front door of the flat they were living in and threatened to set it on fire.
17. In court, Matthew insisted he had *“never raised a hand”* to AJ while Kathryn claimed she was a *“good mum”* and loved her. They both accused the other as the last person to see AJ. At the conclusion of the trial, Kathryn was convicted of murder and cruelty to a child whilst Matthew was found guilty of causing or allowing AJ’s death.
18. In April 2016, Kathryn was sentenced to imprisonment for life (for a term of not less than 24 years), and Matthew to three years and 6 months’ imprisonment. The judge described Kathryn as a *“devious, manipulative and selfish young woman”* who was *“prepared to tell lie after lie”* and the case was just one of *“venting [her] anger on a defenceless child”*. The sentencing judge further remarked that AJ *“was killed in her own home by her own mother – that is the grossest breach of trust.”* (The local member of Parliament called for a public inquiry into Ayeeshia’s death, as he compared the case to that of Victoria Climbié and Baby P (see discussion of the Baby P case (*R v Owen*) in Chapter 3<sup>10</sup>.) The serious case review by the Derbyshire Safeguarding Children Board stated that the professionals involved should have been more inquisitive. However, the report said the girl’s death could not have been predicted.
19. On appeal, the Court of Appeal reduced the sentence of Kathryn to 19 years’ imprisonment due to her youth and immaturity. The Court was of the view that *“[i]n sentencing in such cases where the parent was young and, as in the present case, young in terms of immaturity, ordinarily in the absence of unusual aggravating features accompanied by a lack of mitigating features, a minimum term in excess of 20 years would require very serious aggravating features and very careful reflection before such a*

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9 See various news reports following the case at:  
<https://www.theguardian.com/uk-news/2016/apr/11/ayeeshia-jane-smith-mother-to-serve-at-least-24-years-for>  
<http://www.bbc.com/news/uk-england-stoke-staffordshire-35938209>  
<http://www.bbc.com/news/uk-england-36013256>  
<http://www.bbc.com/news/uk-england-stoke-staffordshire-36006198>  
<https://www.bbc.com/news/uk-england-40776332>  
<https://www.bbc.com/news/uk-england-derbyshire-41151166>

10 See Chapter 3, above, at paras 3.111 to 3.112.

*sentence was imposed. In [the Court's] judgment, the minimum term imposed by the judge did not properly reflect the circumstances of the murder, the previous conduct, the other offences of which she was convicted and the mitigating factors.*"<sup>11</sup>

*Levi-Blu Cassin case*<sup>12</sup>

20. On 22 December 2014, the Birmingham Crown Court sentenced the parents of a 22 months' old baby, Levi-Blue Cassin, to nine years' imprisonment for causing and allowing the death of the baby, who was brutally killed as a result of horrific abdominal injuries, which was consistent with being hit by a car or falling from a three-storey building, in February 2013.<sup>13</sup>
21. Following a five-week trial, the two defendants were both cleared of murder and manslaughter as the jury was unable to pinpoint which one had made the fatal blows. Throughout the trial the mother, a known drug addict, and the father, painted as a violent bully who regularly beat the mother, blamed each other for the death of their son, and refused to testify about the drugs and violence that plagued their son's life. It was found that the injury inflicted on the baby was sustained at least six hours, and perhaps up to 12 hours, before the mother called the police asking for assistance.
22. The relatives of Levi-Blu were dissatisfied with the sentence, considering the nine years' term was insufficient, as they believed that it was a joint enterprise causing the damage on the child, and they condemned social services, which were looking after the matters of the family concerned, for failing to prevent the baby's death. (An independently chaired sub-group of the Solihull Local Safeguarding Children Board was convened subsequently and conducted a serious case review to look at lessons that could be learned from this tragic case.)

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11 *R v Kathryn Helen Smith* [2017] EWCA Crim 1174, at paras 85 to 86.

12 Its report had been agreed on 15 September 2015 and can be found at:  
<http://www.solihullscb.co.uk/media/upload/fck/file/Serious%20Case%20Reviews/ChildS.pdf>

13 See news reports at:  
<http://www.dailymail.co.uk/news/article-2885202/Nine-year-sentence-drug-addicts-toddler-died-massive-internal-injuries-kick-face-says-boy-s-grandmother.html>  
<https://www.birminghammail.co.uk/news/midlands-news/danielle-cassin-levi-blu-prison-15046155>

Leyton Dawick case<sup>14</sup>

23. Eight month-old Leyton Dawick, suffering from multiple injuries, was rushed to hospital on 8 September 2016 where he died two days later. His mother Chantelle Flynn was charged with causing or allowing the death of a child and perverting the course of justice, while her partner Craig Dawick, the child's father, was charged with murder.
24. Flynn had left the baby boy at home with his father for less than an hour. On returning home, she made a 999 call reporting that her baby had stopped breathing. As the ambulance arrived, the father fled the address. Flynn told paramedics she had been cuddling the baby on the sofa when he started sweating and going red and then turned pale. She also claimed Dawick was not at the house when this had happened. When the police arrived, Dawick turned up shortly afterwards pretending he knew nothing about the incident.
25. When questioned by police, Dawick denied the offences and claimed the child had fallen off the sofa, while Flynn tried to give false accounts to help cover up Dawick's actions and claimed Leyton had previously banged his head on the floor. It was subsequently proven that Dawick had in fact punched, stamped on and shook Leyton resulting in catastrophic injuries, including a bleed on the brain, haemorrhages to his eyes, fractured ribs and extensive bruising across his body. The senior investigating officer commented that: *"This has been a truly harrowing case where a small baby boy died in the most brutal of circumstances, at the hands of his own father who should be protecting him the most. Leyton should have had a full life ahead of him but on 6 September 2016 it was taken away by Dawick who caused sickening and ultimately fatal injuries to his eight-month old son. Flynn knew better than to leave her child with him but she did. She had a responsibility as a mother to protect her baby boy and it's clear from conversations they had between themselves she had concerns about her child being around him."*<sup>15</sup>
26. The Manchester Crown Court sentenced the father, Craig Dawick, to life imprisonment with a minimum term of 21 years, and the mother, Chantelle Flynn, to two years' imprisonment suspended for two years for causing or allowing the death of her son and for perverting the course of justice.

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14 See various news reports following the case at:  
<http://www.gmp.police.uk/Live/Nhoodv3.nsf/2e8922885e6a470680257a86004b16f4/de3b550d498537f6802581a10023763f!OpenDocument>  
<http://www.bbc.com/news/uk-england-manchester-37323686>  
<http://www.mirror.co.uk/news/uk-news/mum-accused-causing-babys-death-8805259>  
<https://www.bbc.com/news/uk-england-manchester-41322902>  
<https://www.bbc.com/news/uk-england-manchester-42439809>

15 See: "Craig Dawick jailed for murdering his baby son", Greater Manchester Police website (20 Sep 2017) at:  
<http://www.gmp.police.uk/Live/Nhoodv3.nsf/2e8922885e6a470680257a86004b16f4/de3b550d498537f6802581a10023763f!OpenDocument>

*R v Nemet (Tamas)*<sup>16</sup>

27. Nemet (N) and Repasi (R), the defendants, had been in a relationship, and the victim was R's young child. The defendants had concealed the identity of the child from his biological father and from the authorities. On 23 September 2016, the victim, then aged 14 weeks, was taken to the doctors with a limp arm. Four fractures were discovered: to the victim's arm, rib, thigh bone and shin bone. The doctor concluded that they had been caused by non-accidental injury mostly likely caused by squeezing, pulling and twisting application of force on at least two separate occasions. The consequences of the injuries were not serious or long lasting. In interview, each defendant supported the other. However, by the time of the trial, each defendant blamed the other for the infliction of injuries. Both said that they were unaware that the baby had suffered any injury until the early hours of 23 September 2016, following which he received timely and appropriate medical treatment. They were subsequently convicted of causing or allowing a child to suffer serious physical harm contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004. N and R were sentenced to imprisonment of three and a half years, and three years respectively. The trial judge sentenced the defendants on the basis that they were both equally liable for causing the serious physical harm. In the absence of sentencing guidelines at the time of the trial for this offence, the trial judge had taken account of the closest comparative sentencing guideline for offences of child cruelty<sup>17</sup> and the assault guidelines for inflicting grievous bodily harm.
28. The Solicitor General considered that the sentences were too lenient and applied for leave to refer them to the court for reconsideration. The Court of Appeal was of the view that the sentences were within the proper bracket of sentences for this offending and declined to interfere with them, although leave was granted. The Court of Appeal noted that the trial judge had acknowledged that he could not say which of the defendants had actually carried out the assault, a particular difficulty before the passing of section 5 of the Act. However, that was not a necessary finding in light of the offence charged. Also, an attempt to seek medical help for a victim of serious physical harm was a matter to be taken into account in an offender's favour, although the extent it would do so would depend on the circumstances.

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16 [2018] EWCA Crim 2195.

17 The Sentencing Council for England and Wales issued a *Child Cruelty Definitive Guideline* in September 2018 which also applies to cases of causing or allowing a child to die or suffer serious physical harm under section 5 of the Domestic Violence, Crime and Victims Act 2004. The Definitive Guideline applies to all offenders aged 18 and older, who are sentenced on or after 1 January 2019, regardless of the date of the offence. See discussion in Chapter 3. The Definitive Guideline is available at: [https://www.sentencingcouncil.org.uk/wp-content/uploads/Child-Cruelty\\_Definitive-guideline\\_FINAL-WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Child-Cruelty_Definitive-guideline_FINAL-WEB.pdf)

## Cases involving vulnerable adults

### ***Definition of vulnerable adult***

*Regina v Uddin (Tohel)*<sup>18</sup>

29. The defendant was charged, together with his family members, with causing or allowing the death of a vulnerable adult under section 5 of the Act. The victim was the defendant's sister, Shahena, who was found beaten to death in the family home. Shahena was 19 years of age and was subjected to a lengthy history of isolation and sustained physical and emotional abuse. She and her sisters were treated badly by their mother and removed from her care. Her oldest brother and his wife was awarded custody of the three girls, and believed in discipline of an extreme kind that included beatings on a regular basis and degrading punishments. The other members of the family, including the defendant were either active or complicit in the beatings and punishments. Shahena was not allowed a mobile telephone and had no access to social media. Witnesses were so concerned about her being in an emotionally and physically abusive situation, they obtained contact details for a helpline on domestic abuse and for a local charity to give to her. She did not contact either for fear of repercussions at home.
30. The defendant appealed against conviction, contending that Shahena was not a vulnerable adult within the meaning of section 5 of the Act. The Court of Appeal held that the words "*or otherwise*" provide for an additional third category or categories of potentially vulnerable adults who are not suffering from an illness, disability or old age. The linkage between the categories specified and the alternative category is that the adult's ability to protect himself must be impaired. The third category encompassed can be defined as "*A cause (other than physical or mental disability or illness or old age) which has the effect on the victim of significantly impairing his ability to protect himself from violence, abuse or neglect.*"
31. The cause of such conditions (other than old age) can be either intrinsic or external, for example the mental or physical trauma suffered in an accident. In principle, there is no limit to the facts and circumstances that might lead to the victim finding him or herself in a state of impaired ability to obtain protection. The causes of vulnerability may be physical, psychological and/or they may arise from the victim's circumstances as in *R v Khan*. A victim of sexual or domestic abuse or modern slavery, for instance, might find him or herself in a vulnerable position, having suffered long-term physical and mental abuse leaving them scared, cowed and with a significantly impaired ability to protect themselves. The court also noted that the section provided several safeguards for a defendant. The section provided a series of criteria, each one of which had to be met

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18 [2017] 1 WLR 4739.

before a prosecution could be brought under the section. The criteria were stringent and limited the pool of potential defendants.

*AG's Reference (R v Mills)*<sup>19</sup>

32. In this reference by the Attorney General for a review of sentence, the Court of Appeal reiterated some statements of principle regarding the offence created by section 5 of the Domestic Violence, Crime and Victims Act 2004. Notably, this case also involved a defendant who was himself a vulnerable adult.
33. The deceased, V, was a 24 year-old man suffering from significant learning difficulties and had an IQ of 56 which placed him in the lowest one percentile for intellectual capability. His vulnerability was "*obvious*". In 2014, V "*attached*" himself to, and began living in a household headed by female M, with M's adult son W and his teenage sister living at the same address. V shared a bedroom with W, who was known to be violent and controlling. Also living in that household was a lodger B, an adult with similar learning difficulties to V. W's girlfriend L did not live in the household, but had regular access to it.
34. Over the course of 8 days between May and June in 2015, V was attacked by W on three occasions with escalating force. Amongst other injuries, these various assaults left V with 21 separate rib fractures, fractures to the nasal bones, a partially collapsed lung, and an accumulation of almost a litre of blood in the pleural cavity. A pathologist likened the injuries to having been a car crash without wearing a seat belt.
35. M, L, and B became aware of W's attacks on V but made no attempt to summon medical assistance. Instead, they fed him pain-killers in order to keep him sedated. M and L planned to remove V from the household once his facial injuries had healed and abandoned him on the street in order to conceal what W had done. There was, however, a final assault on V that led to his death. B was instructed by others to dispose of V's body, which he placed in a pram and subsequently abandoned on a footpath before calling the police and telling them that he had found a dead body. M and L meanwhile cleaned up the house.
36. The defendants were charged with various counts. In the end, W was sentenced to life imprisonment with a minimum term of 23 years' imprisonment on his murder conviction, and two years' imprisonment to run concurrently for the charge of conspiracy to pervert the course of justice. B was sentenced to three years' imprisonment for the causing or allowing death offence and 16 months' imprisonment on the substantive charge of perverting the course of justice to run concurrently. M received a term of seven years' imprisonment on the section 5 offence and 12 months' imprisonment for the charge of conspiracy to pervert the

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19 *Att-Gen's Reference (R v Mills)* [2017] 2 Cr App R(S) 7 (CA) (considering, *inter alia*, *R v Ikram and Parveen*, *R v Vestuto* and *R v Khan*).

course of justice which was ordered to run consecutively. L, on the other hand, was sentenced to four years' imprisonment on the section 5 offence and two years' imprisonment to run concurrently.

37. In its review of sentences passed on the defendants, the Court of Appeal expressed in the clearest terms that “[c]ausing or allowing a child or vulnerable adult to die is a serious offence, in some cases as serious an offence as the most serious offence of manslaughter.” Noting that it can be committed in a wide variety of circumstances, an offender’s culpability and hence sentence must be assessed according to all the circumstances. It therefore rejected the submission that allowing a child or vulnerable adult to die is necessarily less culpable than causing a child or vulnerable adult to die, as it will depend on all the circumstances. The Court further observed that while the offenders in question had not sought or gone out of their way to accept responsibility for a vulnerable adult in the sense, for example, that a professional carer or family member may accept responsibility, nevertheless the Parliament has imposed a positive duty under section 5 on members of a household to protect a vulnerable.
38. On these facts, M being the head of the household was most culpable. She knew her son was a violent bully. She was prepared to do anything to ensure W would not suffer the consequences of his attacks whatever the consequences for V. She sedated V and she instigated the conspiracy to cover up the murder. The Court therefore quashed the sentence of seven years on the section 5 offence and imposed one of eight years; and quashed the sentence of 12 months on the conspiracy charge to impose one of two years to run consecutively making a total of 10 years.
39. L was viewed to be not as culpable as M, but she nevertheless played an active part. The court therefore quashed the sentence of four years and substituted one of five years on the section 5 offence to run consecutively with the two years on the conspiracy charge making a total of seven years.
40. The court confessed that it was not “*straightforward*” to impose a sentence on B. It noted that on one hand, B did nothing to help V, someone he knew was vulnerable, and that he was also responsible for the disposal of V’s body. Yet, on the other hand, B was himself a vulnerable adult, and in other circumstances he could have been W’s victim. Moreover, his difficulties went beyond simple learning difficulties and may well amount to a learning disability. On any view, the court accepted that B’s culpability in relation to the section 5 offence was much lower than M and L. In relation to the conspiracy charge, B was simply doing as he was told and he may not have fully appreciated the seriousness of what he was doing or the impact on V’s family. With some hesitation, the court concluded that the total sentence of three years imposed was lenient, *albeit* not unduly lenient, and hence did not disturb it.

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## SOUTH AUSTRALIA

### Further cases decided since implementation of 2005 reforms

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#### Introduction

1. In addition to the case examples referred to in Chapter 4 of this paper, we set out below details of other South Australia cases involving, first, child abuse, and secondly, abuse of vulnerable adults.

#### Child abuse

##### *Sentencing*

*R v N-T and C*<sup>1</sup> (*Baby Ebony's case*)

2. In this case, the parents of a four month-old baby, Ebony, who died from blunt head trauma with multiple and bilateral skull fractures, pleaded guilty to each of the elements of the offence of contravening section 14. The Supreme Court of South Australia conducted a disputed facts hearing to determine the proper basis for sentencing each of the accused in the light of their respective criminal responsibility. The issue in the disputed facts hearing was which of the accused inflicted the fatal injuries to Ebony. The purpose of the disputed facts hearing was to make findings of fact necessary for sentencing each of them. With the guidance of several binding authorities relating to the principles of sentencing, the court noted that:

*“Applying these principles, it is impermissible for the Court to sentence either of the accused for contravening s 14 on the factual basis that either or both of them inflicted the fatal injuries. To do so would be to infringe the principle explained in De Simoni, Olbrich and Austin. The deliberate infliction of injury resulting in death constitutes a more serious offence than criminal neglect. Criminal neglect is an offence of omission not commission.”*<sup>2</sup>

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1 [2013] SASC 200 (19 Dec 2013).

2 *R v N-T and C* [2013] SASC 200, at para 22.

3. Accordingly, the court deemed it obligatory to identify the unlawful act or acts upon which the contravention of section 14 depended. Two unlawful acts were subsequently identified: the assault of Ebony and the failure to obtain medical attention for her (it was revealed in evidence that Ebony's death was not reported for approximately one week). The court was not wholly persuaded that a failure to obtain medical attention constituted an offence, but it did not come to any conclusion on this particular point whilst it was satisfied that there were assaults committed on Ebony by her father, rendering it unnecessary to decide whether any failure to obtain medical attention for Ebony constituted an unlawful act for the purpose of section 14.<sup>3</sup>
4. The accused's testimony on the facts leading to Ebony's death contradicted each other. The court, however, found the mother's evidence credible. In reliance of her evidence which was reinforced by the father's admission that he had assaulted Ebony by squeezing and shaking her on somewhere between seven and ten occasions over a period of perhaps a month and a half, the court was satisfied beyond reasonable doubt that the fatal assaults were committed solely by the father and such findings constituted an aggravating circumstance of the father's contravention of section 14.<sup>4</sup>
5. The court made remarks on the different expectations that the accused should reasonably have met in the circumstances. The steps that the father could reasonably be expected to have taken were to obtain appropriate medical attention for Ebony. On the other hand, following the earlier finding that the mother was aware of the fact that the father had a history of assaulting Ebony, the steps that could reasonably be expected to have been taken by the mother to protect Ebony from harm included not only obtaining appropriate medical attention for Ebony, but also alerting the authorities that Ebony was at risk of harm from her father.<sup>5</sup>

### ***Treatment of vulnerable adult in care facility***

6. The case of *H Ltd v J and Another* helps to illustrate the application of section 14 with regard to the protection of vulnerable adults in care facilities.

#### *H Ltd v J and Another*<sup>6</sup>

7. The Supreme Court of South Australia made brief observation of the scope of section 14 in this case where the plaintiff (H Ltd), a care facility of which the defendant (J) was a resident, sought a declaration that it be allowed to determine the extent to which it could lawfully comply with the

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3 Same as above, at para 24.

4 Same as above, at paras 25 to 29.

5 Same as above, at para 31.

6 *H Ltd v J and Another* [2010] SASC 176.

direction of J, who had made known to H Ltd of her intention to end her life by ceasing to take sustenance and medication. (As J was not represented, arrangements were made to find legal representation through the Attorney-General's Office which supported the making of declarations regarding, amongst other things, section 14.)

8. In relation to this section, the court agreed that, on proper construction, section 14 only applies to an accused's failure to take steps to protect a victim from the consequences of an unlawful act of another. It therefore followed that J's own intended refusal to accept sustenance did not render H Ltd's failure to provide it a contravention of section 14(1)(d). The court, however, expressly left open the question of whether H Ltd would attract liability under section 14 should J revoke her direction and H Ltd become aware, or ought to have become aware, that its staff members themselves were not providing appropriate care for J.<sup>7</sup>
9. In the circumstances, the court made a declaration that included the order that for so long as J's direction subsisted, then for the purposes of section 14 H Ltd was not under a duty to act to protect J from the consequences of her giving of the direction not to provide sustenance and its compliance with that direction.<sup>8</sup>

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7 Same as above, at para 70.

8 Same as above, at para 98.

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## NEW ZEALAND

### Further cases decided since implementation of 2011 reforms

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#### Introduction

1. In addition to the case examples referred to in Chapter 5 of this paper, we set out below details of other recent New Zealand cases involving, first, child abuse, and secondly, abuse of vulnerable adults. The case examples here are grouped under the key legal issues which are discussed.

#### Child abuse cases

***(Dangerous driving case – section 195 of Crimes Act 1961 – “major departure from the standard of care expected of a reasonable person” – gross neglect vs careless parenting)***

*Rakete v Police*<sup>1</sup>

2. This was an appeal case in which the High Court quashed the conviction of Mr Rakete (R) of ill-treatment or neglect of a child under section 195 on the ground that R’s behaviour fell short of gross neglect or abuse. (This case can be contrasted with the case of *JF v New Zealand Police*<sup>2</sup> discussed in Chapter 5.)
3. On the morning of 2 April 2017, R was driving in a residential area with a 50 km per hour speed restriction. At that time, R had his one year old son in a child restraint chair in the front seat of the vehicle. A police car passed R and noticed that he was not wearing a seat belt. The police car made a U-turn and followed R’s car. R increased his speed dramatically and hit the side of the house on the passenger side of the vehicle. R jumped out of the vehicle and left. R’s son was on the side of the vehicle that hit the house and was left alone in the vehicle when R ran from the police. R was convicted of dangerous driving and the offence under section 195. He appealed against the convictions<sup>3</sup>.

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1 [2017] NZHC 2915.

2 [2013] NZHC 2729.

3 [2017] NZHC 2915, at paras 1 and 4 to 6.

4. The appeal court noted that in vacating the vehicle when it collided with the side of the house, R was apprehended a matter of seconds later. His relatives who lived nearby came to the child's aid, also in a matter of seconds. The child was left for a minimal time in the vehicle. The court considered that, "*R's behavior, whilst unwise in respect of his driving, falls short of 'intentionally' engaging in conduct or omitting to perform any legal duty as a parent, in relation to his child.*"
5. The court noted that: "*[t]he major departure test reinforces the purpose of the legislation as discussed in the Law Commission's report, which appears to be targeted at instances of gross neglect or abuse, rather than simply carelessness or careless parenting.*"
6. The appeal was therefore allowed in part in relation to the section 195 offence.<sup>4</sup>

***(Child abuse case – section 195 of Crimes Act 1961 – “major departure from the standard of care expected of a reasonable person” – gross neglect)***

7. The court has highlighted that the increase of maximum penalty in section 195 marked the Parliament's unequivocal intent that offenders ill-treating or neglecting child or vulnerable adult should be dealt with seriously, as emphasised in the case below.

*Rosemary Anne Adams v New Zealand Police*<sup>5</sup>

8. In this case, the appellant was sentenced to one year and eight months' imprisonment following her guilty plea at the District Court to one count of intentionally ill-treating a child (against section 195(1) Crimes Act) and one count of assaulting a child (against section 194(a) Crimes Act). She appealed against this sentence, and contended that the judge should have sentenced her instead to home detention.<sup>6</sup>
9. On the agreed summary of facts prepared for sentencing, it was revealed that the victim boy had been cared for by the appellant since he was aged six weeks. When he reached two years of age, the appellant obtained an interim parenting order which was later made final. The boy remained in the care of the appellant until 22 February 2013.<sup>7</sup>
10. During this time, the appellant would force-feed the victim. This involved her placing him in a highchair and grabbing him by the chin to force his mouth open. Using a large spoon she would then force food into his mouth, and then hold it closed. On some occasions the appellant used

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4 Same as above, at paras 45 to 48.

5 [2014] NZHC 42.

6 Same as above, at para 1.

7 Same as above, at para 2.

the spoon with such force that it would cause him to choke. If he did not swallow the food, she would hit him on his head or his legs with a spoon until he did so, the force of which was sufficient to cause bruising on several occasions. On other occasions, she would strike the victim's cheek until he swallowed. In addition, the appellant also encouraged two other young persons living at their house to assist her in force-feeding the victim. She would arrange for them to hold the victim by his legs and arms to keep him still while she forced food into his mouth.<sup>8</sup>

11. When the victim began to wet his pants as he grew older, this became another source of frustration for the appellant. As a preventative measure, she would place the boy on the toilet and leave him there for long hours, occasionally more than five. On some of these occasions, the victim would fall asleep on the toilet and hence fall off the toilet. In another effort, the appellant also restricted the victim's water intake, allowing him to drink no more than 250 millilitres of water per day when the optimum for a child of his age was around 1.1 litres.<sup>9</sup>
12. The court noted that according to case law, the imposition of a sentence of home detention is a matter of discretion entrusted to the sentencing judge.<sup>10</sup> In relation to section 195, the court noted that:

*“As the Judge in the present case remarked, Parliament has made it clear that cases involving physical violence against young children require a stern response. This is reflected in the fact that, in December 2008, s 9A of the Sentencing Act 2002 came into force. This specifically directs the Court that in cases involving violence against young children, it must take into account the defencelessness of the victim, any serious or long-term physical or psychological effects on the victim and the magnitude of breach of any relationship of trust between the victim and the offender.*

*In addition, Parliament has increased the penalty for this type of offending from five years imprisonment to ten years imprisonment. As the Judge remarked, this significant increase in maximum penalty, illustrates Parliament's intent that the courts should deal sternly with offenders who ill-treat or neglect young children.”<sup>11</sup>*

13. Further observing that there were several aggravating factors in the present case, including: (1) it involved a gross breach of trust by a caregiver in respect of a very young and defenceless victim; (2) the ill-treatment took several different forms, all of which were highly inappropriate and likely to cause longstanding damage for the victim; and

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8 Same as above, at paras 3 to 6.

9 Same as above, at paras 7 to 8.

10 Same as above, at para 13.

11 Same as above, at para 14.

(3) the offending occurred over a very lengthy period,<sup>12</sup> the court concluded that the sentencing judge was entitled to impose a sentence of imprisonment rather than home detention. Accordingly, the appeal was dismissed.<sup>13</sup>

**(Psychological abuse – section 195 of Crimes Act 1961 “real and substantial risk” – “major departure from the standard of care expected of a reasonable person” – “gross neglect” – whether proof of substance abuse)**

14. The application of the reformed provisions in cases involving psychological abuse is illustrated by the case below.

*New Zealand Police v Remy Beck*<sup>14</sup>

15. In this case, the defendant was charged with section 195 Crimes Act 1961 for intentionally engaging in conduct, namely, using drugs or alcohol,<sup>15</sup> causing delirium which resulted in him dropping his baby son whilst holding him. It was alleged that this caused adverse effects to the health, namely, psychological abuse, of the baby and this constituted a major departure from the standard of care to be expected of a reasonable person.

16. The defendant took out an application pursuant to section 147 of the Criminal Procedure Act, arguing that there was no case to answer on this charge.

17. The Court noted that the police must prove five essential elements under section 195.

- (1) The defendant is a person having the actual care or charge of the victim. This was not disputed.
- (2) The victim is a child. This was not disputed.
- (3) The defendant intentionally engaged in conduct, namely, using drugs or alcohol.
- (4) This conduct is likely to cause suffering, injury, adverse effects to health or any mental disorder or disability to the victim.
- (5) The conduct must be a major departure from the standard of care to be expected of a reasonable person.

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12 Same as above, at para 15.

13 Same as above, at paras 18 to 19.

14 [2016] NZDC 15035 (pre-trial application) and [2016] NZDC 18785 (trial).

15 Prior to amendment the application of which was objected to by the defendant but allowed by the court, the charge referred specifically to using methamphetamine.

18. On the third element, it was argued on behalf of the defendant, amongst other things, that there was simply no evidence about the use of drugs or alcohol. The Police, on the other hand, pointed to the strange behaviour of the defendant at the material time and relied on evidence that he was seen struggling to walk, or was stumbling.
19. On the fourth element, the defendant submitted, amongst other things, that the word “*likely*” in section 195 required a “*real and substantial risk*” and the evidence in question did not meet this criteria. It was submitted that what had occurred might have amounted to bad parenting, but it was at a low or ordinary level. On the other hand, the Police contended that both the fourth and fifth elements were satisfied: the baby boy was left unattended and nearly made it onto the road from the house he was living with the defendant, he was later being held loosely by the defendant who was very unsteady on his feet and ultimately led to the victim being dropped. The taking of drugs or substances was a major departure from the reasonable standard of care for somebody having sole charge of a child. The defendant argued that the major departure from the standard of care expected for section 195 needs to be a “*gross departure*” or “*gross negligence*”.
20. Having considered all matters including the evidence and submission by the parties, the court, “*only by the narrowest of margins*”, was satisfied that there was a case to answer and sent the case for trial. In the end, the trial court was not satisfied that the facts amount to psychological abuse or could be said to be a major departure from the standard of care required of a parent and found the charge of neglect of a child had not been proved beyond reasonable doubt. The defendant was acquitted.

## **Abuse of vulnerable adult**

***(Victim with intellectual disability – section 195 of Crimes Act 1961 – “vulnerable adult” – “major departure from the standard of care expected of a reasonable person” – sentencing)***

*R v Karauria and Moeke*<sup>16</sup>

21. In this case, the defendants Leneith Moeke (M) and Gene Karauria (K) were convicted as joint principals of ill treatment of a vulnerable adult under section 195.<sup>17</sup> M was also convicted of assault with intent to injure that same vulnerable adult.
22. The ill treatment of a vulnerable adult charge arose out of the defendants’ care of a 32 year-old man. He had an intellectual disability which affected not only his IQ, but also his day to day living skills. Expert evidence assessed his communication skills, personal self-care, domestic

<sup>16</sup> [2017] NZHC 2759 (Sentence), see also [2017] NZHC 2240.

<sup>17</sup> [2017] NZHC 2240, at paras 1 to 2.

skills, and socialization skills as being equivalent to that of a child aged anywhere between two years 10 months for some skills and 11 and a half years for others.

23. The defendants took the victim (V) into their home when he was living homeless. He was treated poorly by the defendants for the last four or five months of his time with them. The court found that their ill-treatment of V took different forms which in combination amounted to a major departure from the standard of care expected of a reasonable person. The defendants restricted the food that V could eat, at times he was only provided with one meal a day and his hair loss was consistent with poor nutritional status. H was subjected to verbal abuse by frequent yelling and swearing. He was not allowed to use the washing machine and shower by the end of his time with the defendants.
24. The defendants took V's money, took control of his EFTPOS (electronic funds transfer at point of sale) card and took more than what was reasonable in the circumstances while V was paying them board. The court noted that while that might not have been ill-treatment in and of itself, it added to V's suffering because it deprived him of his independence and control over his own affairs. The court had no doubt that this was the defendants' central motivation in having V lived with them and noted that intellectually disabled adults who receive an income whether from a benefit or other sources may be particularly vulnerable to this type of exploitation.
25. Finally, when he was uplifted from the defendants' care, his body was covered in scars and he had wounds on his arms and feet which required medical attention. They would have been obvious to the defendants and yet the defendants did not take him to a doctor or to a hospital to ensure he received the requisite medical attention.<sup>18</sup>
26. In relation to the ill treatment charge, the court directed that the jury had to be sure that the conduct was *"likely to cause suffering"* and that it was a *"major departure from the standard of care to be expected of a reasonable person"*. The court noted that the latter requirement:

*"[I]nvolves something more than being simply ignorant, unthinking, careless, or acting or failing to act when he or she should have. It consists of such a gross or substantial degree of negligence so as to justify making the defendant criminally responsible for what occurred."*
27. Furthermore, *"s195 is directed towards a pattern of ill-treatment over time, and a course of conduct comprising an accumulation of willful ill treatment or neglect."* The court decided that in this case:

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18 [2017] NZHC 2759, at paras 5 to 12 and 25.

*“Taken alone, any one of the particulars may not have been sufficient to meet the gross negligence threshold. However, when viewed together, the evidence shows a course of conduct which was likely to cause suffering, and was a major departure from the standard of care to be expected of a reasonable person.”*<sup>19</sup>

28. For the offence of ill-treatment of a vulnerable adult, M was sentenced to 18 months’ imprisonment and ordered to pay reparation to V. In rejecting to sentence M with home detention rather than imprisonment, the court noted that:

*“The ill treatment offence carries a penalty of ten years’ imprisonment. That is double the maximum penalty which applied for the previous offence of cruelty to children. The maximum penalty provides some indication of the seriousness with which Parliament regards the ill treatment offence.”*<sup>20</sup>

29. The court also noted that in addition to the ill-treatment offence, M was convicted of a serious assault against the vulnerable adult. The court noted that:

*“The deterrence of others from engaging in the type of ill treatment and violent offending [M] engaged in is extremely important in cases involving vulnerable adults. Detection and enforcement of this type of offending can be difficult. The intellectual disability which makes an adult vulnerable in the first place, may also make it difficult to hold offenders to account for what they have done. For that reason, a very strong message needs to be sent to deter others from engaging in this type of conduct.”*<sup>21</sup>

30. For K, the court noted that K and M were charged as joint principals with the ill-treatment of a vulnerable adult. They were jointly responsible for V’s care, and they were both responsible for his poor treatment during the time V resided with them. The court found that there was no basis to distinguish K’s culpability from that of M for this charge.<sup>22</sup> However, noting that K was not up for sentencing on violent offending in addition to the ill-treatment offence, and that K accepted responsibility for her conduct and expressed genuine remorse, K was sentenced to seven months’ home detention and ordered to pay reparation to V.<sup>23</sup>

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19 [2017] NZHC 2240, at paras 5 and 6.

20 [2017] NZHC 2759, at paras 52 to 54.

21 [2017] NZHC 2759, at paras 52 to 54.

22 Same as above, at para.63.

23 Same as above, at para.74.

***(Institutions – corrections officers and doctors – [potentially] section 151 of Crimes Act 1961 – “vulnerable adult” – “major departure from the standard of care expected of a reasonable person”)***

31. A concern raised during the consultation on the proposed reforms was whether persons held in Police or Corrections Service custody would fall within the definition of “*vulnerable adults*” and hence trigger the application of the relevant provisions. Whilst this issue was not addressed squarely or in great detail, a passing *obiter* comment was made by the court in the following case.

*The Chief Executive of the Department of Corrections v All Means All*<sup>24</sup>

32. In this case, Mr All Means All was sentenced to four months’ imprisonment in relation to six charges of threatening to kill. On admission to prison, he staged a hunger strike refusing food and drink as a mark of protest because he believed that a detective testifying against him had lied. The Department of Corrections and the Canterbury District Health Board were concerned to establish their rights and duties in relation to provision of medical treatment to Mr All Means All and applied to the court to seek declarations to better define their responsibilities. The first, sought by the Department of Corrections, was a declaration that Mr All Means All may receive medical treatment by way of artificial hydration and nutrition when: (a) his health or life is in peril in the judgment of a clinician; and (b) he no longer is able to indicate whether he consents to treatment. Alternatively, both the Department and the Health Board sought a declaration that they have lawful excuse for not providing medical treatment so long as Mr All Means All continues to refuse consent to treatment.<sup>25</sup>

33. The Department of Corrections was particularly concerned because under the statutory scheme of the Corrections Act 2004, its Chief Executive, prison managers and all officers are under a duty to ensure “*the safe custody and welfare of prisoners.*” The standard of care provided must be comparable to that in the community, while to that end regulations provide that medical officers (who are general practitioners) are bound to take “*all practicable steps to maintain the physical and mental health of prisoners.*”<sup>26</sup>

34. After evaluation, which included analyses of various foreign cases and references to different legislations and practices, the court refused to grant the first declaration sought because there was no justification to limit the “*right to refuse to undergo any medical treatment*” guaranteed by section 11 of the New Zealand Bill of Rights Act 1990.<sup>27</sup> The judge,

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24 [2014] NZHC 1433.

25 Same as above, at paras 2 to 3.

26 Same as above, at para 31.

27 Same as above, at para 62.

nonetheless, granted the alternative declaration, and in so doing observed in passing:

*“Corrections officers are subject to the duties to which reference has already been made. More general duties of care are cast under the Crimes Act, including a duty to provide necessities to vulnerable adults and to protect them from injury [ie, section 151]. A major departure from the standard of care expected of a reasonable person subject to such a duty may result in liability for manslaughter [section 150A(2)]. Doctors, of course, are subject to this duty.”<sup>28</sup>*

35. Though not expressly stated, this observation of the court could be construed as allowing for the inclusion of persons held in custody to fall within the meaning of “*vulnerable adults*” for the purposes of the 2011 reforms.

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28 Same as above, at para 70.

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## OTHER JURISDICTIONS

### Further cases to those included in Chapter 6

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#### Introduction

1. In addition to the case examples referred to in Chapter 6 of this paper, we set out below details of other recent cases concerning abuse of children and vulnerable adults. The case examples here are grouped under the relevant jurisdiction.

#### AUSTRALIA

##### *(New South Wales – child victim – murder – manslaughter)*

*SW v R*<sup>1</sup>

2. In *SW v R*, a seven year-old girl Ebony was found dead in her room surrounded with faeces and bad smell, and later found by forensic experts that she was “*in an extreme degree of emaciation*” and her death was caused by chronic starvation and profound neglect. There was medical opinion that it had been many hours or days since Ebony had last eaten solid food, and it would have taken “*weeks*” at a minimum for a child to reach the stage Ebony was at when she died.
3. The Court of Criminal Appeal in the New South Wales refused the leave to appeal against conviction of murder against the girl’s mother, the appellant, but quashed the sentence of life imprisonment. The appellant was finally sentenced to a non-parole period of 30 years with an additional term of 10 years. The father was found guilty of manslaughter and sentenced to imprisonment for a term of 16 years, with a non-parole period of 12 years.
4. As regards the appeal against sentence against the appellant, the appellate court, by majority, rejected the view of the trial judge and another appellant judge that it would have been no worse if the appellant had actually formed an intention to kill her daughter. The court accepted the psychiatrist’s diagnosis of personality disorder of the appellant which

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1 [2013] NSWCCA 103.

suggested that she lacked capacity to recognise another person's feelings and such an emotional numbing was considered to be consistent with an exposure to domestic violence early in life.

5. Other factors taken into account included, inter alia, that the appellant did not deliberately set out upon a long term plan to kill the child, and she abused prescription drugs although it was found that the use was not as great as she made out. Therefore, the appellate court concluded that the effect of the evidence was to distinguish the appellant from cases in the worst category such as the killer who acts with cold deliberation, with full capacity and who is prepared to commit a felonious act from motives such as greed or other self-interest.

### *R v JK*<sup>2</sup>

6. In the case of *R v JK*, *JK* was charged with murder of the twelve year-old daughter (*CN*) of his partner *TP* from another man. The couple commenced a relationship in March 2009. *TP* had two children from another man, *CN* and *NZ*, and *JK* and *TP* had two children of their own. There was domestic violence within the family from sometime during 2011. This commenced with *JK* assaulting *TP*, and later her two daughters *CN* and *NZ*. Neither of *JK*'s natural children was subject to such abuse. The violence continued through 2012 and 2013.
7. In 2015 in the last week of *CN*'s life, *JK* assaulted her repeatedly and she was not provided with medical assistance. The victim died on 22 September 2015 after the assault had started on 20 September, which the court had noted, were not isolated events but formed part of a consistent pattern of cruel and barbaric abuse of a helpless child. A post-mortem examination showed that her death was the result of acute blunt force trauma to the head, torso and limbs. There was evidence of multiple applications of force and it was not possible accurately to document the number of injuries. However, fifty separate injuries were observed on the skin alone and many of those injuries might have reflected more than one impact. It was likely that the mechanism of death was cardiorespiratory arrest secondary to shock from loss of blood. The pathologist was of the view that *CN* would probably have survived if she had received medical assistance.
8. The Supreme Court of NSW was of the view that, objectively, this case must be seen as close to the top of the broad and diverse spectrum of conduct that could be charged as homicide. That was so because of the savage and repeated nature of the beatings over a period of days and because there were a number of aggravating features present. The offence was committed on a vulnerable victim in her own home and perpetrated by an offender who abused his position of trust. The offence involved the use of a weapon. It was committed in the presence of another child. The court was not satisfied that *JK* intended to kill *CN*.

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2 [2018] NSWSC 250.

The court sentenced JK on the basis that he intended to inflict grievous bodily harm and was recklessly indifferent to human life.

9. In considering the sentence for JK, counsel in the case referred the court to a number of generally similar cases, *“where children were killed following prolonged periods of unspeakable acts of violence”*. The court was provided with a schedule summarising 23 such cases. Life sentences were imposed in three of those cases. Taking into account the purposes of sentencing both under the common law and in relevant provisions in legislation,<sup>3</sup> JK was sentenced to imprisonment for 37.5 years with a non-parole period of 28 years.
10. The mother of the victim, TP pleaded guilty to manslaughter of her daughter as a result of her gross and criminal neglect.<sup>4</sup> The Supreme Court of NSW noted that:

*“One of the most fundamental aspects of the human condition is the instinct of a parent to protect their child. The civil law recognises this by providing that a parent has a duty of care to protect the child. A breach of that duty may give rise to liability of the parent in a civil action for negligence. Where the breach of duty is so gross that it is properly categorised as “criminal” and deserving of punishment, and where the neglect causes the death of the child, the crime of manslaughter may be committed.”*

11. The court noted that TP was also victim of that terror. Like her two young children, TP was repeatedly beaten by her partner. It was clear that TP suffered from what was once described as *“battered wife syndrome”* or *“battered woman syndrome”* (the World Health Organisation recommends the more precise term *“intimate partner violence”*). She suffered from Post-Traumatic Stress Disorder and severe depression at the time of CN’s death. These conditions, and the history of violence, abuse and manipulation, caused her to disassociate from the family situation and that she felt powerless and frozen into inaction. The court was satisfied that this had a significant impact on her failure to take actions to protect CN.
12. TP was sentenced to four years’ imprisonment with a non-parole period of 18 months. In passing the sentence, the judge noted that:

*“On the one hand, I am dealing with a crime of manslaughter carrying a maximum penalty of 25 years imprisonment. The maximum penalty must be kept firmly in mind as must the fact that the case involves the death of a human being. And in this case, the death followed a long period of almost unimaginable*

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3 Including section 61(1) of the Crimes (Sentencing Procedure) Act 1999 which provides for *“mandatory life sentences”* in murder cases where *“the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition”* of a life sentence.

4 R v TP [2018] NSWSC 369.

*suffering. The neglect occurred over a lengthy period and the injuries inflicted at the hands of the co-offender were devastating, a matter well known to TP.*

*On the other hand, the offender is a person whose moral culpability is greatly diminished by the history of abuse that I have documented in the course of this judgment. No punishment I can impose will add to the “personal deterrence” she has experienced both by going through the criminal process and through her grief. On one view, she needs counselling not more punishment.”*

## CANADA

### ***(British Columbia – child victims – criminal negligence causing death – failing to provide necessities of life)***

*R v Tremblay*<sup>5</sup>

13. In *R v Tremblay*, two teenage girls were, after intoxication to some extent, invited by an adult drug dealer, Tremblay, to whom they referred to as “street dad” and “God” to party at his residence, where they passed out after taking drugs provided by Tremblay, and ultimately died of methadone and alcohol toxicity.
14. Tremblay was found guilty of criminal negligence causing death and failing to provide necessities of life. It was held that Tremblay had a duty to take care of the victims, which arose out of their young age and intoxication and Tremblay’s offering of his premises and exercising control over their activities which, “*by necessary inference from all of these circumstances*”, showed his “*control ... for their safety and well-being*”.
15. The court ruled that the responsibility to protect children “*does not fall solely on parents or individuals placed in a position of authority*” and adults are held to a much higher standard of care than children “*as a result of their age, experience, resources, and position of control*”, particularly “*in case with high-risk activities such as the consumption of alcohol and illegal drugs*”.
16. Tremblay was found to have shown wonton or reckless disregard of the victims’ safety and his acts (including touching them in a sexual manner after seeing they were passed out) and omissions (including failing to seek medical assistance at an earlier opportunity) caused their deaths. His failure to fulfil his duty to provide the necessities of life to both victims was held as a “*substantial contributing cause to their deaths*”. (It bears noting that a conditional stay was entered on the counts of failing to

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5 [2013] BCJ No 959 (22 February 2013).

provide necessities of life, because the criminal negligence offence is a more serious offence.)

*R v J A R*<sup>6</sup>

17. In this case, the accused failed to take precautionary steps after noticing the significant tumble down a steep stairwell of his four year-old son, and instead waited till the next day to simply mention to the foster mother that it was a fall from bed several days earlier.
18. This was held to be a marked departure from the standard of a reasonably prudent parent. It was held that even in the absence of apparent symptoms, a triggering incident or event (such as a fall from stairwell) may itself be of such a nature as to reasonably raise the prospect of serious and permanent endangerment to health, and precautional and prudent foresight demanded the carer to check out to eliminate the existence of a concussion or internal injury.

**(Ontario – child victim – failure to provide necessities of life)**

*R v S J*<sup>7</sup>

19. In this case, a three year-old boy, H, was delivered to the hospital suffering a seizure with unknown cause on 27 January 2007. On examination, injuries, scars and healed bone fractures were found on the boy's body. H was also in a malnourished state and required blood transfusions.
20. H's parents, the appellants, were charged with aggravated assault, but acquitted because medical evidence was unable to determine the time the relevant injuries incurred, indicating a reasonable possibility that H was injured before coming under the care of the appellants in early-November 2006.
21. On the other hand, both appellants were charged and convicted for failing to provide the necessities of life to H, who was vulnerable. The court ruled that there is no need for a causal connection between appellant's failure to provide necessities of life and the child's necessitous circumstances, as this offence only required a marked departure from conduct of a reasonably prudent parent.

*R v Maloney*<sup>8</sup>

22. In a similar case *R v Maloney*, Spencer, a 25 days-old infant, was delivered to the hospital for suffering seizures. The doctor noticed

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6 [2012] BCJ No 1227 (8 June 2012).

7 (2015) ONCA 97.

8 (2011) NSSC 477.

several bruises, including scratches, and a bloody lesion on his body and little spots of bleeding in his eyes, suggestive of “*shaken baby syndrome*”. The parents were both charged with failing to provide necessities to a person under their charge, contrary to section 215(2)(b) of the Criminal Code and aggravated assault under section 268.

23. Both were convicted of the former offence, but acquitted of the latter offence, because there was no evidence of the parents doing any physical harm to Spencer. Despite some evidence suggesting the father’s temper and propensity for violence and some clear inconsistency in the mother’s evidence, those were inadequate to prove aggravated assault beyond reasonable doubt, as there was the possibility of the injuries being inflicted by Spencer’s four year-old brother Ashton, who had an “*active, hyper and rambunctious*” character.
24. The court noted that as the parents were suggesting that Ashton might have been the cause of the injuries, they had admitted their failure to fulfill their responsibility of protecting Spencer from this obvious risk, and therefore both were guilty of the section 215(2)(b) offence.

**(Ontario – vulnerable adult – failure to provide necessities of life)**

*R v Peterson*<sup>9</sup>

25. In this case, a father who was dependent on his son, would not wash or eat without being reminded to do so and was living in a poor and unsafe environment without kitchen or bathing facilities, and was described as “*fiercely independent and contrary*”.
26. The court concluded that the father was in his son’s charge and incapable of withdrawing from his son’s care due to his Alzheimer’s disease and dementia. Whilst the father was hospitalised after collapsing on a street, he was found to be starving and without having bathed, the court found that his son, who had control over his father’s personal care, “*showed a heartless indifference to his father to the point where it amounted to cruelty*” and “*chose not to make decisions that would ensure his father was provided with the necessities of life*”.
27. The personal characteristics of the defendant, falling short of capacity to appreciate the risk, are not a relevant consideration as the use of the word “*duty*” is indicative of a societal minimum that has been established and is aimed at establishing a uniform minimum level of care.<sup>10</sup>
28. The son in question was sentenced to six months’ imprisonment, two years’ probation and 100 hours of community service.

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9 [2005] OJ No 4450.

10 Same as above, at para 35.

## REPORTING OF ABUSE

### Further details on overseas systems (see Chapter 8)

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#### Introduction

1. In addition to the information on types of reporting systems referred to in Chapter 8 of this paper, we set out below further details on the reporting systems in other jurisdictions.

#### AUSTRALIA

##### *The current position on child abuse reporting in Australia*

###### *Overview*

2. Australian States and Territories have different mandatory reporting laws. There are two major areas of difference between the different schemes: which persons are designated as “*mandated reporters*”; and which types of child abuse and neglect they are required to report. There are also other differences, such as the “*state of mind*” that activates the reporting duty (ie, having a concern, suspicion or belief on reasonable grounds) and the destination of the report.<sup>1</sup> Some jurisdictions have relatively broad reporting laws, and others have narrower laws.
3. In addition to state and territory laws, the Commonwealth *Family Law Act 1975* creates a mandatory reporting duty for personnel from the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia. This includes registrars, family consultants and counsellors, family dispute resolution practitioners or arbitrators, and lawyers independently representing children’s interests. Section 67ZA of the Act states that when in the course of performing duties or functions, or exercising powers, these persons have reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the

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1 Mandatory reporting of child abuse and neglect, Child Family Community Australia Resource Sheet – September 2017. Available at: <https://aifs.gov.au/cfca/publications/mandatory-reporting-child-abuse-and-neglect>

person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.<sup>2</sup>

*Who is mandated to make a notification?*

4. The legislation generally contains lists of particular occupations that are mandated to report. The groups of people mandated to notify cases of suspected child abuse and neglect range from persons in a limited number of occupations (eg, Queensland), to a more extensive list (Victoria, Western Australia), to a very extensive list (Australian Capital Territory, South Australia, Tasmania), through to every adult (Northern Territory, New South Wales; and Victoria for sexual offences). The occupations most commonly named as mandated reporters are those who deal frequently with children in the course of their work: teachers, doctors, nurses and police.<sup>3</sup>
5. Any person can make a report if they are concerned for a child's welfare even if they are not required to as a mandatory reporter.<sup>4</sup>
6. Although particular professional groups (such as psychologists) or government agencies (such as education departments in some states) may have protocols outlining the moral, ethical or professional responsibility, or the organisational requirement to report, they may not be officially mandated under their jurisdiction's child protection legislation. For example, in Queensland, teachers are required to report all forms of suspected significant abuse and neglect under school policy, but are only mandated to report sexual abuse under the legislation.<sup>5</sup>

*What types of abuse are mandated reporters required to report?*

7. In addition to differences describing who is a mandated reporter across jurisdictions, there are also differences in the types of abuse and neglect that must be reported. In some jurisdictions it is mandatory to report suspicions of each of the four classical types of abuse and neglect (ie, physical abuse, sexual abuse, emotional abuse and neglect). In other jurisdictions it is mandatory to report only some of the abuse types (eg, Victoria, Australian Capital Territory). Some jurisdictions also requires reports of exposure of children to domestic violence (eg, New South Wales, Tasmania).
8. It is important to note that in most jurisdictions, the legislation generally specifies that except for sexual abuse (where all suspicion must be reported), it is only cases of significant abuse and neglect that must be reported. Reflecting the original intention of the laws, the duty does not apply to any instance of "*abuse*" or "*neglect*" but only to cases that are of

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2 Same as above.

3 Same as above.

4 Same as above.

5 Same as above.

sufficient significant harm to the child's health or wellbeing to warrant intervention or service provision.<sup>6</sup>

#### *Protections given to reporters*

9. In all jurisdictions, the legislation protects the reporter's identity from disclosure. In addition, the legislation provides that as long as the report is made in good faith, the reporter cannot be liable in any civil, criminal or administrative proceeding. Any person making a voluntary (non-mandated) report is also protected with regard to confidentiality and immunity from legal liability.<sup>7</sup>

#### *About whom can notifications be made?*

10. Legislation in all jurisdictions requires mandatory reporting in relation to all young people up to the age of 18 years (whether they use the terms "children" or "children and young people").

#### *Developments in mandatory reporting legislation<sup>8</sup>*

11. In recent years, legislative amendments to reporting laws have occurred in many jurisdictions. It has been commented that nearly all of these amendments enlarged the reporting duties, but some confined them, most notably in New South Wales.<sup>9</sup> In 2018, the Crimes Act 1900 (NSW) was amended<sup>10</sup> to introduce new offences of concealing a child abuse offence<sup>11</sup> and failing to remove the risk that a worker will commit a child abuse offence.<sup>12</sup> Also, three jurisdictions enacted new methods of reporting less serious cases of child maltreatment and family support needs to differential response agencies in an attempt to create more efficient pathways to connect cases of family need directly to community

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6 Same as above. See also Table 2: Mandatory reporting requirements across Australia by state.

7 Same as above.

8 Much of the content of the section below is drawn from the following source: *Child Abuse and Neglect: A Socio-legal Study of Mandatory Reporting in Australia: Report for Australian Government Department of Social Services* (April 2015), available at: [https://www.dss.gov.au/sites/default/files/documents/03\\_2016/child-abuse-and-neglect-v1-aust-gov.pdf](https://www.dss.gov.au/sites/default/files/documents/03_2016/child-abuse-and-neglect-v1-aust-gov.pdf)

9 Same as above, at 5, 75 and 76. Four substantial amendments were introduced by the Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 (NSW), which affected the concept of harm, category of reportable harm, penalty provision and reporting mechanism.

10 The Crimes Act 1900 (NSW) was amended by the Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 (NSW) and the Community Protection Legislation Amendment Act 2018 (NSW), in response to the recommendations published by the Royal Commission into Institutional Responses to Child Sexual Abuse in its *Criminal Justice Report* (August 2017).

11 Section 316A (1) of Crimes Act 1990 (NSW). An adult who knows, believes or reasonably ought to know that a child abuse offence has been committed against another person and that he/she has information which might be of material assistance in securing the apprehension of the offender but fails to bring that information to the attention of a member of the NSW Police Force without reasonable excuse is guilty of an offence.

12 Section 43B (1) of Crimes Act 1990 (NSW). An adult (a position holder) who knows that another person, who is engaged in a child-related work, poses a serious risk of committing a child abuse offence and the position holder has the power or responsibility to reduce or remove the risk but negligently fails to do so is guilty of an offence.

service agencies.<sup>13</sup> In Queensland in 2014, the *Child Protection Reform Amendment Act 2014* was passed to make substantial changes to Queensland's mandatory reporting legislation. These changes will shift Queensland's position towards the current position in Victoria. The changes will broaden some mandatory reporting duties, but will narrow others. The changes will also introduce a more formal statutory footing for differential response pathways.<sup>14</sup>

### ***Mandatory reporting laws v differential response systems***<sup>15</sup>

12. While mandatory reporting laws focus on serious cases which are more likely to require child protection and services, differential response systems focus on less serious cases requiring services and assistance.

#### *Mandatory reporting laws*

13. Mandatory reporting laws are part of a system of responses to child protection and family welfare concerns. It has been observed<sup>16</sup> that the different components of this system are necessary, owing to the differences between types of maltreatment, and recognising that, within the spectrum of circumstances, different responses are appropriate. A case of severe battering of a six month-old infant, or of sexual abuse of a three year old, requires different responses than a case of mild neglect of a 14 year-old arising only from conditions of poverty in an otherwise healthy and well-functioning family. Different responses cater to the needs of children, families, communities, and child protection systems. The Australian Government considers that there is nothing to be gained from the inappropriate use of mandatory reporting laws for cases which are not their primary object; an analogy might be the inappropriate use of an ambulance to deal with a minor health complaint. It is important to avoid overburdening child protection systems wherever possible.<sup>17</sup>

#### *Differential response systems*

14. Some jurisdictions have formalised these different responses – commonly called 'differential response' – to a greater extent than others. The aim is not to apply mandatory reporting laws to any and all cases of 'abuse' and 'neglect', but to limit those laws to severe cases, and to enable referral to and deployment of supportive community agencies to situations of less severe problems. At one end of the differential response continuum, in cases of serious abuse and neglect statutory responses such as child protection orders can be made. At the other end of the continuum, ideally, are supports such as assistance with housing, finance,

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13 Same as above, at 5.

14 Same as above, at Important note.

15 Same as above, at Stage 1: Legal Analysis, para 1.3.

16 Same as above.

17 Same as above.

employment, substance abuse, alcohol dependency, mental health conditions, domestic violence respite care, and parenting skills. Cases of serious abuse and neglect may require a blend of both statutory intervention and support to the family.

### **Victoria**

15. Examples include Victoria's Child and Family Information, Referral and Support Teams (ChildFIRST) system, which enables individuals who have a significant concern about a child's wellbeing to refer their concern to ChildFIRST for help, rather than reporting to the department responsible for child protection. This provision complements the mandatory reporting provisions, where reports of specified cases of a child being 'in need of protection' must be made to the Secretary of the Department. Children and families who are referred to ChildFIRST are assessed and may be offered home-based family support or referred to other health and welfare services. ChildFIRST must forward reports to child protection services if the community-based child and family service considers that the situation may involve more significant harm or risk of harm; that is, that the child may be 'in need of protection' (Government of Victoria, 2006). Equally, reports made to child protective services may be redirected to ChildFIRST if deemed not to require a child protection response (Government of Victoria, 2006).

### **Tasmania**

16. The ChildFIRST model was adopted in Tasmania under the name 'Gateways'. Tasmania also amended its mandatory reporting laws to facilitate a preventative approach. Mandatory reporters could report their concerns about the care of a child to a 'Community-Based Intake Service', and this would fulfil their reporting duty (*Children, Young Persons and Their Families Act 1997*, Part 5B).

### **New South Wales**

17. In New South Wales, to renew an emphasis on limiting mandatory reporting to cases of significant harm, the *Keep Them Safe: Annual Report 2010-11* set out the new system requiring mandated reporters to report to the department only cases of suspected significant harm.
18. Section 27A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) then enabled mandated reporters to make reports to 'Child Wellbeing Units' which were established in the four major State government departmental groups (health, education, police, and family and community services).

19. These units provide support and advice to mandated reporters on whether a situation warrants a mandated report and on local services which might be of assistance (NSW Department of Premier and Cabinet, 2011). The units' focus is on ascertaining what the family needs to minimise or overcome their present situation and on facilitating the most appropriate assistance.

## NEW ZEALAND

### ***The current position on child abuse reporting in New Zealand***

#### *Overview*

20. In New Zealand, it is not mandatory to report child abuse.<sup>18</sup> Under section 15 of *Children's and Young People's Well-being Act 1989*<sup>19</sup> any person can report suspected child abuse at any time if they believe that a child or young person has been, or is likely to be:
- harmed (whether physically, emotionally, or sexually)
  - ill-treated
  - abused
  - neglected, or
  - deprived.
21. Child abuse can be reported to the police or to a social worker from the Ministry for Vulnerable Children. Section 16 provides statutory protection for health care providers who suspect child abuse and/or neglect to report.<sup>20</sup> Under section 17, where any social worker or the police receives a report, that social worker or police shall investigate into the matters contained in the report and consult with a care and protection resource panel in relation to the investigation.

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18 New Zealand Ministry of Health: Family violence questions and answers: <https://www.health.govt.nz/our-work/preventative-health-wellness/family-violence/family-violence-questions-and-answers>

19 *Children's and Young People's Well-being Act 1989*, Reporting (section 15):  
"Any person who believes that any child or young person has been, or is likely to be, harmed (whether physically, emotionally or sexually) ill-treated, abused, neglected, or deprived may report the matter to [a Social Worker] or a member of the Police."

20 *Children's and Young People's Well-being Act 1989*, Protection when disclosing (section 16):  
"No civil, criminal, or disciplinary proceedings shall lie against any person in respect of the disclosure or supply, or the manner of the disclosure or supply, by that person pursuant to section 15 of information concerning a child or young person (whether or not that information also concerns any other person), unless the information was disclosed or supplied in bad faith."

22. [See also Chapter 5 of this consultation Paper] Under the *Crimes Act 1961*, sections 150A, 152, 195, 195A, anyone who is over 18 and who is aware of child abuse occurring in a household in which they live, or are a member of, must take reasonable steps to protect that child from death, serious harm or sexual assault. Practically, this means they must report child abuse that is serious. The law also applies to staff members of hospitals, institutions or residences where a child is living. Further, guardians have a duty to protect children in their care from injury. The maximum penalty for not taking reasonable steps to protect a child from death, serious harm or sexual assault is 10 years' imprisonment. People are not legally required to report less serious suspected child abuse. A person who reports abuse is protected from civil, criminal or disciplinary proceedings, unless they knew that the information they gave was not true.<sup>21</sup>
23. For healthcare providers, best practice recommends staff who identify or suspect child abuse report their concerns to a statutory agency, the police or Oranga Tamariki – Ministry for Children. In some district health boards this is mandatory. Whilst the legislation does not require mandatory reporting of child protection, district health boards, have within their child protection policies the requirement to report child protection concerns to Police and/or Child Youth and Family (now Oranga Tamariki). In addition, all district health boards have signed a Memorandum of Understanding (MOU) with Child, Youth and Family and the New Zealand Police that requires that the parties to the MOU practice in accordance with their organisations policies/procedures.<sup>22</sup> The Ministry of Health has also published a Family Violence Assessment and Intervention Guideline to help health providers make safe and effective interventions to assist victims of interpersonal violence and abuse.<sup>23</sup>

#### *White Paper on Vulnerable Children*

24. In October 2012, the New Zealand Ministry of Social Development issued the *White Paper on Vulnerable Children*.<sup>24</sup> The White Paper included legislation changes and a range of solutions aimed to better identify, support and protect vulnerable children.

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21 See Community Law:  
<http://communitylaw.org.nz/community-law-manual/chapter-27-dealing-with-the-ministry-for-vulnerable-children-oranga-tamariki/reporting-child-abuse-chapter-27/>

22 New Zealand Ministry of Health: Family violence questions and answers:  
<https://www.health.govt.nz/our-work/preventative-health-wellness/family-violence/family-violence-questions-and-answers>

23 Family Violence Assessment and Intervention Guideline: Child abuse and intimate partner violence (Jun 2016), available at:  
<https://www.health.govt.nz/publication/family-violence-assessment-and-intervention-guideline-child-abuse-and-intimate-partner-violence>

24 New Zealand Ministry of Social Development: The White Paper for Vulnerable Children (at 7 to 8, Volume I), available at:  
<https://www.orangatamariki.govt.nz/assets/Uploads/white-paper-for-vulnerable-children-volume-1.pdf>

25. The White Paper did not recommend that the Government should legislate for mandatory reporting of child abuse for the following reasons:

*“The issue of mandatory reporting of child abuse has been debated for many years. There are pros and cons. In some places where it has been introduced there has been an increase in the number of children who slip through the cracks because child protection agencies are so swamped with notifications that they can’t cope. There are also concerns about child protection getting needlessly involved in the lives of everyday families.*

*New Zealand already has high levels of notification – the same or higher than some Australian states which have mandatory reporting. In fact, the vast majority of New Zealand children who are seriously abused are already known to government agencies.*

*Because of this the Government will not be legislating for mandatory reporting.*

*What we will do is introduce a range of initiatives that will raise expectations on agencies and make it easier for frontline staff and the public to identify vulnerable children and report concerns.”*

#### *Children’s Action Plan*

26. Following the release of the White Paper noted above, a *Children’s Action Plan* was introduced to provide the set of actions and initiatives to respond to the issues affecting vulnerable children and to achieve the changes documented in the White Paper.

## **UNITED KINGDOM**

### ***The current position on child abuse reporting in UK***

27. In the UK, practitioners and agencies work within a legislative and structural framework summarised in the *Working Together to Safeguard Children* <sup>25</sup> (“*Working Together*”) statutory guidance. Under this, practitioners should make an immediate referral to local authority children’s social care if they believe that a child has suffered harm or is likely to do so. This is set out in the cross-sector *Working Together* statutory guidance which is supplemented by *What to do if you’re worried a child is being abused* guidance,<sup>26</sup> which aims to help practitioners identify when abuse or neglect might be occurring and provide advice on what to do next.

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25 Statutory Guidance: Working Together to Safeguard Children, available at: <https://www.gov.uk/government/publications/working-together-to-safeguard-children--2>

26 Child abuse concerns: guide for practitioners, available at: <https://www.gov.uk/government/publications/what-to-do-if-youre-worried-a-child-is-being-abused--2>

28. There is currently no general legal requirement on those working with children to report either known or suspected child abuse or neglect. Statutory guidance, however, is very clear that those who work with children and families should report to the local authority children's social care immediately if they think a child may have been or is likely to be abused or neglected. While statutory guidance does not impose an absolute legal requirement to comply, it does require practitioners and organisations to take it into account and, if they depart from it, to have clear reasons for doing so.
29. In 2015, the UK Government introduced a specific requirement on teachers, health professionals and social workers to report known cases of female genital mutilation ("FGM") on girls under 18 to the police. This was in order to address the particular issue of a lack of successful prosecutions. The requirement is intended to ensure that girls subject to this horrific practice get the help and support they need and help to eradicate this crime in England and Wales. As with any other suspected forms of child abuse, suspected cases of FGM should be referred to local authority children's social care, in line with the cross-sector Working Together statutory guidance.<sup>27</sup>

#### *Government consultation*

30. In July 2016, the UK Government launched a consultation<sup>28</sup> which set out the Government's wide-ranging programme of reform to provide better outcomes for vulnerable children. The consultation also sought views on the possible introduction of mandatory reporting of child abuse and neglect or a duty to act in relation to child abuse or neglect. It sought views on the possible introduction of one of two additional statutory measures:
- a mandatory reporting duty, which would require certain practitioners or organisations to report child abuse or neglect if they knew or had reasonable cause to suspect it was taking place; or
  - a duty to act, which would require certain practitioners or organisations to take appropriate action in relation to child abuse or neglect if they knew or had reasonable cause to suspect it was taking place
31. The consultation also sought views on whether the scope of these possible changes should extend to vulnerable adults.

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27 HM Government: Reporting and acting on child abuse and neglect: Government Consultation (21 July 2016), see Part A, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539642/Reporting\\_and\\_acting\\_on\\_child\\_abuse\\_and\\_neglect\\_-\\_consultation\\_document\\_web\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539642/Reporting_and_acting_on_child_abuse_and_neglect_-_consultation_document_web_.pdf)

28 Same as above, see Part C.

### *Consultation responses and Government action*

32. In March 2018, the UK Government published the *Reporting and acting on child abuse and neglect: Summary of consultation responses and Government action*.<sup>29</sup>
33. The majority of respondents to the consultation (63%) were in favour of allowing the Government's existing programme of reforms time to be fully embedded. Only a quarter of respondents (25%) favoured introducing a duty to act, with less than half of that number (12%) favouring the introduction of mandatory reporting.<sup>30</sup>
34. Having considered all of the evidence and the views raised by the consultation, the UK Government believes that the case for a mandatory reporting duty or duty to act has not currently been made. Therefore, it does not intend to introduce a mandatory reporting duty or duty to act at this time.<sup>31</sup>
35. Respondents were more concerned about the potential negative impact of introducing a mandatory reporting regime. Over two-thirds of respondents (68%) agreed that such a duty would have an adverse impact on the child protection system. Eighty-five percent (85%) of respondents agreed that mandatory reporting would not ensure that appropriate action would be taken to protect children. Just over two-thirds of respondents (70%) agreed that a statutory mandatory reporting duty would generate more child abuse and neglect reports, but a similar proportion of respondents (66%) agreed that it could divert attention from the most serious child abuse and neglect cases.<sup>32</sup>
36. The consultation asked for feedback on the key issues within the current child protection system. The areas where respondents thought that improvement was most needed was in better joint working between different local agencies (93%), further work to encourage new and innovative practice (85%) and better training for practitioners (81%).<sup>33</sup>
37. The majority of respondents (51%) agreed that a duty to act would have an adverse impact on the child protection system (such as impacting recruitment and retention of staff, and negatively impacting the serious case review process). A quarter of respondents (25%) were attracted to the idea of the duty to act. Two-thirds of respondents (67%) agreed that a duty to act would strengthen accountability in the system. Over half of

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29 Reporting and acting on child abuse and neglect: Summary of consultation responses and Government action. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/685465/Reporting\\_and\\_acting\\_on\\_child\\_abuse\\_and\\_neglect\\_-\\_response\\_to\\_consultati...pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685465/Reporting_and_acting_on_child_abuse_and_neglect_-_response_to_consultati...pdf)

30 Same as above, at para 9.

31 Same as above, at para 17.

32 Same as above, at para 12.

33 Same as above, at para 10.

respondents (57%) agreed that it would be more likely to improve outcomes for children than a duty focused solely on reporting. A number of respondents suggested that further consultation would be required should such a duty be developed in future.<sup>34</sup>

38. One argument made in individual responses to the consultation was for different forms of mandatory reporting based on reporting within ‘closed institutions’ or ‘regulated activities’.<sup>35</sup> A small number of individual respondents (including the Office of the Children’s Commissioner and the NSPCC<sup>36</sup>) raised the idea of a concealment offence in relation to child abuse and neglect. It was felt this might address scenarios where there is a conflict between reporting and the potential reputational damage to an institution.<sup>37</sup>

#### *Argument for mandatory reporting*<sup>38</sup>

39. The key premise behind a mandatory reporting duty is the threat of sanctions that would then be imposed on those who choose not, or otherwise fail to report concerns about child abuse and neglect. This in turn would lower the threshold for practitioners choosing to report a concern, with a lower likelihood of being dissuaded from doing so – including in cases where, for example, they are unsure what they have seen, they are influenced by professional cautiousness, or they are fearful of the reputational damage that making a report may cause. Supporters of mandatory reporting argue that this reduces the risk that serious cases will pass unnoticed and therefore results in better protection for children.

#### *Argument against mandatory reporting*<sup>39</sup>

40. The UK Government recognises the importance of these points – and the effect following the introduction of mandatory reporting in other countries such as Australia, suggests that referrals do indeed increase where mandatory reporting is in place. However, even compared to countries which have mandatory reporting systems, the rate of referrals is comparable or already higher in England: 54.8 per 1,000 children in England (2016/17), compared to 53.2 per 1,000 children in the USA (2015), and 42.0 per 1,000 children in Australia (2015/16).
41. The UK Government considers that this would not necessarily lead to an increase in subsequent engagement with children brought into the child protection system, and notes that the increasing number of referrals rather risks creating a ‘needle in a haystack’ effect in which it is less likely, rather than more likely, that the social care system will identify key cases.

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34 Same as above, at para 11.

35 Same as above, at para 13.

36 National Society for the Prevention of Cruelty to Children.

37 Same as above, at para 14.

38 Same as above, at para 18.

39 Same as above, at paras 19 to 26.

Implementation of a mandatory reporting duty may also result in less consideration of the most appropriate stage for referrals, leading to a ‘tick box’ procedural approach – not only by social workers, but also those practitioners referring cases including in health, education and the police. Again, this would not help children’s social care workers to identify key cases.

42. If a mandatory reporting duty or duty to act were introduced, it is expected that alongside the increase in referrals, there would be an increase in the intervention in the lives of children and families. This may undermine confidentiality for those contemplating disclosure of abuse with victims more reluctant to make disclosures if they know that it will result in a record of their contact being made. The prospect of such contact may cause families to disengage with services.
43. The UK Government considers that most fundamentally, the evidence and submissions received through the consultation has not demonstrated conclusively that the introduction of a mandatory reporting duty or a duty to act improves outcomes for children. Professional experience and other evidence generally does not find reporting to be a key issue in cases where a child is failed.

*“Whether a child is already known to social care workers or not, translating practitioners’ knowledge of a child’s ongoing needs into appropriate support can be the difference between life and death. Such evidence suggested that issues around information sharing, professional practice and decision making are more likely to be at the crux of incidents where children do not receive the protection they need. What would ultimately be most effective is improved information sharing, supported by better multi-agency working, better assessments, better decision making and better working with children at all stages of their engagement with the safeguarding system.”<sup>40</sup>*

#### *Government action*

44. In response to issues raised by the consultation, the UK Government plans to take out the following targeted action. In particular, it will address four key issues around reporting and acting on child abuse. These include the importance of understanding and reporting abuse, information sharing between agencies that work with children, best practice and professional training, and continuing to assess the legal framework and evidence to ensure the approach that the Government is taking is effective and adequate.<sup>41</sup>

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40 Same as above.

41 Same as above, at 7. See para 27-50.

## UNITED STATES

45. Commenting on the position on reporting requirements in the US, Mathews and Bross observe<sup>42</sup> that the scope of states' initial legislation was restricted to requiring medical practitioners to report serious intentional physical injury. Only a few states included a requirement to report serious injury caused by neglect. The general ambit of these laws soon expanded in three ways.
46. First, state laws were gradually amended to require members of additional professional groups beyond medical practitioners to report suspected cases of abuse (such as teachers, nurses, social workers and mental health professionals); and some states would require all citizens to make reports. Second, the types of reportable abuse were expanded to include not only physical abuse but sexual abuse, emotional or psychological abuse, and neglect. Third, in order to activate the reporting duty, the extent of harm caused or suspected was required to be unqualified by expressions such as "serious" or "significant" harm. A qualification of "serious harm" was inserted later, thus effectively contracting the required scope of state legislation. However, state legislatures may still choose to adopt a broader definition.<sup>43</sup>

### ***The current position on child abuse reporting in the US***

47. All States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the US Virgin Islands have statutes identifying persons who are required to report suspected child maltreatment to an appropriate agency, such as child protective services, a law enforcement agency, or a State's toll-free child abuse reporting hotline.<sup>44</sup>

#### *Professionals Required to Report*

48. Approximately 48 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands designate professions whose members are mandated by law to report child maltreatment. Individuals designated as mandatory reporters typically have frequent contact with children. Such individuals may include:
- Social workers
  - Teachers, principals, and other school personnel

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42 Mathews & Bross (2015), above, at Chapter 1, at 9 to 11.

43 Mathews & Bross (2015), above, at Chapter 1, at 9 to 11.

44 Child Welfare Information Gateway, (2016): Mandatory reporters of child abuse and neglect. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau. Available at: <https://www.childwelfare.gov/pubPDFs/manda.pdf>

- Physicians, nurses, and other health-care workers
- Counselors, therapists, and other mental health professionals
- Child care providers
- Medical examiners or coroners
- Law enforcement officers.

### *Reporting by Other Persons*

49. In approximately 18 States and Puerto Rico, any person who suspects child abuse or neglect is required to report. Of these 18 States, 16 States and Puerto Rico specify certain professionals who must report, but also require all persons to report suspected abuse or neglect, regardless of profession<sup>45</sup>. New Jersey and Wyoming require all persons to report without specifying any professions. In all other States, territories, and the District of Columbia, any person is permitted to report. These voluntary reporters of abuse are often referred to as “*permissive reporters*.”

### *Institutional reporting*

50. The term “*institutional reporting*” refers to those situations in which the mandated reporter is working (or volunteering) as a staff member of an institution, such as a school or hospital, at the time he or she gains the knowledge that leads him or her to suspect that abuse or neglect has occurred. Many institutions have internal policies and procedures for handling reports of abuse, and these usually require the person who suspects abuse to notify the head of the institution that abuse has been discovered or is suspected and needs to be reported to child protective services or other appropriate authorities.

### *Circumstances under which a mandatory reporter must make a report*

51. The circumstances under which a mandatory reporter must make a report vary from State to State. Typically, a report must be made when the reporter, in his or her official capacity, suspects or has reason to believe that a child has been abused or neglected. Another standard frequently used is in situations in which the reporter has knowledge of, or observes a child being subjected to, conditions that would reasonably result in harm to the child. In Maine, a mandatory reporter must report when he or she has reasonable cause to suspect that a child is not living with the child’s family. Permissive reporters follow the same standards when electing to make a report.

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45 Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, and Utah.

### *Privileged communications*

52. Mandatory reporting statutes also may specify when a communication is privileged. “*Privileged communications*” is the statutory recognition of the right to maintain confidential communications between professionals and their clients, patients, or congregants. To enable States to provide protection to maltreated children, the reporting laws in most States and territories restrict this privilege for mandated reporters. For instance, the physician-patient and husband-wife privileges are the most common to be denied by States. The attorney-client privilege is most commonly affirmed.

### *Inclusion of the Reporter’s Name in the Report*

53. Most States maintain toll-free telephone numbers for receiving reports of abuse or neglect. Reports may be made anonymously to most of these reporting numbers, but States find it helpful to their investigations to know the identity of reporters.

### *Disclosure of the Reporter’s Identity*

54. All jurisdictions have provisions in statute to maintain the confidentiality of abuse and neglect records. The identity of the reporter is specifically protected from disclosure to the alleged perpetrator in 41 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, and Puerto Rico.
55. Release of the reporter’s identity is allowed in some jurisdictions under specific circumstances or to specific departments or officials, for example, when information is needed for conducting an investigation or family assessment or upon a finding that the reporter knowingly made a false report. In some jurisdictions (California, Florida, Minnesota, Tennessee, Texas, Vermont, the District of Columbia, and Guam), the reporter can waive confidentiality and give consent to the release of his or her name.

### *Elder abuse*

56. Nearly all states have mandatory reporting laws with respect to elder abuse, but each varies on who is required to report.<sup>46</sup> Most mandatory reporting laws include healthcare professionals, nursing home and care facility employees, and law enforcement officers, whereas some controversy exists over whether certain other professions, such as members of the clergy and attorneys, should be required by law to report known or suspected elder abuse or neglect.<sup>47</sup>

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46 See, for example, Kentucky Revised Statutes, §209.030; Florida Statutes, §415.1034; and Maryland Code, Family Law §14-302.

47 Lara Queen Plaisance, ‘Will You Still...When I’m Sixty Four: Adult Children’s Legal Obligations to Aging Parents’ (2008) 21(1) *Journal of the American Academy of Matrimonial Lawyers* 245, at 255 to 256.