THE LAW REFORM COMMISSION OF HONG KONG

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

CONSULTATION PAPER

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

EXECUTIVE SUMMARY

(This executive summary is an outline of the consultation paper issued to elicit public response and comment on the Sub-committee's provisional recommendations. Those wishing to comment should refer to the full text of the consultation paper which can be obtained from the Secretary, Law Reform Commission, 4th Floor, East Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong, or downloaded from the Commission's website at: <http://www.hkreform.gov.hk>.

Comments should be submitted to the Secretary of the Sub-committee on Causing or Allowing the Death of a Child or Vulnerable Adult by 16 August 2019.)

Introduction

Terms of reference

1. The terms of reference of the Law Reform Commission's Sub-committee on Causing or Allowing the Death of a Child or Vulnerable Adult are:

> *"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."*

2. 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.

Format of the Consultation Paper

3. 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.

4. 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 relevant 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.

5. 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.

6. 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.

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

The Sub-committee's recommendations

A new offence of "failure to protect"

8. The Sub-committee recommends in Chapter 7 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"*. This offence would impose criminal liability on those who fail to take steps to protect a child (under 16 years of age) or a vulnerable person (over 16 years of age) from death or serious harm in circumstances where:

- the defendant owed a duty of care to the victim, or was a member of the victim's household and had frequent contact with the victim;

- the defendant was, or ought to have been, aware of the risk of serious harm to the victim;

- the defendant's failure to take steps to protect the victim from harm was, in the circumstances, so serious that a criminal penalty is warranted.

9. In addition to applying in both fatal and non-fatal cases, and to both child and vulnerable adult victims, the Sub-committee intends that the scope of the offence would be wide enough to apply in both domestic and institutional care situations.

10. The proposed offence carries high maximum penalties:

- 20 years' imprisonment in cases where the victim dies; and

- 15 years' imprisonment where the victim suffers serious harm. (The high maximum here is to cover cases where, even though the victim has survived, the harm they have suffered is so serious that, for example, they have been left in a permanent vegetative state.)

11. These high maximum penalties would be available for the court to impose whether the defendant was a culpable 'bystander' or may have actually inflicted the harm on the victim.

12. As liability for the offence is based on the defendant's failure to take steps to protect the victim, it would not be necessary for the prosecution to prove whether the defendant was a culpable bystander or the perpetrator of the harm. Nonetheless, the list of elements which must be proven before the offence applies in a particular case still presents a high evidential threshold for the prosecution to achieve.

Recommending the review (upwards) of the maximum penalty for Hong Kong's existing child ill-treatment and neglect offence

13. The Sub-committee also recommends (in Recommendation 3) that the Government should undertake a review of the current maximum penalty applicable under section 27 of the Offences against the Person Ordinance (Cap 212) (OAPO) (ie, 10 years' imprisonment on conviction on indictment) with a view to increasing it as appropriate.

Background to the Sub-committee's proposals

Overview of the problem

Victims without a voice: the problem of "which of you did it?"

14. In family violence and other cases where the victims are children or vulnerable adults, a particular evidential problem can arise for the prosecution in trying to prove beyond reasonable doubt which of the victim's carers or members of the victim's household committed 'the unlawful act' which caused the victim's death (ie, the immediate cause of death) or serious harm. 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 attitude of the courts in such circumstances has traditionally been clear. In order to avoid the possibility of a miscarriage of justice, all accused parties should be acquitted of murder or manslaughter where the victim dies if it cannot be proven beyond reasonable doubt which one of them was responsible, even though it is very likely one or the other must have committed the criminal act, but there was no evidence of which one.

Point of view of the prosecution

15. 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, for example, ill-treating or neglecting a child under section 27 of the OAPO in the case of a child victim.

Point of view of the defence

16. 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 the 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.

Developments in other jurisdictions

17. In 2004, 2005 and 2011, the United Kingdom, South Australia and New Zealand, respectively, each introduced a new offence to deal with this type of situation. While each offence was different, the underlying principle was to charge the suspects with a very serious offence, carrying a severe penalty, whether they had *caused* the harm to the victim or had stood by and *allowed* the harm to happen without taking steps to prevent it. A key feature of this new type of offence is that the *prosecution does not need to prove* which role a particular suspect has played in the harm inflicted on the

victim (ie, whether as the perpetrator of the harm or a bystander) for the suspect to be liable under the offence.

The United Kingdom offence model

18. 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 non-accidental deaths of children.

19. 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. (These developments in the United Kingdom are discussed in detail in Chapter 3 of the Consultation Paper.)

The South Australian offence model

20. An offence entitled *"criminal neglect,"* with somewhat similar (though broader) scope and effect to the English reform, was introduced in South Australia in 2005, although it underwent significant amendment in 2018 due to problems of enforcement with the original offence. (These developments in South Australia are discussed in detail in Chapter 4 of the Consultation Paper.)

The New Zealand offence model

21. 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. This was part of a more complex model of inter-related provisions which also expressly covered institutional care situations. (These developments in New Zealand are discussed in detail in Chapter 5 of the Consultation Paper.)

The Sub-committee's approach

22. In determining the content of the reforms recommended in our Consultation Paper, 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 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 (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. 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.

The current law and procedure in Hong Kong

Introduction

23. 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.

24. 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, the relevant statute law, common law and rules of criminal evidence and procedure are closely examined in Chapter 2.

The substantive offences

25. 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 OAPO, exposing child whereby life is endangered under section 26 of OAPO and infanticide under section 47C of 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.)

26. 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. These include various wounding and assault offences. Relevant offences under other Ordinances, depending on the circumstances, may include various sexual offences under the Crimes Ordinance (Cap 200).

27. 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. However, it has been observed 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. Furthermore, 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.

28. 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. 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.

Relevant rules of evidence and procedure

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

29. As apparent from the various cases described in Chapter 2, 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. These evidential and procedural rules are inter-related and concern the accused's right to silence and his privilege against self-incrimination.

30. 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). 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.

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

31. 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.

32. In the case where a child or vulnerable adult dies as a result of abuse, 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, the actual cause of death, possible accidental cause of death, whether there was more than one injury, which injury caused death, the intent indicated and possible unfairness of a resulting conviction.

33. Where the child or vulnerable adult is physically abused but survives, there are additional issues which may arise in non-fatal abuse cases where a victim may be called to give evidence: where multi-disciplinary teams are involved, problems in interviewing the victim, the age of the victim, corroboration of the victim’s testimony and where there is video recorded evidence for vulnerable witnesses.

34. Issues which may arise in relation to children and mentally impaired victims giving evidence in these cases include the following.

- 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.

- 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.

- Young children (victims or witnesses)/mentally impaired victims have difficulty in remembering exactly what happened or in what sequence after a few months have elapsed.

- Children/mentally impaired victims can feel intimidated by the entire court experience.

The need for reform in Hong Kong

35. As the Consultation Paper's 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.

36. 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 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, in all probability, must have been aware that serious harm was being inflicted on a victim by another) is limited and difficult to prove.

37. Although the maximum sentence for contravention of section 27 of the OAPO was increased from two to ten years' imprisonment in 1995, this reform appears to have been insufficient for the courts to deal with severest cases of child abuse where the victim is fatally injured. Further change to the law may therefore be necessary.

The Sub-committee's concluding remarks

38. 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. We trust that the offence we propose achieves that balance by targeting the wrongdoers 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*

committed the offence [that killed the victim], that both are therefore guilty of it."[1]

39. The offence recommended in the Consultation 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.

40. Those caring for children or vulnerable persons should be held responsible for harm suffered by them if they knew or should have known the victim was suffering abuse and could have taken steps to prevent it (for example, by removing the victim or reporting the abuse to the authorities). 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.

41. 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.

42. The full text of Chapter 7 of the Consultation Paper and a draft Bill incorporating the Sub-committee's proposed offence ("Annex A") is attached to this Executive Summary.

1 See CMV Clarkson and Sally Cunningham (ed), *Criminal Liability for Non-Aggressive Death* (2008, Ashgate), at 138.

Chapter 7

Our proposed reform model for Hong Kong

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,[1] South Australia[2] and New Zealand,[3] 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

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[4] (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.[5] 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[6]), 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.

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).[7]

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"*[8] 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,[9] 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[10]).

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

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,[11] 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)[12] 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.[13] 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).[14] 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,[15]

14 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).

15 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.[16]

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.[17] In contrast, the New Zealand Law Commission proposed raising the age of *"child"* in its proposed package of reforms to *"under 18 years"*[18] and this approach was adopted in the enacted New Zealand offence model.[19] 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"*.[20] 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"*.

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,*[21] *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."*[22] The same definition has been adopted in the New Zealand enacted model.[23]

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)[24]).

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"*;[25]

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"*****;**[26] **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".***[27]

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.[28] As we saw earlier in this paper, a similar approach was advocated under the English Law Commission's recommended offence model,[29] 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."*[30] 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.[31] 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),[32] *"serious harm"* is defined as:

> *"(a) harm that endangers, or is likely to endanger, a person's life; or*

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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 DVCV 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.[33])

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.[34] 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."*[35] It therefore includes *"murder and the wide range of offences against the person (grievous bodily harm, assault, sexual offences)."*[36] (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."*[37] 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."*[38] 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.[39] 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), DVCV 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[40] (though not psychological injury[41]) 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."*[42])

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."*[43] 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."*[44] 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 … ."*[45]

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.[46]

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.[47] We saw that a duty of care is imputed under this legislation where the defendant is a parent[48] or guardian of the victim, or where the defendant *"has assumed responsibility for the victim's care"*,[49] 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.[50] 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*

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.[51] (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"*,[52] 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.[53]

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.[54]

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.[55]

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.[56]

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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 Ie, 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.[57])

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"*.[58] 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.[59] 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"*.[60]

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).[61] 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."*[62] [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."* [63]

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.[64])

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).[65]

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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"*.[66] 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"*.[67]

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"*[68] 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.[69] 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.[70]

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"*.[71] 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."*[72]

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 orce 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)[73] 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;[74]

(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*"*.[75]

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."*[76]

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.[77] 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."*[78]

7.43 As noted earlier, the relevant wording of the New Zealand enacted offence (based on the New Zealand Law Commission's proposed model[79]) 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.[80] 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[81]).

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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.[82] 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.[83]

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.[84]

Recommendation 9

We recommend:

(a) that section 14(1)(c) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005)[85] 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.[86]

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."* [87]

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."*[88] 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.[89]

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]".* [90] 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"*.[91] 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]"*.[92]

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."*[93] (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

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.[94]) 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.[95]

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)[96] should be adopted in the Hong Kong offence; and

(b) the word *"such"* should be added before *"harm"* in the new provision.[97]

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"*.[98]

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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."*[99] 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."[100] 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."*[101]

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)."*

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[102] 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):[103] *"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."*[104] 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."*[105]

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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."*[106] 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.[107])

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".*[108] 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."*[109] 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."*[110]

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.[111] 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.[112]

> *"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."*[113]

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."*[114] 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.[115] 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."*[116] 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.[117]

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*

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."[118]

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[119] and for manslaughter, a maximum penalty of life imprisonment.[120] Similar maximum penalties for these offences apply in the United Kingdom, South Australia and New Zealand.[121]

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[122] 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.[123] 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.[124] 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. [125] 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.[126] These penalties in South Australia have been increased to life imprisonment and 15 years' imprisonment, respectively, from 6 September 2018.[127]

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.**[128]

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 Ie, comprised in, 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.[129]

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.[130] 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.[131]

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;

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.[132]

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.[133] 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.[134]

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.[135] 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."[136]

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).[137]

> *"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]."*[138]

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.[139]

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.

Annex A

(Proposed new offence for Hong Kong)[1]

Offences against the Person (Amendment) Bill

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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1 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.".