

Causing or allowing
the death or serious harm of
a child or vulnerable adult

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

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

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September 2021

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DEDICATION

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

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Preface

1. This report (“Report”) discusses the responses received to the consultation paper issued by the Law Reform Commission’s Causing or Allowing the Death of a Child or Vulnerable Adult Sub-committee (“Sub-committee”) in May 2019. It sets out our analysis and final recommendations on this topic, including a draft provision of a new offence of *“failure to protect”* (“the proposed offence”) to be added to the Offences against the Person Ordinance (Cap.212) (“OAPO”) attached at Annex 1 to the Report (the “draft Bill”).

Background

Speaking up for victims without a voice: bystander’s liability in “which of you did it?” cases

2. In family violence and other cases where the victims are children or vulnerable persons¹ who cannot speak up for themselves, a particular evidential problem can arise for the prosecution in trying to prove beyond reasonable doubt which of the victims’ carers or members of the victims’ household committed *“the unlawful act”* which caused the victims’ death or serious harm. The situation is often further complicated by the silence of the suspects, or by their mutual accusations, and by the silence of other family members in their attempts to protect the suspects. In the absence of testimony from the victim, it may be impossible to establish who committed the unlawful act.

3. 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.

4. 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 (for example, charging ill-treatment or neglect of a child under section 27 of the OAPO in the case of a child victim). In addition, 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

¹ “Vulnerable person” in the proposed offence refers to a vulnerable person aged 16 years or above. For further discussion see Chapter 4 (Final Recommendation 4).

has been inflicted on a victim by another) is limited and difficult to prove. This Report is addressing bystander's liability in this sort of situation.

Terms of reference

5. In September 2006, the Secretary for Justice and the Chief Justice directed the Law Reform Commission ("LRC"):

"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."

Membership of the Sub-committee

6. The current Chairman of the Sub-committee is Ms Amanda Whitfort, who succeeded Mr Alexander King SC.² The current members of the Sub-committee are:

Ms Amanda Whitfort (Chairman) ³	Associate Professor Faculty of Law University of Hong Kong
Dr Philip S L Beh	Associate Professor Department of Pathology University of Hong Kong
Mr Chan Tat Ming, Neil (From April 2020)	Senior Superintendent of Police (Crime Support)(Crime Wing) Hong Kong Police Force
Ms Diane Crebbin	Barrister (formerly Senior Government Counsel Prosecutions Division Department of Justice)

² Mr King chaired the Sub-committee from December 2006 until his tragic death in February 2015, following an illness.

³ Ms Whitfort has been the Chairman since April 2015, and has been a member of the Sub-committee since its establishment.

Mr Stephen Hung	Solicitor
Ms Lee Kam-yung, Dora (<i>From November 2018</i>)	Chief Social Work Officer (Domestic Violence) Social Welfare Department
Ms Jacqueline Leong, SC	Barrister
Ms Lisa Remedios	Barrister
Mr John Saunders, SBS	former Judge of the Court of First Instance of the High Court

7. Previous Sub-committee members from the Police Force (“Police”) were Mr Ma Siu-yip,⁴ Mr Stephen Lee,⁵ Mr Alan Man Chi-hung,⁶ Ms Pang Mo-yin,⁷ Mr Lee Wai-man⁸ and Mr Ho Chun-tung,⁹ and those from the Social Welfare Department (“SWD”) were Ms Pang Kit-ling,¹⁰ Mrs Wong Ho Fung-see,¹¹ Mr Yam Mun-ho,¹² Mr Lam Bing-chun,¹³ Ms Annisa Ma Sau-ching¹⁴ and Mrs Chang Lam Sook-ye.¹⁵

8. Ms Louisa Ng in the LRC Secretariat is the Secretary to the Sub-committee.¹⁶

⁴ Until February 2008.

⁵ From February 2008 until September 2010.

⁶ From September 2010 until May 2012.

⁷ From June 2012 until July 2014.

⁸ From July 2014 until August 2017.

⁹ From August 2017 until April 2020.

¹⁰ Until June 2009.

¹¹ From June 2009 until November 2010.

¹² From November 2010 until December 2012.

¹³ From January 2013 until May 2013.

¹⁴ From August 2013 until February 2018.

¹⁵ From May to June 2013 and March to October 2018.

¹⁶ Ms Michelle Ainsworth, formerly Secretary of the LRC, was the Secretary to the Sub-committee from December 2006 until March 2018.

Chapter 1

Introduction

Consultation exercise

1.1 In May 2019, the Sub-committee published the consultation paper on Causing or Allowing the Death or Serious Harm of a Child or Vulnerable Adult (“Consultation Paper”). After carefully considering the law and practice in many other common law jurisdictions, in particular significant legislative and judicial developments that have taken place in three jurisdictions: England,¹ South Australia² and New Zealand,³ the Sub-committee recommended 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”*. The Sub-committee put forward 14 recommendations (referred to in this Report as “Recommendations”) and with the assistance of the Law Draftsman, set out the suggested text of the proposed offence at Annex A in the Consultation Paper, as a new section 25A in the OAPO.

1.2 Following the LRC’s usual practice, the consultation period lasted for three months until August 2019. Since we received various individual requests for time extension, the period was extended to mid-October 2019 in some cases. A press conference was held whereby the recommendations in the Consultation Paper were explained to the media and the public. Members of the Sub-committee attended the meeting of the Panel on Administration of Justice and Legal Services of the Legislative Council in May 2019, gave various interviews to media and spoke at various seminars.⁴

The proposed offence

1.3 As recommended in the Consultation Paper, the proposed offence would impose criminal liability on those who fail to take steps to protect a child

¹ Section 5 of *Domestic Violence, Crime and Victims Act 2004* (“corresponding English offence”).

² Section 14 of *Criminal Law Consolidation Act 1935* (“corresponding South Australian offence”).

³ Section 195A of *Crimes Act 1961* (“corresponding New Zealand offence”).

⁴ Members of the Sub-committee attended the seminars held by the following organisations: Commission on Children, Elderly Commission, The Elderly Services Association of Hong Kong, Haven of Hope Christian Service, Heep Hong Society, Hong Chi Association, The Hong Kong Council of Social Service, The Hong Kong Joint Council of Parents of the Mentally Handicapped, Hong Kong Society for the Protection of Children, Neighbourhood Advice – Action Council, Rehabilitation Advisory Committee and Women’s Commission.

(under 16 years of age) or a vulnerable person (over 16 years of age) from death or serious harm caused by an unlawful act or neglect in circumstances where:

- (a) 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;
- (b) the defendant was, or ought to have been, aware of the risk of serious harm to the victim; and
- (c) 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.

1.4 In addition to applying in both fatal and non-fatal cases, and to both children and vulnerable persons victims, the Sub-committee intends that the scope of the offence would be wide enough to apply in both domestic and institutional care situations.⁵

1.5 As liability for the proposed offence is based on the defendant's failure to take steps to protect the victim, a key feature of the offence is that it would not be necessary for the prosecution to prove whether the defendant was the perpetrator of the harm or a culpable bystander. Nonetheless, the Sub-committee considers that the list of elements which must be proved by the prosecution beyond reasonable doubt before the offence applies will set a high evidential threshold.

Consultation responses

1.6 In total, 113 responses were received.⁶ A list of the Respondents is set out in Annex 2 of this Report. We are most grateful to all those who commented on the Consultation Paper.

1.7 The responses ranged from a simple acknowledgment of the Consultation Paper to detailed submissions on the Sub-committee's recommendations and related issues. Both the number of responses and the arguments in the substantive responses have been taken into account in the

⁵ The proposed offence carries high maximum penalties for both fatal and non-fatal cases:

- (a) 20 years' imprisonment in cases where the victim dies; and
- (b) 15 years' imprisonment where the victim suffers serious harm (to cover, for example, cases where although the victim survived the injuries, these were so severe that the victim was left in a permanent vegetative state).

⁶ The respondents are social service organisations (including social welfare organisations and non-governmental organisations ("NGOs") providing subvented services); Government bureaux and departments, Government advisory bodies; tertiary institutions and educational bodies; legal professional bodies, lawyers and civic affairs bodies; medical organisations; women's groups (including NGOs with women's interests); teachers' and parents' groups; elderly services organisations; trade and business organisations; political organisation; consulate general and other interested individuals (the "Respondents").

formulation of final recommendations in this Report. While the number of Respondents subscribing to a view may indicate the amount of support it has, what is more important is the merits of the analyses and reasoning in the responses. When referring to the responses in this Report, we will follow the wording the Respondents used as much as we could so as to more accurately report what they said. Their responses are summarised and addressed in the subsequent chapters. We work on the presumption that the responses received still hold true at publication of this Report, as we have not received any alteration or withdrawal from the Respondents.

Approach of this Report

Reading this Report in conjunction with the Consultation Paper

1.8 In this Report, we will analyse the responses we have received and set out our considerations and final recommendations. As such, this Report will not repeat the details already covered in the Consultation Paper. Readers should therefore read this Report in conjunction with the Consultation Paper in order to get the full picture of the issues involved. Where we notice any development since the publication of the Consultation Paper which is relevant to an issue under discussion, we will mention it in this Report.

Structure of this Report

1.9 This Report consists of ten chapters dealing with 14 Final Recommendations:

- (a) This chapter gives an introduction.
- (b) Chapter 2 gives an overview of the proposed 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 (Final Recommendation 1).
- (c) Chapter 3 discusses the relationship of the proposed offence with the OAPO (Final Recommendations 2 and 3).
- (d) Chapter 4 examines the scope of the proposed offence (Final Recommendations 4 and 5).
- (e) Chapter 5 covers the defendants of the proposed offence (Final Recommendations 6 and 7).
- (f) Chapter 6 examines the operation of the proposed offence (Final Recommendations 8, 9 and 10).
- (g) Chapter 7 addresses evidential matters relating to the proposed offence (Final Recommendation 11).

- (h) Chapter 8 deals with the maximum penalties for the proposed offence and related procedural matters (Final Recommendations 12, 13 and 14).
- (i) Chapter 9 discusses other collateral measures on training and publicity and Respondents' other observations, including the reporting of abuse.
- (j) Chapter 10 sets out again, for quick reference, all of our final recommendations made in the previous chapters.

The draft Bill (**Annex 1**) and the list of Respondents (**Annex 2**) can be found at the end of this Report.

Chapter 2

Overview of the proposed offence “Failure to protect”

The Sub-committee's Recommendation 1 in the Consultation Paper

2.1 This Chapter discusses the responses on the Sub-committee's recommendation to introduce the proposed offence. The Sub-committee recommended in Recommendation 1 in the Consultation Paper¹:

“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).”

Number of responses to Recommendation 1

2.2 Of the Respondents who have expressly stated their stance on Recommendation 1, 91% (51/56) support it.

	Number	Percentage (%)
Agree	51	45%
Oppose	5	4%
Neutral/No Comment	55	49%
Other Comments	2	2%
<u>Total</u>	<u>113</u>	<u>100%</u>

(Note: Percentages of the responses throughout this Report are rounded to the nearest whole number.)

¹ See paras 7.3 to 7.5 of the Consultation Paper for the reasons for making the recommendation.

Comments from Respondents on Recommendation 1

Respondents supporting Recommendation 1

2.3 An overwhelming majority of the Respondents that have expressly stated their stance on Recommendation 1 support the recommendation. Most of them are social service organisations; women's groups; a Government bureau, Government departments and Government advisory bodies; medical organisations; teachers' and parents' groups; tertiary institutions and educational bodies.

Reasons for supporting Recommendation 1

Strengthening protection of children and vulnerable persons

2.4 The majority of Respondents share the view that the proposed offence will strengthen the protection of children and vulnerable persons who are at risk of being seriously abused. It will raise carers' awareness about protection of children and vulnerable persons, and facilitate early prevention and intervention of tragedies. It will send a clear message to society about the need to protect children and vulnerable persons from abuses.

In the best interests of the child

2.5 Some Respondents comment that the proposed offence will reinforce the importance of upholding the "*best interests of the child*" principle under the *United Nations Convention on the Rights of the Child* ("UNCRC") and is in line with Article 19 of the UNCRC to take all appropriate measures to protect the child.

Motivating carers and professionals

2.6 A social service organisation welcomes the proposed offence as an initiative to motivate children-related professionals to uphold their duties of care to children.

In line with the Government's policy

2.7 A Government bureau and a Government department comment that the objective of the proposed offence in protecting children and vulnerable persons is in line with their policy objective in preventing and handling abuse cases with a view to safeguarding the best interest and safety of children and vulnerable persons, and providing them and their families with appropriate assistance. They also note that the proposed offence is a rather complex legislative proposal with wide ranging implications and would require very careful deliberation by various stakeholders, as well as consensus building by society at large.

Benefiting vulnerable persons

2.8 A social service organisation welcomes the recommendation because there is currently no specific offence in Hong Kong to deal with ill-treatment, neglect or abuse of the elderly. A parents' group notes that persons with disabilities and persons with dementia are similar to children in terms of their degree of vulnerability. A civic affairs body hopes that the recommendation would benefit all relevant individuals, including migrant domestic workers; non-refoulement protection claimant; survivors of torture or cruel, inhuman or degrading treatment or punishment; and other marginalised individuals in a position of vulnerability.

Lingering concerns and suggestions

2.9 While expressing their support in principle for the proposed offence, some Respondents also express their concerns or suggestions:

- (a) The interpretation of the elements of the proposed offence needs to be further deliberated. There is a need for clear examples to illustrate the elements of the proposed offence, including the definitions of *"vulnerable person"*, *"unlawful act"* or *"neglect"*, *"omission"*, *"duty of care"*, *"was or ought to have been aware"*, *"serious harm"* and *"steps that could reasonably be expected to have taken in the circumstances"*.
- (b) The proposed offence may encourage the prosecution to choose to charge a bystander instead of the perpetrator.²
- (c) The personal circumstances of the defendants should be taken into account.³ In domestic violence cases, *"bystanders"*, for example the parent or sibling of the victim, may also be at risk of abuse. There is a risk that domestic helpers may be under pressure of their employers because of power imbalance.
- (d) The publicity and promotion work after the enactment of the proposed offence is equally important.⁴ The emphasis should not be on punishing *"bystanders"*. Instead, the proposed offence should serve as a warning to the public and encourage them to report abuse cases promptly, so that social welfare organisations and health-care professionals can intervene as early as possible.

² This is further discussed in paras 7.11 to 7.15 of Chapter 7 (Final Recommendation 11) under the heading of *"Providing charging options against perpetrator and bystander"*.

³ This is further discussed in paras 3.24 to 3.26 of Chapter 3 (Final Recommendation 3) under the heading of *"Knew, or had reasonable grounds to believe"* and paras 6.53 to 6.54 of Chapter 6 (Final Recommendation 10) under the heading of *"Objective test with subjective element (personal circumstances of defendants)"*.

⁴ This is further discussed in Chapter 9.

2.10 These concerns and suggestions of the Respondents on the elements⁵ of the proposed offence and the application of it to abuse cases will be addressed in further detail in subsequent chapters of the Report.

Respondents opposing Recommendation 1

2.11 Respondents opposing Recommendation 1 are mostly social service organisations. The primary reasons given by them are:

(a) Right to a fair trial

There is concern over undermining important principles of justice such as the presumption of innocence, the accused's right to silence and the privilege against self-incrimination.

(b) Institutional settings

The proposed offence will cover extensively various targets, including care institutions providing social service. There is a need to examine in depth the feasibility of including social service sector in the proposed offence, and there are strong views that the proposed offence is unsuitable for implementation in residential care homes for the elderly and for persons with disabilities. There is also reservation in implementing the proposed offence when there are not sufficient supporting measures and preparation.

(c) Reviewing existing legislation and measures

A legal professional body suggests that the purpose of the proposed offence can be achieved by amending section 27 of the OAPO. Other approaches and complementary measures to protect children and vulnerable persons from harm should be explored first. For example, an elderly services organisation suggests that the codes of practice and statutory regulatory regime of residential care homes can be improved.

Our analysis and response on Recommendation 1

2.12 We have carefully considered the views and suggestions of all the Respondents. As an overview of the proposed offence, we in this chapter succinctly address the main arguments and concerns of the Respondents

⁵ See the subsequent chapters for discussion on the elements of the offence: Chapter 3 (Final Recommendation 3) *"was or ought to have been aware"*; Chapter 4 (Final Recommendation 4) *"vulnerable person"*; (Final Recommendation 5) *"serious harm"*; Chapter 5 (Final Recommendation 6) *"duty of care"*; Chapter 6 (Final Recommendation 8) *"unlawful act"* or *"neglect"*, *"omission"*; (Final Recommendation 10) *"steps that could reasonably be expected to have taken in the circumstances"*.

opposing Recommendation 1.⁶ In addition, we will also, as outlined towards the end of this chapter, set out our remarks on collateral measures on training and publicity and amend the draft Bill so as to complement the proposed offence in addressing the relevant arguments, concerns and suggestions.

Right to a fair trial

2.13 Respondents opposing Recommendation 1 are concerned that important principles of justice, as set out above in relation to the accused's right to have a fair trial, will be undermined.

2.14 It is our guiding principle that a careful balance should be struck between the public's interest in bringing those guilty of extremely serious conduct towards children and vulnerable persons to justice, and the rights of individuals accused of crimes to receive a fair trial.

Not recommending evidential or procedural reforms

2.15 In proposing the offence for Hong Kong based on the South Australian offence model, we have carefully considered the human rights issues which arise in this area. We do not introduce in the proposed offence evidential or procedural reforms adopted under the English model⁷ which may have been seen as impinging on the accused's rights to silence. Our recommendations do not include any measures to place restrictions on the accused's right to silence, the presumption of innocence, privilege against self-incrimination or other procedural safeguards in criminal trials.

Prosecution's standard of proof for the proposed offence (of "failure to protect"): "beyond reasonable doubt"

2.16 Under the proposed offence, 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 the suspect knew, or had reasonable grounds to believe, that there was a risk of serious harm), then each one is the perpetrator of the proposed offence (of "*failure to protect*"), albeit not the offence of committing the unlawful act or neglect itself. There is no injustice to both suspects if the elements of the proposed offence (of "*failure to protect*") are established beyond reasonable doubt against each of them. The human rights issues are addressed in Chapter 7 (Final Recommendation 11).

⁶ As the subsequent chapters will deal with different elements of the proposed offence, those chapters will more elaborately address the relevant arguments, concerns and suggestions so as to minimise repetition.

⁷ See further discussion in paras 7.9 to 7.10 of Chapter 7 (Final Recommendation 11) under the heading of "*Not recommending procedural or evidential reform*".

Institutional settings

2.17 We note the concerns in relation to the institutional settings as set out above. On the other hand, we also note that other Respondents regard the proposed offence as an initiative to protect children and vulnerable persons from harm by motivating children-related and other relevant professionals to uphold their duties of care to them.

High threshold of unreasonableness to warrant criminal liability

2.18 If carers and care institutions have taken reasonable steps to protect the victims from serious harm, the proposed offence would not apply to them. We wish to stress that the proposed offence only targets very serious cases of abuse when the victim died or suffered serious harm and the carer's failure to take steps was so unreasonable as to warrant criminal liability. The proposed offence does not target accidents.

What amounts to reasonable steps

2.19 While what amounts to reasonable steps in the circumstances is ultimately a matter for the court to decide, we believe that stakeholders and professionals in the care services sector would be in the best position to develop a reasonable standard of care, whether in the form of codes of practice or guidelines. Rather than detailing examples of reasonable steps in the proposed offence, codes or guidelines are more flexible as they can be updated from time to time to adapt to changes in the care services.

2.20 There are existing procedural guides published by the Social Welfare Department ("SWD") in handling suspected abuse cases, including the *Protecting Children from Maltreatment - Procedural Guide for Multi-disciplinary Co-operation*⁸ (Revised 2020, which updated the previous *Procedural Guide for Handling Child Abuse Cases*) ("*Procedural Guide for Protecting Children*"). The procedural guide was drawn up by SWD, in collaboration with relevant Government departments, NGOs and professionals for reference by different professionals in taking necessary actions for suspected child maltreatment cases. It was revised in 2020:

*"Following the changes in the society and family circumstances, the problem of children being harmed/maltreated has become more complicated. A few serious child maltreatment cases occurred in Hong Kong in the past few years have also attracted much public attention. Therefore, stakeholders from various sectors consider it necessary to provide a clearer guidance and reference for frontline personnel so as to identify families having risk of child maltreatment at an early stage".*⁹

⁸ SWD, *Protecting Children from Maltreatment - Procedural Guide for Multi-disciplinary Co-operation (Revised 2020)*. Available at: https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/id_1447/ (accessed on 14 April 2021).

⁹ Same as above, at 3.

2.21 The SWD has also published other procedural guidelines to deal with different types of vulnerable persons:

- (a) *Procedural Guidelines for Handling Elder Abuse Cases* (Revised 2021)¹⁰

The guidelines have been updated in 2019 and further in 2021 in view of the development of welfare services.

- (b) *Procedural Guidelines for Handling Adult Sexual Violence Cases*
- (c) *Procedural Guide for Handling Intimate Partner Violence Cases*
- (d) *Guidelines for Handling Mentally Handicapped/Mentally Ill Adult Abuse Cases*.¹¹

2.22 We will consider further the issue of what are the reasonable steps which carers and care institutions may take in Chapter 6 (Final Recommendation 10). The concern on supporting measures and other preparation such as training and publicity is addressed in Chapter 9.

Reviewing existing legislation and measures

Section 27 of the OAPO

2.23 We note that a legal professional body suggests that the purpose of the proposed offence can be achieved by amending section 27 of the OAPO. However, recasting section 27 would not adequately address the problem of “*which of you did it*” cases because the purposes of section 27 and the proposed offence are different.

2.24 Section 27 targets perpetrator who wilfully ill-treats or neglects a child or young person. However, in abuse cases where there is no sufficient evidence pointing to which of the defendants actually inflicted the harm on the victim, all defendants had to be acquitted. The proposed offence will close this evidential loophole by charging the suspects whether they had caused the serious harm to the victim or had stood by and allowed the harm to happen without taking reasonable steps to prevent it.

Other measures

2.25 While taking other measures such as improving the existing codes of practice and the statutory regulatory regime of residential care homes can improve the protection of children and vulnerable persons, this cannot address the concern on the evidential loophole. How the proposed offence will close

¹⁰ SWD, *Procedural Guidelines for Handling Elder Abuse Cases* (Revised 2021). Available at: https://www.swd.gov.hk/en/index/site_pubsvc/page_elderly/sub_csselderly/id_serabu_seelder/ (accessed on 5 April 2021).

¹¹ See paras 8.37 to 8.50 of the Consultation Paper which discusses various guidelines and circulars of the SWD and the Education Bureau (“EB”).

this evidential loophole is further discussed in Chapter 3 (Final Recommendation 3).

Our remarks on collateral measures: training and publicity

2.26 We have also noted that there is reservation in implementing the proposed offence when there are not sufficient supporting measures and preparation. We also agree that publicity and promotion work after the enactment of the proposed offence are equally important so as to raise the awareness of the public about the protection of children and vulnerable persons to prevent the occurrence of tragedies.

2.27 Therefore, we have further set out our remarks on collateral measures (see further discussion in Chapter 9) – encouraging the Government to provide further training to carers, care services sectors, relevant stakeholders and professionals, and to educate the public to promote awareness and understanding of the proposed offence.

Amendments to the Bill

2.28 To further allay some Respondents' concerns, we will make the following amendments to the draft Bill (see **Annex 1**), which will be discussed in the ensuing chapters of this Report:

- (a) Changing the *mens rea* “was, or ought to have been aware” to “knew or had reasonable grounds to believe” for the proposed offence in section 25A(1)(c) of the OAPO to take into account of the personal circumstances of the defendants from their subjective viewpoints;¹²
- (b) Emphasising that the proposed offence applies when the defendants failed to take “reasonable” steps in the circumstances to protect the victims in section 25A (1)(d) of the OAPO;¹³
- (c) Specifying that the “factors for determining the reasonable steps in the circumstances” include the defendant’s personal circumstances and characteristics in section 25A(3A) and (3B) of the OAPO;¹⁴
- (d) Emphasising that the defendant may be convicted of the proposed offence regardless of whether he did or may have done the unlawful act or neglect in section 25A(4) of the OAPO;¹⁵

¹² This is further discussed in Chapter 3 (Final Recommendation 3).

¹³ This is further discussed in Chapter 6 (Final Recommendation 10).

¹⁴ This is further discussed in Chapter 6 (Final Recommendation 10).

¹⁵ This is further discussed in Chapter 7 (Final Recommendation 11).

- (e) Defining that “*harm*” includes psychological or psychiatric harm in section 25A(6) of the OAPO;¹⁶
- (f) Expressly including the elderly by adding the word “*age*” in the definition of “*vulnerable person*” in section 25A(6) of the OAPO;¹⁷
- (g) Providing that the consent to prosecute of the Secretary for Justice is required in section 25A(7) of the OAPO so that decision to prosecute an under-aged defendant under the proposed offence will be cautiously made.¹⁸

Our Final Recommendation 1

2.29 In view of the overwhelming support from the Respondents and the fact that all the major concerns and arguments can be addressed (as discussed in this and subsequent chapters), we maintain Recommendation 1 without amendment.

Final 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).

¹⁶ This is further discussed in Chapter 4 (Final Recommendation 5).

¹⁷ This is further discussed in Chapter 4 (Final Recommendation 4(c)).

¹⁸ This is further discussed in Chapter 5 (Final Recommendation 7).

Chapter 3

Relationship with Offences against the Person Ordinance (Cap 212)

The Sub-committee's Recommendations 2 and 3 in the Consultation Paper

3.1 This Chapter discusses the responses on the Sub-committee's Recommendation 2¹:

"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)² 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."

and Recommendation 3 in the Consultation Paper³:

"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."*

Number of responses to Recommendation 2

3.2 Of the Respondents who have expressly stated their stance on Recommendation 2, 100% (15/15) support it.

¹ See paras 7.6 to 7.9 of the Consultation Paper for the reasons for making the recommendation.

² The proposed section 25A of the OAPO in the draft Bill (Annex A of the Consultation Paper).

³ See paras 7.10 to 7.11 of the Consultation Paper for the reasons for making the recommendation.

	Number	Percentage (%)
Agree	15	13%
Oppose	0	0%
Neutral/No Comment	97	86%
Other Comments	1	1%
<u>Total</u>	<u>113</u>	<u>100%</u>

Comments from Respondents on Recommendation 2

Respondents supporting Recommendation 2

3.3 All Respondents, who have indicated their stance, support Recommendation 2. The Respondents comment that it is logical for a new offence to be set out in the position suggested, ie section 25A of the OAPO, if the proposed offence is to be enacted. A separate specific offence can help to illustrate to the public the specificity of the offence while locating the proposed offence earlier in the OAPO can help to highlight the serious nature of the proposed offence. This can also help to maintain the current framework of criminal justice procedure and avoid any fundamental change to the rules of criminal procedure and evidence. The proposed offence could complement the existing offence of ill-treatment and neglect of a child under section 27 of the OAPO.

Our analysis, response and Final Recommendation 2

3.4 We note the overwhelming support from the Respondents for Recommendation 2. As explained in the Consultation Paper,⁴ the proposed offence should be located earlier in the OAPO than the existing section 27 (ie, the existing child abuse and neglect offence) in order to indicate the more serious nature of the proposed offence. For these reasons, we maintain Recommendation 2 without amendment.

⁴ See paras 7.8 to 7.9 of the Consultation Paper for the reasons for the location of the proposed offence.

Final Recommendation 2

Subject to the views of the Law Draftsman, we recommend that the proposed offence of *“Failure to protect a child or vulnerable person where the child’s or vulnerable person’s death or serious harm results from an unlawful act or neglect”* should be comprised in a new section of the Offences against the Person Ordinance (Cap 212) and should be located earlier in the Ordinance than section 27 of that Ordinance, to indicate the more serious nature of the proposed offence.

Number of responses to Recommendation 3(a) and (b)

3.5 Of the Respondents who have expressly stated their stance on Recommendation 3(a), 65% (11/17) support it.

	Number	Percentage (%)
Agree	11	10%
Oppose	6	5%
Neutral/No Comment	95	84%
Other Comments	1	1%
<u>Total</u>	<u>113</u>	<u>100%</u>

3.6 Of the Respondents who have expressly stated their stance on Recommendation 3(b), 90% (19/21) support it.

	Number	Percentage (%)
Agree	19	17%
Oppose	2	2%
Neutral/No Comment	92	81%
Other Comments	0	0%
<u>Total</u>	<u>113</u>	<u>100%</u>

Comments from Respondents on Recommendation 3(a)

Respondents supporting Recommendation 3(a)

3.7 A majority of the Respondents who have stated their stance support Recommendation 3(a) in general without giving detailed reasoning.

Respondents opposing Recommendation 3(a)

Better to amend section 27 of the OAPO instead

3.8 Respondents opposing the recommendation suggest that section 27 of the OAPO could be amended to obviate the need for the proposed offence as there is considerable overlap between the two offences. Besides, confusion over the co-relation of the proposed offence and section 27 of the OAPO needs to be avoided since the same set of facts could fall within the two offences.

3.9 For the following reasons, the preliminary views of a legal professional body are that: *“instead of introducing a new offence under the OAPO, it might be better and simpler to amend section 27 of the OAPO.”*

- (a) No statistics of high number of abuse cases in Hong Kong
Apparently, there has been no similar statistics of a high number of abuse cases or series of highly publicised cases and outcry in Hong Kong matching that in the United Kingdom (“UK”), South Australia or New Zealand. It is not a foregone conclusion that there is a pressing problem in Hong Kong requiring an unusual form of criminal legislation.
- (b) The *mens rea* of “*ought to have been aware of a risk*” lowering the hurdle for the prosecution
 - (i) The proposed offence would have the effect of lowering the hurdle required in favour of the prosecution. It allows conviction of the defendant under the new concept of “*ought to have been aware of a risk*” – a much lower standard of proof of *mens rea* since it is not necessary to establish as a fact that a defendant knew a risk. In addition, how could it be said that a defendant failed to take the steps that the defendant could reasonably be expected to take – when the defendant did not actually know?
 - (ii) The proposed offence contains no guidance on the question of whether the defendant’s own character (ie, a subjective element) would be taken into account in considering what the defendant “*ought to have been aware of a risk*”.

(c) Fabrication of evidence in domestic context

It would introduce unprecedented difficulties in the family context. There would be much unethical temptation by an estranged party in family proceedings to abuse the system and file false police report against the other party. It is not difficult at all to foresee fabrication of evidence putting the wrongly accused party in jeopardy of conviction. A contrasting feature is that spouses/partners may have such affection for their spouses/partners that the former do not have an objective view of the latter's behavior, or may otherwise be under their influence.

(d) Prosecution under section 27 of the OAPO

There is obviously no need for the proposed offence in those cases where there is evidence to support a murder, manslaughter, or wounding charge. The difficulty is with charges of murder/manslaughter/wounding when the culprit is not clear. Section 27 of the OAPO may still then be available. Section 27 of the OAPO can be prosecuted in conjunction with manslaughter.

Suggested amendments to section 27 of the OAPO

3.10 This Respondent suggests that the existing section 27 could be amended to:

- (a) cover not only children, but also vulnerable persons;
- (b) include "*serious harm*";
- (c) impose a higher penalty; and
- (d) contain elements of (i) wilful conduct; (ii) grossly negligent conduct causing harm; and (iii) failing to prevent harm, as separate items.

Since for manslaughter, gross negligence may give rise to a criminal liability, suitable wording to that effect should be used instead of "*ought to have been aware*" which introduces novel difficulties and considerations.

Our analysis and response on Recommendation 3(a)

3.11 We will under this heading deal with the Respondent's reasons for opposing Recommendation 3(a).

Alarming statistics on abuse cases

3.12 The Respondent comments that apparently, there has been no similar statistics of a high number of abuse cases or series of highly publicised cases and outcry in Hong Kong as in overseas jurisdictions. We, however,

note that since the publication of the Consultation Paper in May 2019, there are further updates of the statistics on child and elder abuse cases, and the number of children who have died from assault.

3.13 In 2018, 2019 and 2020, 1064, 1006 and 940 cases of child abuse were recorded by the SWD respectively.⁵ In 2018, 2019 and 2020, 496, 488 and 469 cases⁶ of elder abuse were recorded by the SWD respectively. Of the 1062 children who died in Hong Kong between 2006 and 2015, 58 of these deaths were attributed to assault on the children. In 2014 and 2015, 3 and 6 children respectively died from assault.⁷

3.14 Over the years, there were a number of highly publicised child and elder abuse cases, and abuse cases of domestic helpers in Hong Kong which have drawn wide public outcry.⁸ While the statistics of serious abuse cases in Hong Kong may not match the level in overseas jurisdictions as suggested by the Respondent, we consider that serious abuse cases of children and vulnerable persons should not be tolerated at all.

Inadequacy of section 27 of the OAPO in “which of you did it” cases

3.15 The Respondent suggests that section 27 of the OAPO is available to the prosecution where *“there is difficulty with charges of murder/manslaughter/wounding when the culprit is not clear”*. Instead of enacting the proposed offence (*“failure to protect”*), section 27 of the OAPO should be amended.

3.16 However, recasting section 27 of the OAPO would not adequately address the problem of *“which of you did it”* cases because the purposes of section 27 and the proposed offence are different. Section 27 targets the perpetrator who wilfully ill-treats or neglects a child or young person. Where there is no sufficient evidence pointing to which of the defendants

⁵ See para 1.34 of the Consultation Paper for previous statistics. See SWD web-site on *Support for Victims of Child Abuse, Spouse/Cohabitant Battering and Sexual Violence*, available at: https://www.swd.gov.hk/vs/index_e.html#s3 (accessed on 3 March 2021).

⁶ See para 1.52 of the Consultation Paper for previous statistics. See SWD, Statistics on newly reported elder abuse cases, available at: https://www.swd.gov.hk/en/index/site_pubsvc/page_elderly/sub_csselderly/id_serabu_seelder/ (accessed on 3 March 2021).

⁷ See para 1.35 of the Consultation Paper for previous statistics. See *Child Fatality Review Panel, Fourth Report (for child death cases in Hong Kong in 2014 and 2015)* (updated at November 2019), available at: https://www.swd.gov.hk/storage/asset/section/2867/en/CFRP_Fourth_Report_en_No_v2019.pdf (accessed on 3 March 2021).

⁸ For example, the fatal child abuse case of a five-year-old girl in *HKSAR v C.H.P. & Others* [2021] HKCFI 1069. See also examples of Hong Kong abuse cases of children, elderly and domestic helpers discussed in paras 2.131 to 2.154 of the Consultation Paper, in particular the child abuse case in *HKSAR v Wong Wing-man, Mandy alias Wang Xuexin and Ling Yiu-chung, Rocky* [2018] HKCFI 1484 and the abuse case of domestic helper in *HKSAR v Law Wan-Tung* [2015] HKDC 210. These cases caused wide public outcry.

actually inflicted the harm on the victim, all defendants should be acquitted. This is so even though it is very likely one or other must have committed the criminal act but there was no evidence of which one. *Archbold Hong Kong* has the following comments on section 27:

“if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to acquit both. ... This statement of the general principle has been considered in the context of acts of violence committed upon a child within the privacy of the home by one or other or both ‘parents’.”⁹

Closing the loophole: the proposed offence (“failure to protect”)

3.17 The proposed offence closes this evidential loophole by allowing the suspects to be charged whether they had caused the serious harm to the victim or had stood by and allowed the harm to happen without taking reasonable steps to prevent it. The prosecution does not have to prove whether the suspect is the perpetrator of the harm. The proposed offence will be able to deal with the *“which of you did it”* cases, so that offenders can be brought to justice, with a sentence which properly reflects the seriousness of the criminal behaviour involved.

Mens rea encompassing subjective viewpoint of defendants

Knowledge of risk not required: for better protection of potential victims

3.18 The Respondent comments that the proposed offence would have the effect of lowering the hurdle required in favour of the prosecution. The proposed offence allows conviction of the defendant under the new concept of *“ought to have been aware of a risk”* which is a much lower standard of proof of *mens rea* since it is not necessary to establish as a fact that a defendant knew that there was a risk.

3.19 The Sub-committee proposed in the Consultation Paper that the defendant commits the proposed offence if the defendant satisfied the *mens rea* that 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. This formulation of *mens rea* is more desirable than the New Zealand model which requires that the defendant *“knows”* the victim is at risk of harm (ie subjective mental element). This means that the prosecution must prove that the defendant was actually aware of the risk.¹⁰

⁹ *Archbold Hong Kong* (2021), at para 20-419. See paras 2.26 to 2.30 of the Consultation Paper.

¹⁰ See para 7.43 of the Consultation Paper for the discussion on the mental element of the New Zealand model.

3.20 On the other hand, both the English and South Australian models require that the defendant “*was, or ought to have been, aware*” of the risk. The fact that the risk is one of which the defendant “*ought to have been aware*” introduces an objective element. Accordingly, the defendant cannot escape criminal liability by being so careless of the safety of the victim that the defendant did not think there was any risk when the defendant ought to have done so.¹¹

3.21 Therefore, as in line with the English and South Australian models, the formulation of “*was, or ought to have been, aware*” would afford better protection to a potential victim which is the main purpose of this reform exercise, by requiring the defendant to be aware of what a reasonable person ought to have been aware of the risk of serious harm to the victim. We consider that this formulation has struck the right balance and would tackle the problem.

Subjective element of the defendant’s own character

3.22 The Respondent also comments that the proposed offence contains no guidance on whether the defendant’s own character (ie, a subjective element) would be taken into account in considering what the defendant “*ought to have been aware of a risk*”.

3.23 To address this, we propose to replace “*was, or ought to have been aware*” with “*knew, or had reasonable grounds to believe*”, a formulation developed by the Hong Kong courts which takes into consideration of the subjective views of the defendant in the *mens rea* of an offence. This formulation of *mens rea* is used in a number of Hong Kong offences including section 25(1) of the Organized and Serious Crimes Ordinance (Cap 455).¹² There is a line of Court of Final Appeal authorities interpreting the meaning of “*knowing or having reasonable grounds to believe*”.¹³

“Knew, or had reasonable grounds to believe”

3.24 Under this formulation, the *mens rea* of the proposed offence consists of two limbs: (1) knew, or (2) had reasonable grounds to believe. Adopting the Court of Final Appeal’s approach in *HKSAR v Harjani Haresh Murlidhar*¹⁴ in relation to section 25(1) of Cap 455, the test of “*knew or had reasonable grounds to believe*” for the proposed offence would consist of:

¹¹ See para 3.50 of the Consultation Paper for the discussion of the test of “*ought to have been aware*” under the English model.

¹² Section 25(1) of Organized and Serious Crimes Ordinance (Cap 455) provides: “Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person’s proceeds of an indictable offence, he deals with that property.”

¹³ See the Court of Final Appeal decisions of *HKSAR v Pang Hung Fai* (2014) 17 HKCFAR 778; *HKSAR v Yeung Ka Sing Carson* (2016) 19 HKCFAR 279; *HKSAR v Harjani Haresh Murlidhar* (2019) 22 HKCFAR 446.

¹⁴ *HKSAR v Harjani Haresh Murlidhar* (2019) 22 HKCFAR 446, at para 26. The Court of Final Appeal reformulated the test as follows:

- (a) A subjective element ie, what facts or circumstances, including those personal to the defendant, were known to the defendant that may have affected his belief as to whether there was a risk that serious harm would be caused to the victim by the unlawful act or neglect?
- (b) An objective element from the viewpoint of the defendant ie, would any reasonable person who shared the defendant's knowledge be bound to believe that there was such risk? (We consider that the defendant should not escape criminal liability in disregarding the safety of the victim where there are reasonable grounds to believe that there was a risk that serious harm would be caused to the victim by the unlawful act or neglect.)

The test needs to be applied from the viewpoint of the defendant, having regard to all the facts and circumstances known to him, and not from the viewpoint of an objective bystander.

3.25 The objective test of reasonableness in this formulation takes into account of the viewpoint of the defendant. We consider that this test is preferable to the strict test of an objective bystander as this would allow the court to take into consideration what facts and matters affected, or may have affected, the defendant's belief as to whether or not there was a risk that serious harm would be caused to the victim by the unlawful act or neglect.

3.26 We believe this would squarely address the Respondent's concern that the defendant's own character should be taken into account in considering whether the defendant "*had reasonable grounds to believe*" that there was a risk that serious harm would be caused to the victim by the unlawful act or neglect.

-
- "(i) What facts or circumstances, including those personal to the defendant, were known to the defendant that may have affected his belief as to whether the property was the proceeds of crime ('tainted')?"*
 - "(ii) Would any reasonable person who shared the defendant's knowledge be bound to believe that the property was tainted?"*
 - "(iii) If the answer to question (ii) is 'yes' the defendant is guilty. If it is 'no' the defendant is not guilty."*

The test of "reasonable grounds to believe" needs to be applied "from the viewpoint of the defendant, having regard to all the facts and circumstances known to him, and not from the viewpoint of an objective bystander considering simply the adverse inferences to be drawn from the details of the transaction itself. This Court was certainly not intending to indicate that the defendant was entitled to be acquitted if he believed, or may have believed, that the property was not tainted, where he did not have reasonable grounds for such belief.

Once the court has determined, having due regard to the defendant's evidence if he has testified, what facts and matters affected, or may have affected, his belief as to whether or not the relevant property was tainted, including any facts or matters that may have led him to form personal beliefs, perceptions or prejudices, the court must then ask the objective question of whether, any reasonable person, affected by all those facts and matters, would have been bound to conclude that the property was tainted." (at paras 56 - 57)

Suggested amendments to section 27 of the OAPO

3.27 This Respondent also makes a number of suggestions on amending section 27 of the OAPO as set out in paragraph 3.10 above.

3.28 We have already explained generally that recasting section 27 would not adequately address the problem of “*which of you did it*” cases. Specifically, we do not consider that those suggestions would work either because:

- (a) even if the prosecution is required to prove the element of wilful conduct, that would not solve the problem of “*which of you did it*” cases;
- (b) gross negligence manslaughter is proved based on the “*objective standard of reasonableness*” only, unlike the *mens rea* we recommend above;¹⁵
- (c) the meaning of the suggested element of “*failing to prevent harm*” is unclear (in contrast with our elaborate explanation on how the proposed offence (“*failure to protect*”) would operate).

Incentive to tell the truth

3.29 The Respondent also comments that the proposed offence would introduce unprecedented difficulties in the family context, and there would be much unethical temptation to fabricate evidence in family proceedings.

3.30 We do not agree that the proposed offence would encourage defendants to fabricate evidence. On the contrary, defendants would have a lesser incentive to give vague evidence or false incriminations or resort to mutual denial when they must provide an answer to the question why they neglected their duty of care. Where one accused asserts his right to silence, the other accused has an incentive to tell the whole truth and apportion liability accordingly, or face taking the full force of the law.¹⁶ This would facilitate the prosecution to obtain more evidence sufficient to charge the perpetrator who inflicted the harm with a causative offence (ie murder, manslaughter, wounding or section 27 of the OAPO). In explaining by examples¹⁷ on how the

¹⁵ Archbold Hong Kong (2021), at para 20-181: “*The CFA in HKSAR v Mak Wan Ling (No 2)(2019) 22 HKCFAR 321 ... emphasised the value placed by the law on human life and held that the last element of gross negligence manslaughter ‘is proved by application of the objective standard of reasonableness, there being no additional requirement that the prosecution must also prove that the defendant was subjectively aware of an obvious and serious risk of death to the deceased’.*”

¹⁶ See para 4.17 of the Consultation Paper for the discussion on the incentive for the accused to tell the truth.

¹⁷ Such examples include family scenario where both parents/partners denied responsibility. See paras 4.53 to 4.60 of the Consultation Paper.

corresponding South Australian offence (which the proposed offence is modelled on) would apply, the Attorney General in South Australia said in the Parliament:

*“[T]his law will allow the prosecution several charging options in cases like these. The choice will depend on the facts of each case. One or both suspects may be charged with both the causative offence and the offence of criminal neglect in the alternative, or either offence on its own. In some cases, only one suspect may be charged.”*¹⁸

Incentive to prevent abuse

3.31 The proposed offence also provides incentive for parents and carers to take reasonable steps to prevent the abuse from escalating and, facilitates early detection of abuse cases. A new offence separate from the existing section 27 would highlight the focus on protection of children and vulnerable persons by prevention and deterrence, rather than mere punishment of the perpetrator. This proactive and preventive approach echoes similar perspective adopted in the recently revised *“Procedural Guide for Protecting Children”*¹⁹:

*“It emphasises the principle of ‘Child-focused’ and expects personnel to shift their focus of work from previous ‘case handling’ to ‘child protection’ so as to replace the ‘task-centred’ point of view with the one of ‘person-centred’. At the same time, personnel should also shift their work direction from the need to determine whether a case is child maltreatment to the need for protecting children from harm/maltreatment, i.e. to move from a relatively passive perspective to a more proactive and forward-looking perspective.”*²⁰

Comments from Respondents on Recommendation 3(b)

Respondents supporting Recommendation 3(b)

3.32 There is an overwhelming support for this recommendation. Respondents who support Recommendation 3(b) welcome an increase in the maximum sentence for section 27(1)(a) of the OAPO as it will create a stronger

¹⁸ South Australian Hansard debates, House of Assembly, 12 October 2004, at 335, per Hon M J Atkinson (Attorney General). Available at: <http://hansardpublic.parliament.sa.gov.au/#/search/1/2004> (accessed on 14 April 2021).

¹⁹ SWD, *Protecting Children from Maltreatment - Procedural Guide for Multi-disciplinary Co-operation (Revised 2020)*. Available at: https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/id_1447/ (accessed on 14 April 2021).

²⁰ Same as above, at 9.

deterrent effect. As the proposed offence would have a bearing on section 27 (including its maximum penalty vis-à-vis that of the new provision), this matter should therefore be considered in a holistic manner instead of being dealt with separately. A Government bureau and a Government department comment as follows:

“while [they] have no objection, in principle to the proposed review and where appropriate, adjustment to the maximum penalty of section 27 of OAPO from the child protection angle, the question of what constitutes an appropriate level of penalty commensurate with the level/seriousness of the offences is essentially one of legal policy and public law and order.”

Respondents opposing Recommendation 3(b)

3.33 A teachers’ group which opposes the recommendation comments that *“with the offence of ‘failure to protect’ in place, the rationale for increasing the maximum penalty under section 27(1)(a) of the OAPO should be explained, or else the original penalty should be retained.”*

Our analysis and response on Recommendation 3(b)

3.34 Following a recent tragic child abuse case, the judge called for the maximum penalty under section 27 of the OAPO (ie, 10 years’ imprisonment on conviction on indictment) to be considered for reform as he considered that an increased penalty was needed to deal with the most serious cases of non-fatal child abuse.²¹ Besides, in light of the maximum penalties the Sub-committee recommended for the proposed offence under Recommendations 12 and 13 (ie 15 years if the victim suffers serious harm and 20 years if the victim dies), we recommend that the Government undertake a review of the current maximum penalty under section 27(1)(a) with a view to increasing it as appropriate. We agree that the maximum penalty of section 27(1)(a) and the proposed offence should be dealt with holistically, as both offences aim at deterring child abuse and neglect (albeit with different focuses). The former targets the perpetrator who wilfully ill-treats or neglects the victim whereas the latter targets the culpable bystander who fails to take reasonable steps to protect the victim.

Our Final Recommendation 3(a), (b) and (c)

3.35 For the reasons set out above, we recommend retaining Recommendation 3(a) and (b) without amendment and adding a Final Recommendation 3(c) on substituting the *mens rea* “knew, or had reasonable

²¹ *HKSAR v Wong Wing-man, Mandy alias Wang Xuexin and Ling Yiu-chung, Rocky* [2018] HKCFI 1484, per Hon Zervos J (as he then was). See footnote 14 of Chapter 7 of the Consultation Paper.

grounds to believe,” for “*was, or ought to have been, aware*” in the proposed offence (ie section 25A (1)(c) of the draft Bill).

Final 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);**
- (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; and**
- (c) that section 14(1)(c) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005) should be adopted in the proposed offence subject to the substitution of the *mens rea* “*knew, or had reasonable grounds to believe,*” for “*was, or ought to have been, aware*” in the provision.²²**

²² The proposed section 25A(1)(c) of the OAPO in the draft Bill (Annex 1 of this Report):
“25A. (1) A person (**defendant**) commits an offence if—

...

- (c) *the defendant knew, or had reasonable grounds to believe, that there was a risk that serious harm would be caused to the victim by the unlawful act or neglect;*”.

Chapter 4

Scope of the proposed offence

The Sub-committee's Recommendations 4 and 5 in the Consultation Paper

4.1 This Chapter discusses the responses on the Sub-committee's Recommendation 4¹:

"We recommend that under the new offence of failure to protect:

- (a) the scope of 'victim' should include 'a child or a vulnerable person';*
- (b) 'child' should be defined as 'a person under 16 years of age'; and*
- (c) 'vulnerable person' should be defined as 'a person aged 16 years or above whose ability to protect himself or herself from an unlawful act or neglect is significantly impaired for any reason, including but not limited to, physical or mental disability, illness or infirmity'."*²

¹ See paras 7.12 to 7.19 of the Consultation Paper for the reasons for making the recommendation.

² The proposed section 25A(1)(a) and (6) of the OAPO in the draft Bill (Annex A of the Consultation Paper):

*"25A. (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;*

...

(6) In this section—

...

***child** means a person under 16 years of age;*

...

***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."*

and Recommendation 5 in the Consultation Paper³:

*“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.”*⁴

We are not in favour of the inclusion of a statutory definition of ‘serious harm’ within the terms of the offence.”

Number of responses to Recommendation 4

4.2 Of the Respondents who have expressly stated their stance on Recommendation 4(a), 100% (12/12) support it.

	Number	Percentage (%)
Agree	12	11%
Oppose	0	0%
Neutral/No Comment	101	89%
Other Comments	0	0%
<u>Total</u>	<u>113</u>	<u>100%</u>

4.3 Of the Respondents who have expressly stated their stance on Recommendation 4(b), 32% (10/31) support it and 68% (21/31) oppose it.

	Number	Percentage (%)
Agree	10	9%
Oppose	21	19%
Neutral/No Comment	79	70%
Other Comments	3	2%
<u>Total</u>	<u>113</u>	<u>100%</u>

³ See paras 7.20 to 7.25 of the Consultation Paper for the reasons for making the recommendation.

⁴ The proposed section 25A(1)(a) of the OAPO in the draft Bill (Annex A of the Consultation Paper).

4.4 Of the Respondents who have expressly stated their stance on Recommendation 4(c), 71% (12/17) support it.

	Number	Percentage (%)
Agree	12	11%
Oppose	5	4%
Neutral/No Comment	87	77%
Other Comments	9	8%
<u>Total</u>	<u>113</u>	<u>100%</u>

Comments from Respondents on Recommendation 4

Scope of “victim” in Recommendation 4(a)

Respondents supporting including “child” or “vulnerable person”

4.5 All Respondents who have expressly stated their stance agree that the scope of victim should include a “*child*” or a “*vulnerable person*” as proposed in Recommendation 4(a).

Definition of “child” in Recommendation 4(b)

Respondents supporting the age limit of 16 years

4.6 While some Respondents support the proposed definition of a “*child*” as “*a person under 16 years of age*”, more of them consider that it should be a different age. The reason for supporting the recommendation, as stated by a social service organisation, is that “*teenagers over 16 years of age should have the ability to express and protect themselves.*”

Respondents opposing the age limit of 16 years

4.7 Respondents opposing Recommendation 4(b) have two suggestions for the reasons set out below:

- (a) Raising the age limit to 18 years
 - (i) This is for consistency with the United Nations Convention on the Rights of the Child (“UNCRC”)⁵ and the SWD’s

⁵ Article 1 of the UNCRC: “*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*”.

Procedural Guide for Protecting Children,⁶ and also for protecting children at the age of 16 and 17 years under the proposed offence.

- (ii) There should be a uniform age limit for children in the legislation of Hong Kong.
 - (iii) The age of 18 years is regarded as the cutting line between childhood and adulthood for some disciplines such as child psychiatry and paediatrics.
- (b) Lowering the age limit to below 16 years

A social service organisation observes that *“children are getting mature both physically and psychologically much earlier than age 16”* according to research and experience. In its opinion, a 14 year old *“child”* can already take responsibility for his own safety. A member of a government advisory committee also suggests lowering the age limit from 16 to 12 years.

Definition of “vulnerable person” in Recommendation 4(c)

Respondents supporting Recommendation 4(c)

4.8 A majority of the Respondents who have expressly stated their stance support the proposed definition of *“vulnerable person”*. They suggest that the proposed offence should protect the following various categories of vulnerable persons:

- (a) the elderly (although they would presumably be covered by *“infirmity”*), especially in light of Hong Kong’s aging population;⁷
- (b) ethnic minorities and foreign domestic helpers;⁸
- (c) *“protection claimants”*;⁹

⁶ SWD, *Protecting Children from Maltreatment - Procedural Guide for Multi-disciplinary Co-operation (Revised 2020)*. Available at: https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/id_1447/ (accessed on 14 April 2021).

⁷ A legal professional body.

⁸ A statutory body says: *“newly arrived ethnic minorities and their families have a stake in the proposed offence as cases in the UK show that individual isolated by a lack of friends and language barrier, even though physically young or apparently fit, may still be regarded as a vulnerable adult. Newly arrived foreign domestic workers ..., and in some cases, newly arrived immigrants from Mainland China, may also fall within the definition of ‘vulnerable person’.”*

⁹ A civic affairs body further suggests the LRC to elaborate on the situations of vulnerability, such as including *“protection claimants”* in Hong Kong who are survivors of torture and other cruel, inhuman or degrading treatment or punishment. They are vulnerable to exploitation due to their inability to work, and problems relating to their socio-economic status, language abilities and legal status, etc.

- (d) persons detained or imprisoned;¹⁰
- (e) persons being held in hospitals;¹¹ and
- (f) victims of domestic abuse and whose relationships are accented by coercion and control.

Respondents opposing Recommendation 4(c)

4.9 On the other hand, some Respondents do not support the proposed definition. A legal professional body questions whether it is desirable to widen the proposed offence by including the phrase “for any reason” in the definition of “vulnerable person”:

“The Hong Kong public might be surprised that under a UK authority (Consultation Paper para 3.94, R v Khan [2009] 4 All ER 544 (CA)) a fully fit adult can be held vulnerable if ‘dependent’. This is effectively included in Hong Kong by the phrase ‘for any reason’.”

4.10 Respondents who do not support the proposed definition suggest clarifying the definition of “vulnerable person” because:

- (a) staff in residential homes and members of the public may not know whether those under their care are “vulnerable persons” under the proposed definition. As a result, they may easily fall foul of the law.
- (b) the definition of “vulnerable person” may fail to take into account those people who temporarily become a vulnerable person as a result of injury or illness.

Determination of “vulnerable person”

4.11 It is also not clear how to determine the impairment of a vulnerable person. A Government bureau and a Government department express their “concern on the legal definition of ‘impairment level’ of the ‘vulnerable person’, which is not clearly elaborated (ie based on what assessment and whose assessment).”

4.12 To determine whether a person is a “vulnerable person”, some Respondents suggest:

¹⁰ A social service organisation suggests extending the scope of “vulnerable person” to include a person who is detained, on remand or serving a sentence of imprisonment. The reason is as follows: “while under custody in the custodial setting of law enforcement agencies’ detention facilities or correctional institutions, these persons lose their basic personal liberty and their living routines are all in the hands of the officers of the law enforcement agencies or correctional authorities. In such supervised circumstances, their ability to protect themselves from an unlawful act or neglect is also impaired. Therefore they should be covered.”

¹¹ A women’s group notes that: “it is also possible that adults may be rendered vulnerable through their personal situations of dependency ... (e.g. those being held in hospitals ...)”.

- (a) that, apart from the opinions of doctors, opinions of other professionals, like social workers or psychologist, should also be taken into account, so that there is a more holistic determination of the victim's ability.
- (b) setting out those professionals who may determine whether a person with mental disabilities is a "*vulnerable person*", such as psychiatrists, clinical psychologists, and registered social workers specialising in mental health.

Our analysis and response on Recommendation 4

Scope of "*victim*" in Recommendation 4(a)

Covering "child" and "vulnerable person"

4.13 We note that the Respondents who have expressly stated their stance overwhelmingly agree that the scope of victim should cover a "*child*" and a "*vulnerable person*". Besides, the relevant legislation in South Australia, England and New Zealand also has similar provisions. In view of Respondents' overwhelming support and overseas experience, we consider that the proposed offence should apply to both "*children*" and "*vulnerable persons*" so as to be applicable as widely as possible to those who may be vulnerable to abuse. We therefore maintain Recommendation 4(a).

Definition of "*child*" in Recommendation 4(b)

"Child" - keeping age limit at 16 years

4.14 While the majority of Respondents oppose Recommendation 4(b) and suggest that the age limit should be raised to 18 years or lowered to below 16 years, we consider that the age limit should remain at 16 years for the following reasons:

- (a) Working in tandem with section 27 of the OAPO

We note that there are currently different age limits for "*a child*" in existing offences relating to children and young persons, for example, 16 years (section 27 of the OAPO), abandonment of children under two (section 26 of the OAPO) and stealing a child under 14 years of age (section 43 of the OAPO).¹²

¹² Other examples are section 2(1) of the Juvenile Offenders Ordinance (Cap 226) and section 2 of the Protection of Children and Juveniles Ordinance (Cap 213): a "*child*" is defined as "*under the age of 14 years*" and a "*young person*" is defined as "*14 years of age or upwards and under the age of 16 years*". Section 79A of the Criminal Procedure Ordinance (Cap 221) provides that "*child*" means, for offence other than sexual abuse, a person under 14 years of age; or 15 years of age for video recorded

When we consider the age limit of the victim in the proposed offence, it is important to ensure that the proposed offence and section 27 of the OAPO are consistent as they will work in tandem.

We note that there is the same consideration in England. The primary reason of the English Law Commission for adopting the age of 16 years is to maintain consistency with the offence of “*cruelty to persons under sixteen*” under section 1(1) of the Children and Young Persons Act 1933 (“1933 Act”), which is the equivalent of section 27 of the OAPO. In the English Law Commission’s view, the interests of internal consistency with section 1(1) of the 1933 Act, with which the English provisions will work in tandem, should prevail over the argument for consistency with the age of 18 years under the UNCRC.

(b) Children of 16 years able to express and protect themselves

Respondents supporting Recommendation 4(b) consider that children over 16 years have the ability to express and protect themselves. In any event, if they suffer from impairment and cannot protect themselves, they would be regarded as “*vulnerable persons*” under the proposed offence which, we believe, would give effective protection to vulnerable persons between 16 to 18 years.

Besides, the cut-off point is also 16 years of age in both the South Australian and the English models. As in other aspects of the law,¹³ section 14 of the Criminal Law Consolidation Act 1935 in South Australia was drafted on the assumption that children under the age of 16 years are less able to protect themselves from harm than adults.¹⁴

In addition, as recommended in our Report on Review of Substantive Sexual Offences, there should be a uniform age of consent to sexual activity in Hong Kong of 16 years of age, irrespective of gender and sexual orientation. The report noted that there was overwhelming support for the recommendation¹⁵ during consultation, and further stated as follows:

evidence under section 79C. For sexual abuse offence, “*child*” means a person who is under 17 years of age; or 18 years of age for video recorded evidence under section 79C.

¹³ See footnote 31 in Chapter 4 of the Consultation Paper for examples of other laws in South Australia making the same assumption and adopting the age limit of 16 years as quoted by the Attorney General of South Australia in the House of Assembly (eg criminal laws prohibiting sexual activity with children under 16), see South Australian Hansard debates, 30 June 2004, at 2625. Available at: <http://hansardpublic.parliament.sa.gov.au/#/search/1/2004> (accessed on 14 April 2021).

¹⁴ See para 4.21 of the Consultation Paper for the element of “*vulnerable adult*” under the South Australian model.

¹⁵ See *Law Reform Commission of Hong Kong, Review of Substantive Sexual Offences (Report, December 2019)*(Final Recommendation 1 of the *Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment*, at 42).

“... we cannot identify any strong justification for raising or lowering from the present level of 16 which has been well established and understood by the Hong Kong community. ... On the other hand, any suggestion to raise the age of consent may be criticised on the grounds that such a suggestion fails to recognise that children mature physically and psychologically at a much earlier age nowadays.”¹⁶

This further supports that children of 16 years old are capable of expressing and protecting themselves.

- (c) Diverse policy considerations would involve if uniformly raising the age limit to 18 years

There would be substantial social impacts if uniformly raising the age limit to 18 years (as suggested by some Respondents) which would involve diverse policy considerations. This is, however, beyond the purview of this study. As commented by a Respondent:

“Under section 27 of the OAPO, a ‘child’ is defined as a person under the age of 16 years. If the definition is amended, leaving an 18 year-old person alone at home may also constitute the offence. It is necessary to consider the substantial social impacts of the relevant amendment.”

- (d) Different views on age of maturity of children

Some Respondents note that the age of 18 years is regarded as the cutting line between childhood and adulthood for some disciplines such as child psychiatry and paediatrics. However, other Respondents consider that children are getting matured both physically and psychologically much earlier than age 16 according to research and experience. There is thus no one single age that can easily be agreed on.

Definition of “vulnerable person” in Recommendation 4(c)

4.15 The majority of the Respondents who have indicated their stance support the inclusion under this definition a wide variety of persons in need of protection against abuses, who may be rendered vulnerable through their personal situations of dependency, or their potential for exploitation, such as the elderly, ethnic minorities, foreign domestic helpers, etc.

¹⁶ Same as above, at para 3.7, at 42.

Elderly

4.16 We agree with some Respondents' suggestion on including the elderly by adding the word "*age*" in the definition of "*vulnerable person*". This is to expressly cover the elderly who may become weak because of aging and are in need of protection from abuse, albeit not suffering from physical or mental disability, illness or infirmity. Although the elderly may otherwise be covered as persons whose ability to protect themselves is "*significantly impaired for any reason*", adding the word "*age*" in the definition would send a clear message to society on the need to protect the elderly. This is particularly important in light of our rapidly aging population. This would also provide strong deterrence especially in the absence of a specific offence against elder abuse similar to the child abuse offence in section 27 of the OAPO.

Catch-all phrase of "for any reason" in the definition

4.17 Respondents' preference of a wide application of "*vulnerable person*" is already given effect by the catch-all phrase of "*for any reason...*" in the definition, as it is not possible to list all the eventualities in one definition. However, we note that a legal professional body has reservation on whether it is desirable to widen the scope of "*vulnerable person*" by including a "*catch-all*" phrase.

4.18 It is noteworthy that the English and New Zealand models also have similar "*catch-all*" phrases. The Court of Appeal in England¹⁷ has adopted an expansive interpretation of the term "*vulnerable adult*" in the sense that the catch-all phrase "*or otherwise*" has created a separate category of victim whose ability to protect himself is significantly impaired (other than through physical or mental disability, illness or old age). In principle, there is no limit to the facts and circumstances that might lead to a person in a state of impaired ability to obtain protection. The causes of vulnerability may be physical, psychological or may arise from the victim's circumstances. Besides, the English courts have also held that the state of vulnerability does not need to be long-lasting; it may be short, or temporary.

4.19 This is illustrated by the case of *R v Khan*,¹⁸ where the victim was isolated by a lack of friends and a language barrier, and was totally dependent on her husband and his family. The Court of Appeal held:

*"the objective [of the offence] is to protect those whose ability to protect themselves is impaired ... we do not rule out the possibility that an adult who is utterly dependent on others, even if physically young and apparently fit, may fall within the protective ambit of the Act."*¹⁹

¹⁷ *R v Uddin* [2017] 1 WLR 4739.

¹⁸ *R v Khan* [2009] 4 All ER 544.

¹⁹ *R v Khan*, same as above, at para 26. See paras 3.34 to 3.36 of the Consultation Paper for the discussion on "*vulnerable adult*" in the case of *R v Khan*.

4.20 Likewise, the New Zealand model also applies to a wide range of vulnerable adults, ie anyone who is “*unable by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person*” by having the catch-all phrase “*or any other cause*”.²⁰

4.21 Therefore, we consider that the proposed definition of “*vulnerable person*” is sufficiently wide to cover the various categories of vulnerable persons suggested by the Respondents by adopting the catch-all phrase of “*for any reason, including but not limited to age, physical or mental disability, illness or infirmity.*” It would also cover those people who temporarily become vulnerable persons in light of the English jurisprudence.

Determination of “vulnerable person”

4.22 Some Respondents raise the concern of how to determine whether a person is a “*vulnerable person*” and who does it. They also suggest setting out those professionals who may make the determination.

4.23 We consider that in applying the definition of “*vulnerable person*” in the proposed offence, the courts in Hong Kong will have regard to the fact and context of the case and take into account evidence of the causes of vulnerability of the victim, which may be physical, psychological or arising from the victim’s circumstances. These may include expert evidence from doctors and other professionals like psychologists or social workers, and evidence showing the vulnerability of the victim due to the personal circumstances of the victim (such as the live-in situation of a foreign domestic helper in the employer’s home). The extent of the term “*vulnerable person*” under the proposed offence will evolve as the court develops its jurisprudence. In explaining the term “*vulnerable adult*”, the UK Ministry of Justice said:

*“[a]lthough the term ‘vulnerable’ is clearly defined in the legislation, the extent of the term in this context will emerge as offences under this part of the Act come to court.”*²¹

4.24 Some Respondents are also concerned that staff in residential care homes and members of the public may not know whether those under their care are “*vulnerable persons*” under the proposed definition. To assist frontline personnel and the public in recognising and protecting vulnerable persons, we set out our remarks on collateral measures²² that training and

²⁰ See para 5.59 of the Consultation Paper for the discussion on “*vulnerable adult*” under the New Zealand model.

²¹ UK Ministry of Justice, “*Domestic Violence, Crime and Victims (Amendment) Act 2012*” (Circular no 2012/03 June 2012), Annex A (Home Office Circular 9/2005), at para 29. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/219903/circular-03-12-dvcv-act.pdf (accessed on 5 March 2021).

²² See further discussion in Chapter 9.

publicity on the proposed offence should be provided so that there would be a better understanding of the meaning of “*vulnerable person*”.

4.25 Further, overseas experience illustrates that factsheets,²³ circulars²⁴ or other guidelines can be issued to frontline care personnel explaining the meaning of this term and other elements of the proposed offence, as well as their application. As far as we know, it is indeed the practice of the SWD to issue guidelines from time to time.²⁵

Our Final Recommendation 4

4.26 For the reasons set out above, we conclude that Recommendation 4(a) and (b) can be retained, but recommend amending the definition of “*vulnerable person*” to expressly include the elderly by adding the word “*age*” in Final Recommendation 4(c).

Final Recommendation 4

We recommend that under the proposed offence:

- (a) the scope of “*victim*” should cover “*a child*” and “*a vulnerable person*”;**
- (b) “*child*” should be defined as “*a person under 16 years of age*”; and**
- (c) “*vulnerable person*” should be defined as “*a person aged 16 years or above whose ability to protect himself or herself from an unlawful act or neglect is significantly impaired for any reason, including but not limited to age, physical or mental disability, illness or infirmity*”.²⁶**

²³ See, for example, Victoria State Government (Australia): “*Failure to protect: a new criminal offence to protect children from sexual abuse*”, available at: <https://www.justice.vic.gov.au/safer-communities/protecting-children-and-families/failure-to-protect-a-new-criminal-offence-to> (accessed on 5 March 2021).

²⁴ See, for example, UK Ministry of Justice, “*Domestic Violence, Crime and Victims (Amendment) Act 2012*” (Circular no 2012/03 June 2012), Annex A (Home Office Circular 9/2005), see above at footnote 21.

²⁵ See, for example, those guidelines/guides set out under the heading of “*What amounts to reasonable steps*” in paras 2.20 to 2.21 of Chapter 2.

²⁶ The proposed section 25A(1)(a) and (6) of the OAPO in the draft Bill (Annex 1 of this Report):

“25A. (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;

...

(6) In this section—

Number of responses to Recommendation 5

4.27 Of the Respondents who have expressly stated their stance on Recommendation 5, 100% (24/24) support it.

	Number	Percentage (%)
Agree	24*	21%
Oppose	0	0%
Neutral/No Comment	82	73%
Other Comments	7	6%
<u>Total</u>	<u>113</u>	<u>100%</u>

* 12 support and 12 oppose the inclusion of a statutory definition of “*serious harm*”.

Comments from Respondents on Recommendation 5

Responses on applying to cases of “death” or “serious harm”

4.28 All Respondents agree that the proposed offence should apply in cases involving either the death of the victim, or where the victim has suffered serious harm as proposed in Recommendation 5.

Responses on having a statutory definition of “serious harm”

4.29 Some Respondents support Recommendations 5 in not including a statutory definition of “*serious harm*”. Their reasons are set out below:

- (a) It is not possible to draw up an exhaustive list of grievous bodily harm for physical abuse cases.
- (b) The issue of what constitutes “*serious harm*” should be left to the court and jury to determine according to the actual circumstances of each particular case. This would allow flexibility for development through the common law.

...

child means a person under 16 years of age;

...

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, age, physical or mental disability, illness or infirmity.”.

4.30 On the other hand, some Respondents consider that there should be a definition of “*serious harm*” because:

- (a) The term “*serious harm*” is ambiguous which would easily lead to legal loophole.
- (b) For consistency, reference should be made to existing legislation such as section 27(1) of the OAPO, which provides that “*unnecessary suffering or injury to health*” includes injury to or loss of sight, or hearing, or limb, or organ of the body, or any mental derangement.²⁷

Psychological or psychiatric harm and sexual assault

4.31 Some Respondents suggest that physical harm, mental harm, psychological harm, psychiatric harm, emotional harm and harm resulting from sexual assault should be considered as falling within the scope of “*serious harm*.”

4.32 A social service organisation comments that the victim of child abuse may suffer psychiatric harm:

“All types of child abuse, including sexual assault, may cause psychiatric harm to the child and have far-reaching consequences for his or her physical and mental development, such as developmental retardation, physical and mental symptoms, speech and language impairment, or even thoughts or attempts to harm oneself or commit suicides. Psychiatric harm may also be one of the factors that cause death or serious physical harm.”

4.33 For sexually abused children, a social service organisation observes that victims may suffer psychological distress:

“Research indicates that sexually abused children express significantly higher levels of psychoticism, hostility, anxiety, somatisation, phobic anxiety, paranoid ideation, depression, obsessive-compulsiveness, and psychological distress compared with their non-abused children and these psychological problems could have long-term impact on their mental health that carry into their adulthood.”

²⁷ Archbold Hong Kong (2021), para 20-414: “*The suffering must be something more than a slight fright or some mental anxiety.*”

Degree of seriousness and indicators of “serious harm”

4.34 A legal professional body comments that “*serious harm*” should convey the sense of “*really*” serious harm. This is to convey a degree of seriousness such that the defendant will not be liable for mere carelessness.

4.35 A social service organisation suggests that specific indicators should be devised to provide members of the community and frontline carers with a clearer concept of “*serious harm*” to prevent them from breaching the law inadvertently.

Our analysis and response on Recommendation 5

“Death” or “serious harm”

4.36 All Respondents who have indicated their stance support that the proposed offence should apply in cases involving the death of the victim, or where the victim has suffered serious harm. In addition, the models in South Australia, England and New Zealand have adopted the same approach.

“Harm” including psychological or psychiatric harm; applying to sexual assault

4.37 The Respondents have suggested that the victim may suffer from other types of harm apart from physical harm, and that the harm from sexual assault should be included. As quoted above, some Respondents have forcefully pointed out that harm other than physical harm could have “*far-reaching consequences*” and “*long-term impact... that carry into ... adulthood*”. Having carefully considered the Respondents’ comments, we are convinced that “*harm*” in the proposed offence should include psychological or psychiatric harm. In our opinion, this would include harm resulting from sexual assault. Therefore, there is no need to specifically mention sexual assault in the proposed offence.

No need for a statutory definition of “serious harm” or referring to section 27 of the OAPO

4.38 We note that there is both support and opposition from the Respondents who have indicated their stance on whether to include a statutory definition of “*serious harm*” in the proposed offence.

4.39 Some Respondents are of the view that a statutory definition of “*serious harm*” is needed because the meaning of the term is ambiguous which would easily lead to legal loophole. However, we consider that there is no need to do so as it is not possible to define the term to cover all types of serious harm that may be suffered by victims of abuse cases. It is also not possible

to have an exhaustive list of all types of serious harm that the victim may suffer. Contrary to what some Respondents consider, defining “*serious harm*” may lead to legal loophole such that some victims may not be protected under the proposed offence when they should be. The problem is illustrated by the South Australian experience discussed below.

The South Australian amendment – replacing “serious harm” with “harm”

4.40 In 2018, the term “*serious harm*” was amended to “*harm*” in the South Australian model. As explained in the Consultation Paper²⁸, the South Australian Parliament noted that children generally have a superior ability to heal from injuries compared to adults. Major injuries that would amount to “*serious harm*” when sustained by adults may not have this result when sustained by children. This is because, although suffering much pain and distress from serious injuries, children possess a natural ability to recover quickly and fully that adults do not possess. In particular, children of different ages have different healing capacities.

4.41 If the victims of the South Australian offence are children, it may therefore be difficult to establish the elements of the offence, particularly that the children have suffered “*serious harm*” (defined as “*serious and protracted impairment*”). Consequently, the definition of “*serious harm*” has been found not to cover many serious, non-fatal injuries to children, and is more apt to address serious injuries to adults (for if adults suffered the same injuries, there would most likely be a permanent impairment as a result).

4.42 There was thus a concern that people who inflict such injuries on children may escape criminal prosecution. The anomaly needed to be corrected. Therefore, the term “*serious harm*” was amended to “*harm*” so that the offence is capable of extending to injuries inflicted on children notwithstanding their greater capacity to heal.

4.43 The South Australian experience vividly illustrates the disadvantage of defining the term “*serious harm*”. Therefore, rather than defining the term in the proposed offence, we prefer to allow the court and the jury to determine the meaning of the term in a particular case according to its circumstances, and jurisprudence will gradually develop.

4.44 By the same token, it is also not advisable to adopt some Respondents’ suggestion of making reference to, for consistency, section 27(1) of the OAPO, which provides that “*unnecessary suffering or injury to health*” includes injury to or loss of sight, or hearing, or limb, or organ of the body, or any mental derangement.

²⁸ See paras 4.91 to 4.108 of the Consultation Paper on the enactment of the *Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018* in South Australia.

Degree of seriousness and indicators of “serious harm”

4.45 A Respondent suggests that “*serious harm*” should convey the sense of “*really*” serious harm so as to bring out a degree of seriousness such that the defendant will not be liable for mere carelessness.

4.46 We consider that “*serious harm*” means “*serious harm*”. There is no need to define “*serious harm*” to indicate that the harm is “*really*” serious harm. This is because the degree of seriousness of the harm has already been encapsulated in the word “*serious*” and would exclude minor injuries.

4.47 Some Respondents suggest that specific indicators on what constitute “*serious harm*” should be devised to provide members of the community and frontline carers with a clearer concept to prevent them from breaching the law inadvertently.

4.48 As far as we know, guidelines developed by professionals and stakeholders who care for children and vulnerable persons already set out indicators of abuses to facilitate identification of abuse cases. Indicators relating to physical harm/abuse include bruises and welts, lacerations and abrasion, burns and scalds, fractures and internal injuries (brain/head/abdominal injuries).²⁹ There are also indicators relating to psychological harm/abuse such as psychosomatic symptoms, eating disorder (eg anorexia nervosa) etc; and indicators relating to sexual abuse and neglect.³⁰

4.49 While what constitutes “*serious harm*” is a matter for the court and jury to decide, these guidelines would provide frontline carers with an indication of the harm that victims of abuse cases may suffer, so that they would take reasonable steps to protect the victims and would therefore not be liable under the proposed offence. In addition, we set out our remarks on collateral measures³¹ that training and publicity on the proposed offence should be provided to assist frontline personnel and the public in understanding the offence.

Our Final Recommendation 5

4.50 For the reasons set out in this chapter, we recommend retaining Recommendation 5 and additionally specifying that “*harm*” includes psychological or psychiatric harm.

²⁹ SWD, *Protecting Children from Maltreatment - Procedural Guide for Multi-disciplinary Co-operation (Revised 2020)*, see above at footnote 6, at p 51.

³⁰ Same as above, at p 53 - 56.

³¹ See further discussion in Chapter 9.

Final Recommendation 5

We recommend that the proposed offence should apply in cases involving either the death of the victim, or where the victim has suffered serious harm.³²

We are not in favour of the inclusion of a statutory definition of “*serious harm*” within the terms of the proposed offence.

We recommend that “*harm*” should be defined to include psychological or psychiatric harm.³³

³² The proposed section 25A(1)(a) of the OAPO in the draft Bill (Annex 1 of this Report):
“25A.(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;”.

³³ The proposed section 25A(6) of the OAPO in the draft Bill (Annex 1 of this Report):
“(6) In this section—
harm includes psychological or psychiatric harm;”.

Chapter 5

Defendants of the proposed offence

The Sub-committee's Recommendations 6 and 7 in the Consultation Paper

5.1 This Chapter discusses the responses on the Sub-committee's Recommendation 6¹ :

"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,² should be used as alternative bases for liability under the Hong Kong offence."

and Recommendation 7³ in the Consultation Paper:

*"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)."*⁴

¹ See paras 7.26 to 7.30 of the Consultation Paper for the reasons for making the recommendation.

² The proposed section 25A(1)(b)(i) and (ii) of the OAPO in the draft Bill (Annex A of the Consultation Paper):

*"25A. (1) A person (**defendant**) commits an offence if—*

...

(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;"

³ See paras 7.31 to 7.35 of the Consultation Paper for the reasons for making the recommendation.

⁴ The proposed section 25A of the OAPO in the draft Bill (Annex A of the Consultation Paper).

Number of responses to Recommendation 6

5.2 Of the Respondents who have expressly stated their stance on Recommendation 6, 70% (16/23) support it. In addition, around 36% (40/113) of all the Respondents have not clearly indicated whether they support or oppose it, but have made other comments and suggestions on this recommendation.

	Number	Percentage (%)
Agree	16	14%
Oppose	7	6%
Neutral/No Comment	50	44%
Other Comments	40	36%
<u>Total</u>	<u>113</u>	<u>100%</u>

Comments from Respondents on Recommendation 6: domestic settings

5.3 A majority of the Respondents who have expressly indicated their stance support Recommendation 6. They agree that defendants of the proposed offence should be:

- (a) For domestic settings – a “*member of the same household*” as the victim and has “*frequent contact*” with the victim.
- (b) For institutional settings – a person who owes a “*duty of care*” to the victim.

5.4 The Respondents’ reasons for covering both settings are as follows:

- (a) Including institutional care within the scope of the proposed offence will provide a comprehensive statute to protect victims. This is because not just children are in need of protection, people living in residential care homes for the elderly or persons with disabilities often become victims of abuse due to their old age, physical disabilities, mobility difficulties or intellectual difficulties.
- (b) This could raise the institutional staff’s awareness of protecting the persons under their care.

5.5 On the other hand, some Respondents object to Recommendation 6. They consider that the proposed offence should focus on domestic situation and should not apply to institutional settings because the majority of abusers are family members in a household and not many cases involved service providers.⁵

5.6 Furthermore, some Respondents have also made other comments and suggestions on Recommendation 6. Their comments and suggestions are set out below.

“Member of the same household”

5.7 Some Respondents comment that the scope of the defendants should not be confined to *“member[s] of the same household”* because:

- (a) Many people who have frequent contact with the victims are not necessarily members of the same household, for example, relatives, neighbours and friends.
- (b) The scope of the defendants should be further extended to include volunteers, instructors and mentors who provide long-term services to children.
- (c) It is common in Hong Kong that a substantial number of people with a responsibility to take care of their elders do not live with the elders in the same households, and they may not visit their elders often. These people should also be covered.

5.8 In contrast, some Respondents caution that the net of *“member of the same household”* should not be cast too wide because:

- (a) There is a concern that older child siblings who have to look after their younger siblings would be liable.
- (b) Another concern is that this would include persons who only visit the victim, eg occasionally visiting relatives who live apart, or visiting neighbours or friends.
- (c) This would create heavy workload for the investigation of abuses as many people would become suspects of abuses. This may delay the processing of abuse cases.

5.9 Furthermore, some Respondents seek clarification on the scope of *“member of the same household”*:

- (a) Whether this includes only nuclear family members and persons cohabiting with the victim, or whether residents in sub-divided units or co-living residential units would also be covered.

⁵ According to the statistics of the SWD on elder abuse cases, the percentage of the cases in which the abusers are agency staff providing service to the victim is: 2.3% (2017), 2.8% (2018), 1.6% (2019) and 0.9% (2020).

- (b) Whether “*household*” includes community centres, youth centres, family service centres, private tuition centres and children’s home.

“Frequent contact”

5.10 A Government bureau and a Government department comment that the frequency of the visit on its own may not be a reasonable and sufficient ground to regard a person as belonging to a household. It is also necessary for the prosecution to prove that a frequent visitor has been well-informed of the victim’s condition of care.

5.11 Some Respondents are concerned that the requirement of “*frequent contact*” may have a negative impact on people’s incentive in caring for household members. It may discourage family members from making frequent visits to the household of vulnerable family members. Non-primary carers such as relatives, friends, and other families in the same residence who are willing to help will avoid providing assistance to the primary caregivers of children, elderly or other vulnerable persons for fear of contravening the proposed offence.

Our analysis and response on Recommendation 6: domestic settings

Domestic settings: “member of the same household” of the victim and in “frequent contact” with the victim

An extended meaning of “member of the same household”

5.12 A majority of the Respondents who have indicated their stance support that the proposed offence should apply to both domestic and institutional settings, though some Respondents have concerns on its application to the latter settings.

5.13 For domestic settings, some Respondents suggest that the proposed offence should be extended to include persons who are not members of the same household of the victims but are in frequent contact with the victims. On the other hand, some Respondents caution against casting the net too wide.

5.14 Having considered the views of both sides, we consider that it is justifiable that the scope of the defendants should cover a person being a “*member of the same household*” and having “*frequent contact*” with the victim. In explaining the rationale for adopting these two concepts, UK Ministry of Justice said:

“It is reasonable that a person in those circumstances should be expected to take some action if this is possible, not simply stand

by and do nothing. It is also reasonable that such a person should be expected to account to the court for the circumstances of the victim's death".⁶

5.15 We find the above rationale justifiable and reasonable. We also agree with the New Zealand Law Commission that those who live in close proximity to the victim, and are in frequent contact with the victim, have a "*sufficiently close nexus*" to make the imposition of a duty of care appropriate as:

"... those who live with a child have a different kind of relationship and responsibility than others with whom the child may come into contact; the home should be a place of safety."⁷

5.16 Some Respondents query whether the concept of "*member of the same household*" includes only nuclear family, or whether co-habitees, residents in sub-divided units and co-living residential units are also included. To cater for modern lifestyle and increasingly flexible family arrangements, we consider it desirable to adopt a wider definition of "*household*", similar to the English and New Zealand models, and hence suggest that a person should be regarded as a "*member of the same household*" if he visits the household so often and for such periods of time that it is reasonable to regard him as a member of it. This would apply whatever the person's formal relationship with the victim is and would accordingly include non-cohabiting couples; residents in sub-divided or co-living units; frequently visiting relatives, neighbours, friends and carers.⁸ Furthermore, the proposed offence should also apply where a victim might have lived in different households at different times, and only members of the household where the victim suffered serious harm could be guilty of the offence.⁹

5.17 The offence applies to members of the household who have "*frequent contact*" with the victim. This may include family members or carers, but is not confined to that group.¹⁰ Whilst the mere fact of frequent and long visits can in itself be sufficient to show that a person can be regarded as a

⁶ UK Ministry of Justice, "*Domestic Violence, Crime and Victims (Amendment) Act 2012*" (Circular no 2012/03 June 2012), Annex A (Home Office Circular 9/2005), at para 12. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/219903/circular-03-12-dvcv-act.pdf (accessed on 25 March 2021).

⁷ New Zealand Law Commission, *Review of Part 8 of The Crimes Act 1961: Crimes Against the Person* (2009), at paras 5.26 and 5.31.

⁸ See para 3.38 of the Consultation Paper on the discussion of "*member of the same household*".

⁹ *Explanatory Notes*, section 5 of *Domestic Violence, Crime and Victims Act 2004*, at para 30. Available at: <https://www.legislation.gov.uk/ukpga/2004/28/notes/division/4/1/5> (accessed on 20 March 2021).

¹⁰ The English Crown Prosecution Service, *Child Abuse (non-sexual) - prosecution guidance*. Available at: <https://www.cps.gov.uk/legal-guidance/child-abuse-non-sexual-prosecution-guidance> (accessed on 25 March 2021).

member of the household, other relevant factors may include taking meals in the household or routinely being included in outings and other household social activities and routines. Membership of the household will be for the courts to determine on a case-by-case basis, taking all the circumstances into account.¹¹

5.18 We believe that the above extended definition of “*member of the same household*” will set a proper scope of persons who should have a duty to protect the victims. Although the proposed offence would apply to children (above 10 years old) who are asked to take care of their younger siblings, there are elements in the offence which would recognise their difference in awareness and power from adults and would thus provide them with some possible defences.¹²

“Household” excluding community centres, etc

5.19 Some Respondents also query whether “*households*” include community centres and various other centres. We note that under the English model, the term “*household*” will be given its ordinary English meaning by the courts, and this means it is not likely to include care home or nursery.¹³ We therefore consider that, by the same token, the term “*household*” would unlikely catch these centres mentioned by the Respondents.

“Frequent contact”: no negative impact

5.20 A Respondent suggests that it is also necessary for the prosecution to prove that a frequent visitor has been well-informed of the victim’s condition. We consider that whether the visitor is informed of the victim’s condition would be taken into account in proving the element of whether the defendant “*knew or had reasonable grounds to believe*” that the victim is at risk of serious harm (as proposed under Final Recommendation 3).

¹¹ UK Ministry of Justice, “*Domestic Violence, Crime and Victims (Amendment) Act 2012*” (Circular no 2012/03 June 2012), Annex A (Home Office Circular 9/2005), at para 17. See above at footnote 6.

¹² As discussed under the heading of “*Defences recognising difference in awareness and power between children and adults*” in paras 5.69 to 5.70 of this Chapter (Final Recommendation 7).

¹³ UK Ministry of Justice, “*Domestic Violence, Crime and Victims (Amendment) Act 2012*” (Circular no 2012/03 June 2012), Annex A (Home Office Circular 9/2005), at para 15. See above at footnote 6.

The English Crown Prosecution Service, *Child Abuse (non-sexual) - prosecution guidance* provides: “*Household is defined in section 5(4)(a) [of the Domestic Violence, Crime and Victims Act 2004] and will be given its ordinary meaning. It is not likely to include care homes or nurseries where a child is looked after with a number of others. A paid or voluntary domiciliary carer, a housekeeper or an au-pair or similar may fall under the definition, if it would be reasonable in the circumstances. ... Membership of a household will be for the courts to determine on a case by case basis.*” Available at: <https://www.cps.gov.uk/legal-guidance/child-abuse-non-sexual-prosecution-guidance> (accessed on 25 March 2021).

5.21 Some Respondents are concerned that the element of “*frequent contact*” with the victim may have a negative impact on people’s incentive in caring for household members. We would like to stress that what a defendant is required to do is only to take reasonable steps to protect the victim. The proposed offence does not impose an onerous duty on a carer to take care of the victim.

Comments from Respondents on Recommendation 6: institutional settings

Defendant having a “duty of care” to the victim

Scope of persons having a “duty of care”

5.22 A majority of the Respondents agree that the proposed offence should cover a person who has a “*duty of care*” to the victim and the scope of defendants should cover:

- (a) sibling and other relative;
- (b) domestic helper and babysitter;
- (c) social worker;
- (d) school teacher, private tutor, workshop supervisor;
- (e) healthcare professional and assistant, nursing personnel;
- (f) manager of elderly care home; and
- (g) volunteer helper in an institution.

Exempting certain sectors from the proposed offence

5.23 Besides, some Respondents are doubtful if the proposed offence should apply to the following sectors as institutions and personnel working in these sectors are already regulated by various statutes, codes and guidelines.

I. Education

5.24 This is because currently a code is already in place on reporting child abuse by teachers and schools. Moreover, the Respondents raise the following concerns:

- (a) The liabilities of different personnel in schools under the proposed offence are unclear as teachers, teaching assistants, school employees, social workers and various paramedical staff collaborate as a team to provide child service in school. It is also not clear if the school management committee, school supervisor, principal or individual teaching staff would be liable.

- (b) Responsibilities and burden would be imposed on workers on early childhood education, staff currently working in schools for the physically disabled or special schools for the severely mentally handicapped.

II. Care services for the elderly and persons with disabilities

5.25 The reason is that elderly care service and care service for persons with disabilities are already regulated by various statutes,¹⁴ guidelines and various monitoring mechanisms (including those under the Licensing and Regulation Branch of the SWD, and the SWD's Funding and Service Agreements for subvented services and service quality standards).

III. Hospitals and medical personnel

5.26 It is not appropriate to charge and convict doctors under the proposed offence when they provide medical care to victims of abuses.

5.27 Aside from being publicly accountable to the Government and stakeholders, hospitals are already subject to their legal duties and responsibilities in the provision of healthcare service, including the duty of care under common law. Extending criminal liability to hospital staff will raise serious concerns and impose difficulties on them as it would be too burdensome to identify:

- (a) the scope and range of persons that have a “*duty of care*” in the healthcare setting; and
- (b) the range of circumstances in healthcare institutions in which the duty can arise.¹⁵

IV. Prisons

5.28 The reason is that all persons in detention, including young persons as well as those suffering from illness, physical or mental disability, are provided with reasonable and sufficient protection under the existing law. Moreover, prison officers already have to fulfil their statutory duties under the Prisons Ordinance (Cap. 234) and the Prison Rules (Cap. 234A), and are subject to disciplinary proceedings if they neglect their duties.

¹⁴ Residential Care Homes (Elderly Persons) Ordinance (Cap.459), Residential Care Homes (Elderly Persons) Regulation (Cap.459A), Residential Care Homes (Persons with Disabilities) Ordinance (Cap.613) and Residential Care Homes (Persons with Disabilities) Regulation (Cap.613A).

¹⁵ A medical organisation considers that the hospitals should be excluded from the proposed offence: “*The setting of [hospitals] is very different and more complex than the setting of household or private elderly care homes. ... People attend [hospitals] for a variety of purposes, for example, they can be inpatients who are hospitalised for treatment, outpatients for operation/investigation procedure, ad hoc attendance in Accident & Emergency setting, or patients admitted for a short period in emergency ward for observation pending admission or discharge.*”

Who in an institution having duty of care

5.29 Some Respondents suggest that there is a need to provide a clear definition for “*duty of care*” so as to define who should have the duty in the delivery of social service, since very often a number of staff are involved in providing care service to the residents in care institutions at different times. For example, carers may be working on shift and caring for different residents in rotation, or working part-time, and the abuse may happen during “case handover”, or when the victim is on home leave.

5.30 Some Respondents also suggest clearly stipulating whether the frontline staff (ie persons directly taking care of the victims), or the licence holder or management of the institution should be held criminally liable.¹⁶

Staff shortage and increasing workload

5.31 Because of the potential criminal liability under the proposed offence and the fear of having additional legal duties, some Respondents are concerned that there would be difficulty in employing staff in care institutions (whether professional staff like therapists or nurses, or frontline staff like care workers or cleaning workers). Furthermore, there are concerns that carers will be reluctant to take up complicated cases such as cases of children or persons with disabilities who have records of abuse, or who have uncooperative parents/carers or have severe emotional or behavioural problems.

5.32 There are also worries that the workload on processing abuse cases will increase as the frequency of reporting to the Police, seeking medical assistance and activating the crisis management mechanism will increase significantly.

Guidelines, training and support

5.33 To assist carers and care institutions in complying with the proposed offence, some Respondents suggest that there should be practical guidelines on reporting of abuse mechanism, and clear guidance on the legislative intent of the proposed offence. There should also be clear guidance on the exercise of prosecutorial discretion as well.

5.34 Moreover, some Respondents urge the Government and care institutions to provide training to care service staff so as to raise their awareness on the proposed offence. In addition, appropriate community support service, psychological and legal services should be available for parents and teachers in need who are traumatised by the incidents of abuse.

¹⁶ The different personnel involved in care institutions may include:

- (a) licensees;
- (b) operation supervisors/managers;
- (c) professional workers (such as doctors, nurses, therapists (e.g. speech therapists, occupational therapists) and social workers);
- (d) schoolwork counsellors and stewards who attend to child residents’ daily living;
- (e) frontline care workers and support staff (such as drivers and cleaning workers).

Our analysis and response on Recommendation 6: institutional settings

Duty of care

Covering both domestic and institutional settings

5.35 As listed above, Respondents suggest a wide spectrum of persons from both domestic and institutional settings as persons who should have a “*duty of care*” to the victim. On the other hand, some other Respondents object to including defendants from institutional settings.

5.36 One reason for objecting to applying the proposed offence to institutional settings is that those Respondents consider that a great majority of the abuse cases occur in domestic settings rather than in institutional settings. However, according to the World Health Organisation (“WHO”), the rates of elder abuse are much higher in institutions than in community settings. The reported statistics of elder abuse are also likely to be an underestimation due in part to the unwillingness of older people to report cases of abuse. The following information from the WHO web-site is relevant:

“Elder abuse is an important public health problem. A 2017 study based on the best available evidence from 52 studies in 28 countries from diverse regions, including 12 low- and middle-income countries, estimated that, over the past year, 15.7% of people aged 60 years and older were subjected to some form of abuse.

This is likely to be an underestimation, as only 1 in 24 cases of elder abuse is reported, in part because older people are often afraid to report cases of abuse to family, friends, or to the authorities. Consequently, any prevalence rates are likely to be underestimated.

...

However, systematic reviews and meta-analyses of recent studies on elder abuse in both institutional and community settings based on self-report by older adults suggests that the rates of abuse are much higher in institutions than in community settings.

...

Globally, the number of cases of elder abuse is projected to increase as many countries have rapidly ageing populations whose needs may not be fully met due to resource constraints.”¹⁷ (emphasis added)

¹⁷ WHO, “Elder Abuse”. Available at: <https://www.who.int/news-room/fact-sheets/detail/elder-abuse> (accessed on 2 August 2021).

5.37 Besides, placement of children with disabilities in institutions also increases their vulnerability to violence. According to the WHO:

*“Placement of children with disabilities in institutions also increases their vulnerability to violence. In these settings and elsewhere, children with communication impairments are hampered in their ability to disclose abusive experiences.”*¹⁸

5.38 In Hong Kong, the statistics show that there is consistently high number of child and elder abuse cases for the past few years,¹⁹ although the statistics do not indicate that there is a high number of institutional abuses. However, as observed by the WHO, given that the number of abuse cases is likely to be an underestimation, and that the problem of elder abuse would become more serious as the population is aging, we consider that this supports that the proposed offence should apply to institutional settings as well.

Not exempting any sector

5.39 We note some Respondents’ suggestion of not applying the proposed offence to four sectors: education, care services for elderly and persons with disabilities, hospitals and medical personnel, and prisons.

5.40 In considering whether any sector should be excluded, we have drawn on the experience of New Zealand, which includes an express reference to cover “a staff member of any hospital, institution, or residence where the victim resides” as a defendant in its corresponding offence. In explaining the reasons for adding the express reference, the New Zealand Ministry of Justice commented that health professionals operate under a number of legal duties and professional codes of practice that require them to work to high standards of care:

*“As stated previously, section 195A [ie the corresponding New Zealand offence] sets a high standard of culpability and it is not unreasonable to expect a health professional to take reasonable steps to protect a third party if s/he is aware that a colleague has breached his or her duty in respect of that person and that person is at risk of death, grievous bodily harm, or sexual assault.”*²⁰

¹⁸ Regional Office for the Americas of the WHO, “Children with disabilities more likely to experience violence”. Available at: https://www3.paho.org/hq/index.php?option=com_content&view=article&id=6998:2012-children-disabilities-more-likely-experience-violence&Itemid=135&lang=en (accessed on 11 August 2021).

¹⁹ As discussed under the heading of “Alarming statistics on abuse cases” in paras 3.12 to 3.14 of Chapter 3 (Final Recommendation 3).

²⁰ See New Zealand Ministry of Justice, *Crimes Amendment Bill (No 2) - Report of the Ministry of Justice* (July 2011), at 18. Available at: https://www.parliament.nz/resource/en-nz/49SCSS_ADV_00DBHOH_BILL10599_1_A195677/5df9fef0c1d97406d8230e9cda8d6628a608fa4f (accessed on 20 March 2021).

5.41 Likewise, for persons in custody in prison or in detention, the New Zealand Ministry of Justice commented:

“The reference to ‘vulnerable adults’ and its definition has come from existing law and as such does not change existing liability. Persons in the custody of Police or the Corrections Service are already recipients of an appropriate standard of care as set down in legislation. Criminal responsibility is only likely to occur where a vulnerable adult who is detained is injured and the standard of care he received is less than the standard of care that a reasonable Police or Corrections Officer would be expected to provide.”²¹

5.42 We agree with the above explanation which, in our opinion, would also apply to the education sector and the care services sector (for elderly and persons with disabilities). To avoid criminal liability under the proposed offence, personnel in these sectors only need to take reasonable steps to protect the victims. We therefore do not agree that personnel and institutions in the four sectors suggested by the Respondents should be excluded from the proposed offence. This is because it is not unreasonable to expect them (ie health professionals, prison officers, immigration officers, police officers, teachers and school personnel, carers and care institutions etc) to take reasonable steps to protect a child or vulnerable person from death or serious harm whom they already owe a reasonable standard of care. In other words, if they have fulfilled their professional standard of care, they would not be liable under the proposed offence.

“Duty of care” – flexible to cover staff with different responsibilities

5.43 Some Respondents also suggest that there should be a clear definition of *“duty of care”* to define who should have the duty when a number of staff with different responsibilities in the institutions are involved in providing care service.

5.44 Indeed, we agree that there should be some clear parameters within which a *“duty of care”* would arise. We are attracted by the South Australian approach of stipulating that a defendant has a *“duty of care”* to the victim only if the defendant:

See paras 5.89 to 5.90 of the Consultation Paper for the discussion on the New Zealand Ministry of Justice’s comment on *“Health professionals’ comments”*.

²¹ See New Zealand Ministry of Justice, *Crimes Amendment Bill (No 2) - Report of the Ministry of Justice* (July 2011), at 17, see above at footnote 20. See para 5.28 of the Consultation Paper for the discussion on the New Zealand Ministry of Justice’s comment on persons in the custody of police or the correctional service.

- (a) is a parent or guardian of the victim; or
- (b) has assumed responsibility for the victim's care.²²

5.45 The South Australian Attorney General explained the concept of “*duty of care*” in the Parliament:

“A person has a duty of care to a victim (whether a child or vulnerable adult) if the person is a parent or guardian of the victim or has assumed responsibility for the victim’s care. In case where the accused is not a parent or guardian, it must be proved beyond reasonable doubt that he or she actually assumed responsibility for the care of the victim.

...

*The court will look at any responsibility assumed in the past and the circumstances in the household at the time of the victim’s death [in determining whether a person owed a duty of care to the victim]”.*²³

5.46 We believe that the concept of “*duty of care*” is flexible enough to cater for the various situations where there are multiple carers taking care of the victim in a care institution. Whether a frontline staff, the licence holder or management of a care institution should be liable would depend on the circumstances in each case, and any responsibility assumed in the past for the victim’s care.

5.47 Given the diverse types of institutions and working arrangements involved in care institutions, we consider that such a flexible approach is preferable to rigidly stipulating in the proposed offence who in the institution is liable, as this would allow the court to take into consideration the circumstances of each case.²⁴

²² Section 13B(4) of the South Australian *Criminal Law Consolidation Act 1935*. See paras 4.30 to 4.33 of the Consultation Paper for the discussion on “*Duty of care*” under the South Australian model.

²³ South Australian Hansard debates, House of Assembly, 30 June 2004, at 2625 to 2626, *per* Hon M J Atkinson (Attorney General). Available at: <http://hansardpublic.parliament.sa.gov.au/#/search/1/2004> (accessed on 14 April 2021). See para 4.32 (also 4.22) of the Consultation Paper for the discussion on “*duty of care*”.

²⁴ For example, unlike the proposed offence, the Australian Capital Territory *Crimes (Offences Against Vulnerable People) Legislation Amendment Act 2020* criminalises specifically a “*person in authority*” for failing to protect vulnerable person from criminal offence (section 36B). Available at: <https://www.legislation.act.gov.au/View/a/2020-41/20210420-74886/PDF/2020-41.PDF> (accessed on 20 March 2021).

See also Revised Explanatory Statement (13 August 2020), at 17 to 18. Available at: https://www.legislation.act.gov.au/b/db_62217/ (accessed on 20 March 2021).

Suffice for defendants to take reasonable steps

5.48 The proposed offence aims at protecting children and vulnerable persons by requiring responsible persons to take reasonable steps to protect the victims from serious abuses. It only covers cases where the failure to take reasonable steps was, in the circumstances, so serious that a criminal penalty is warranted.

5.49 In fact, the court has appreciated the efforts of persons involved in the welfare and care of children and vulnerable persons. In a tragic child abuse case, Hon Zervos J (as he then was) commended the efforts and dedication of the persons involved in the welfare and care of children who each played a role in bringing the case to justice, including the teachers, social worker, social welfare department personnel, medical staff and police officers:

*“I wish to acknowledge and commend the efforts and dedication of the persons involved in the welfare and care of children who each played a role in this tragic case.”*²⁵

No significant increase of duties and workload

5.50 There is also concern that the proposed offence may impose additional legal duties on carers and care institutions. However, as noted by some Respondents, care institutions are already regulated by existing legislation, regulations and rules, codes and guidelines, licence conditions and standards. The staff and the management of care institutions who have complied with these existing standards should be considered as having taken reasonable steps to protect the children and vulnerable persons, and would therefore not be liable under the proposed offence. We do not expect that the duties and workload of the carers and care institutions would increase significantly, comparing to those under the existing regulatory regime.

Guidelines

5.51 As to some Respondents’ request for practical guidelines on reporting of abuse, the Education Bureau issues circulars from time to time²⁶ to schools (including kindergarten and special schools) on the procedures (including reporting of abuse) for handling suspected cases of child maltreatment and domestic violence, apart from the various guidelines and guides published by SWD to handle abuse cases.²⁷

²⁵ *HKSAR v Wong Wing-man, Mandy alias Wang Xuenxin and Ling Yiu-chung, Rocky* [2018] HKCFI 1484, at paras 164 to 169.

²⁶ Education Bureau Circular No. 1/2020: *Handling Suspected Cases of Child Maltreatment and Domestic Violence*, at paras 5 and 7. Available at: <https://applications.edb.gov.hk/circular/upload/EDBC/EDBC20001E.pdf> (accessed on 20 March 2021).

²⁷ See discussion under the heading of “*What amounts to reasonable steps*” in paras 2.20 to 2.21 of Chapter 2 (Final Recommendation 1).

5.52 In England, apart from the circulars issued by the Ministry of Justice and Home Office,²⁸ the Crown Prosecution Service has issued legal guidance to assist prosecutors in making charging decisions in relation to child abuse offences, including the corresponding English offence.²⁹ We consider this an effective way to assist the stakeholders, including the care service sector and the prosecutors. Following the useful experience of England, Hong Kong could also issue similar circulars and prosecutorial guidance to assist the relevant professionals and stakeholders in understanding the proposed offence.

Increasing resources and training

5.53 Some Respondents have urged the Government to provide training and resources to parents, teachers, care service staff and institutions.

5.54 In adopting the South Australian model as the basis for the proposed offence, we note that the equivalent criminal neglect offence in South Australia was prepared against the backdrop of the government's child protection reform program and the government injected further sums over four years into child protection at the time of the passing of the offence.³⁰ Resources aside, other state in Australia provides for a delayed commencement of its provision to allow relevant training and processes to be established.³¹

5.55 In Hong Kong, we understand that the Government's recurrent spending on welfare and healthcare has increased in recent years³² and there are further plans to improve the quality of services and regulation of elderly care institutions.³³ In addition, the Government should allow adequate time for all

²⁸ UK Ministry of Justice, "*Domestic Violence, Crime and Victims (Amendment) Act 2012*" (Circular no 2012/03 June 2012), Annex A (Home Office Circular 9/2005). See above at footnote 6.

²⁹ The English Crown Prosecution Service, *Child Abuse (non-sexual) - prosecution guidance*. Available at: <https://www.cps.gov.uk/legal-guidance/child-abuse-non-sexual-prosecution-guidance> (accessed on 20 March 2021).

³⁰ South Australian Hansard debates, Legislative Council, 17 February 2005, at 1159-1160, per P Holloway. Available at: <http://hansardpublic.parliament.sa.gov.au/#/search/1/2005> (accessed on 14 April 2021).

³¹ For example, see Australian Capital Territory, *Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020, Revised Explanatory Statement* (13 Aug 2020), Details (Clause 2). The Australian Capital Territory provides for a delayed commencement for the criminal offence of "*failure to protect vulnerable person from criminal offence*" to allow relevant training and processes to be established.

³² The *Chief Executive's 2019 Policy Address*, at para 30. Available at: <https://www.policyaddress.gov.hk/2019/eng/p30.html> (accessed on 20 March 2021).

³³ See *Secretary for Labour and Welfare's Blog* (16 Aug 2020). Available at: https://www.lwb.gov.hk/tc/blog/post_16082020.html (accessed on 20 March 2021). The Government subsequently responded to the recommendations on improving the regulation of elderly care homes made by the Coroner's court in a death inquiry of an elderly resident of a private elderly care home that took place in Aug 2020.

stakeholders to familiarise with the proposed offence before its commencement. The issues of resources and training will be further dealt with in Chapter 9.

Our Final Recommendation 6

5.56 We have duly considered and weighed the reasons and arguments on all the issues, concerns and suggestions on the scope of defendants of the proposed offence, in light of overseas experiences, relevant judgments and other relevant materials. In conclusion, we recommend retaining Recommendation 6.

Final 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 the concept of “*member of the same household*” who has “*frequent contact*” with the victim used in section 5 of the English Domestic Violence, Crime and Victims Act 2004, should be used as alternative bases for liability under the proposed offence.³⁴

Number of responses to Recommendation 7

5.57 Of the Respondents who have expressly stated their stance on Recommendation 7, 34% (12/35) support it and 66% (23/35) oppose it.

	Number	Percentage (%)
Agree	12	11%
Oppose	23	20%
Neutral/No Comment	73	65%
Other Comments	5	4%
<u>Total</u>	<u>113</u>	<u>100%</u>

³⁴ The proposed section 25A(1)(b) of the OAPO in the draft Bill (Annex 1 of this Report):
“25A. (1) A person (**defendant**) commits an offence if—

...

- (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;”.

Comments from Respondents on Recommendation 7

Respondents supporting Recommendation 7

5.58 For Respondents who have expressly stated their stance in supporting that there should be no specific minimum age for the defendant in relation to the proposed offence, their reasons for supporting Recommendation 7 are set out below:

- (a) The minimum age of criminal responsibility, which is currently 10 years of age, has already afforded protection to under-aged defendants.³⁵
- (b) Children or infants of under-aged parents who have problems taking care of their children would be protected if there is no specific minimum age for the defendant in relation to the proposed offence.
- (c) Some elements of the proposed offence recognise *“the difference in awareness and power between children and adults”*. This would allow the court to take into account of the personal circumstances of under-aged defendants, eg in deciding whether they had failed to take reasonable steps to protect the victims.
- (d) The sentence imposed on under-aged defendants may be different from that imposed on adults to take into account his future development.

Respondents opposing Recommendation 7

Setting the minimum age for the defendant at 16 or 18 years

5.59 Two groups of Respondents, however, suggest setting the minimum age for the defendant in relation to the proposed offence at 16 and 18 years respectively. Their reasons for setting the age limit at 16 years are as follows:

- (a) This would reduce the risk of young people who are not mentally or psychologically mature of breaking the law inadvertently.
- (b) Adult defendants, not under-aged children bystanders, should bear the ultimate responsibility to protect children victims from harm.
- (c) It is doubtful whether it is fair and reasonable for a child under 16 to assume a *“duty of care”* to a victim or to be liable for the proposed offence.
- (d) It is also consistent with section 27 of the OAPO as the minimum age of a person liable to be prosecuted under section 27 is 16 years.

³⁵

Section 3 of the Juvenile Offenders Ordinance (Cap 226).

5.60 For Respondents suggesting that the minimum age for the defendant should be set at 18 years, their reasons are to follow the New Zealand model which sets the minimum age of defendant at 18 years, and to be consistent with the obligations under the UNCRC.

Setting the minimum age for the defendant at 10 years

5.61 On the other hand, a social service organisation and a medical organisation suggest that the minimum age for the defendant should be set at 10, ie the current minimum age of criminal responsibility under section 3 of the Juvenile Offenders Ordinance (Cap 226).

Other comments from Respondents

5.62 Some Respondents have also made the following general comments relevant to under-aged defendants.

(a) Domestic violence

It is very likely that an under-aged defendant is under duress or extreme domestic violence, or an adult defendant may exert authority over the under-aged defendant. It is not reasonable to expect a traumatised child witness of domestic violence or abuse to take reasonable steps to help another child victim. Putting these children at risk of prosecution is unreasonable.

(b) Review minimum age of criminal responsibility

The minimum age of criminal responsibility in Hong Kong should be reviewed. The Criminal Procedure Ordinance (Cap 221) and Cap 226 should be scrutinised to see whether a 10-year-old child is mature and developed enough to fully appreciate the gravity of his wrong-doings.

(c) Civil liability and rehabilitation

There are better ways to encourage child bystanders to speak out than to put them at risk of prosecution, like educating them about their rights and establishing more child-friendly complaint procedures in the child welfare system. It would be more appropriate to impose civil liability or provide for rehabilitation rather than to impose criminal liability on 16-17 years old children who fail to take reasonable steps to protect other children from harm.

Our analysis and response on Recommendation 7

No specific minimum age for the defendant in relation to the proposed offence

5.63 While some Respondents support that no specific minimum age limit should be set for the defendant in relation to the proposed offence, more Respondents consider that the minimum age for the defendant should be set at 16 or 18 years for the reasons set out above. A few Respondents suggest setting the age limit at 10 years. After carefully considering the responses, we consider that there is no need to specifically set out the minimum age for the defendant in relation to the proposed offence for the following reasons.

I. Minimum age of criminal responsibility

5.64 First of all, the minimum age of criminal responsibility is currently set at 10 years in Cap 226 and by default applies to all offences, and thus excludes under-aged defendants below the age of 10 years from criminal responsibility. This would, of course, also apply to the proposed offence (without the need of expressly setting it out again), unless another age is specifically stipulated for the offence.

II. Protecting children of under-aged parents

5.65 We note the above conflicting arguments put forth by the Respondents on the need to protect under-aged parents' children who often cannot protect themselves against their abusers, and the interests of young immature under-aged defendants. We agree that we have to weigh these considerations and strike the right balance.

5.66 In doing so, we are aware that although the English³⁶ and New Zealand³⁷ models impose a minimum age of 16 and 18 respectively for the defendant in the corresponding offences, there are provisions³⁸ which specifically stipulate that parents below that minimum age will still be liable.

³⁶ Section 5(3)(a) of the *Domestic Violence, Crime and Victims Act 2004*: "If [the defendant] was not the mother or father of [the victim] - (a) [the defendant] may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused the death or serious physical harm...". See para 7.32 of the Consultation Paper for the discussion on the English model.

³⁷ Section 152 of the *Crimes Act 1961* provides that "Every one who is a parent, or is a person in place of a parent, who has actual care or charge of a child under the age of 18 years is under a legal duty -
(a) to provide that child with necessities; and
(b) to take reasonable steps to protect that child from injury."

See para 5.61 of the Consultation Paper for the discussion on the New Zealand model.

³⁸ Section 5(3)(a) of the English *Domestic Violence, Crime and Victims Act 2004* and Section 152 of the New Zealand *Crimes Act 1961*. See above at footnotes 36 and 37.

5.67 The rationale for having these provisions is to reflect the special responsibility which parents have towards their children. We agree with the approach in both England and New Zealand that children must be protected from abuses even when the defendants are their under-aged parents, especially when there are ways to safeguard the interests of the latter as defendants (as illustrated in the South Australian model below).

III. Defences recognising difference in awareness and power between children and adults

5.68 Some Respondents are concerned about the ability of a child to protect another child victim and doubt whether it is fair and reasonable for a child under 16 years to assume a “*duty of care*” to the victim under the proposed offence.

5.69 We believe that these concerns can be addressed because some elements of the proposed offence would allow the court to recognise differences in awareness and power between children and adults, even without setting a specific minimum age higher than 10 years. This is how the South Australian model operates. The Attorney General there succinctly articulated in the South Australian Parliament³⁹ how elements of the corresponding offence could provide some possible defences for such under-aged defendants:

*“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. ... 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. ... this offence has other elements that allow a court to recognise the difference in awareness and power between children and adults.”*⁴⁰

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.

³⁹ South Australian Hansard debates, House of Assembly, 12 October 2004, at 334, *per* the Hon M J Atkinson (Attorney General). Available at: <http://hansardpublic.parliament.sa.gov.au/#/search/1/2004> (accessed on 14 April 2021). See para 7.34 of the Consultation Paper for the South Australian model on the reasons for not stipulating a specific minimum age of defendant higher than 10 years (the minimum age of criminal responsibility there).

⁴⁰ Same as above.

*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.”*⁴¹

IV. Safeguards to protect interests of under-aged defendants

5.70 A Respondent suggests that it would be more appropriate to impose civil liability on or to allow for rehabilitation of under-aged defendant than to impose criminal liability.

5.71 Apart from possible defences for under-aged defendants discussed above, there are also safeguards to protect their interests in both the prosecution and sentencing. The *Prosecution Code* has specific provisions on juvenile offenders:

“15.1 It is a longstanding legal requirement that in prosecuting juveniles the court must give priority to their welfare. Special procedural provisions apply to persons under the age of 16 years and, so far as possible, the hearing of such cases should be expedited and prosecuted in the Juvenile Court.

*15.2 Consequently, the prosecution often prefers to deal with allegations against juveniles by alternative methods to criminal prosecution, unless the seriousness of the offence or other circumstances require a prosecution in the public interest.”*⁴²

5.72 Moreover, for cases of domestic violence, the *Policy for Prosecuting Cases Involving Domestic Violence*⁴³ provides that criminal law and civil law may need to be used in conjunction. It recognises that some victims may not wish to pursue criminal action, preferring to make use of civil remedies and other safety and support mechanisms.

⁴¹ Same as above.

⁴² Department of Justice of Hong Kong, *Prosecution Code* (2013). Available at: <https://www.doj.gov.hk/en/publications/pdf/pdcode1314e.pdf> (accessed on 14 March 2021).

⁴³ Department of Justice of Hong Kong, *Policy for Prosecuting Cases Involving Domestic Violence*, at para 5:

“Stopping domestic violence is a priority for the prosecutor. Cases which proceed must be prosecuted effectively, and a multi-agency approach is vital. Criminal proceedings are just one element of this approach, and criminal law and civil law may need to be used in conjunction. Some victims may not wish to pursue criminal action, preferring to make use of civil remedies and other safety and support mechanisms. In deciding whether to prosecute, the safety of the victim, children and other persons involved must be considered.”

Available at: <https://www.doj.gov.hk/eng/public/pubppcdv.html#1> (accessed on 7 March 2021).

5.73 Furthermore, in sentencing under-aged defendants, young age is very often a mitigating factor. It is generally considered more important to rehabilitate a young offender than to severely punish him as a deterrent. There is also no doubt that the court must exercise great care before committing young offenders to prison.⁴⁴

V. Better protection to children

5.74 Some Respondents suggest setting a specific minimum age of defendant at 16 years for the proposed offence, for consistency with section 27 of the OAPO.

5.75 As the Respondents themselves have pointed out, it is not possible to charge parents under 16 for ill-treating and abusing their children under section 27. If the same minimum age is set for the proposed offence, parents under 16 cannot be charged with this offence as well. Obviously, this is not desirable from the angle of providing protection to children whose parents are below 16. A minimum age for the proposed offence at 10 (ie under Cap 226) would allow under-aged parents, who are excluded from criminal responsibility under section 27, to be charged under the proposed offence for failing to protect their children.

5.76 In conclusion, after carefully balancing the above different arguments, we recommend maintaining Recommendation 7 such that there is no need to impose a specific minimum age for the proposed offence. In addition, some Respondents suggest that the minimum age of criminal responsibility in Cap 226 should be reviewed. However, we do not consider it appropriate to deal with the general issue of minimum age of criminal responsibility in this Report as it is outside the terms of reference of the present study.

New recommendation: Secretary for Justice's consent to prosecute

5.77 We, however, understand some Respondents' concerns on subjecting under-aged defendants to prosecution under the proposed offence, and agree that the decision to prosecute must be made carefully and only in appropriate cases.

5.78 A Government department suggests that no prosecution for the proposed offence shall be instituted without the consent of the Secretary for Justice:

"... whilst the offender is not the abuser but is incriminated for not taking actions to protect the victim, the evidence of each case should be very carefully weighed. The threshold of prosecution should remain high and it may be more appropriate to seek the

⁴⁴ I Grenville Cross and Patrick Cheung, *Sentencing in Hong Kong* (LexisNexis, 9th ed 2020), at para 30-21.

consent from the Secretary for Justice prior to prosecution. As such, [we] suggested that no prosecution for the offence shall be instituted without the consent of the Secretary for Justice.”

5.79 We agree with this Respondent’s suggestion. Indeed, the *Prosecution Code* has stipulated this generally:

“6.1 The Secretary for Justice must give his or her consent before certain kinds of prosecutions can be undertaken. This is a safeguard to ensure that an appropriate level of scrutiny is exercised in particular cases.”

5.80 To ensure that a decision to prosecute an under-aged defendant under the proposed offence is cautiously made, we recommend that the requirement of obtaining Secretary for Justice’s consent first should be specifically stipulated in the statute, and thus a new sub-section (7) be added to the proposed section 25A of the OAPO:

“A prosecution for an offence under subsection (1) may only be started by or with the consent of the Secretary for Justice.”

Our Final Recommendation 7

5.81 Having carefully considered the views, arguments and suggestions from the Respondents, the positions on the minimum age for defendant in different overseas jurisdictions and other relevant materials, we recommend that Recommendation 7 should be retained and a new section 25A(7) should be added such that the consent of the Secretary for Justice to prosecute under the proposed offence is required.

Final Recommendation 7

We recommend that no specific minimum age for the defendant should be stipulated in the proposed offence, in line with the approach in section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005).

We recommend that the consent of the Secretary for Justice to prosecute under the proposed offence is required.⁴⁵

⁴⁵ The proposed section 25A(7) of the OAPO in the draft Bill (Annex 1 of this Report):
“25A. (7) *A prosecution for an offence under subsection (1) may only be started by or with the consent of the Secretary for Justice.*”

Chapter 6

The operation of the proposed offence

The Sub-committee's Recommendations 8, 9 and 10 in the Consultation Paper

6.1 This Chapter discusses the responses on the Sub-committee's following recommendations in the Consultation Paper:

Recommendation 8¹

"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) 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;*²
- (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'."*³

¹ See paras 7.36 to 7.40 of the Consultation Paper for the reasons for making the recommendation.

² The proposed section 25A(1)(a) of the OAPO in the draft Bill (Annex A of the Consultation Paper):

*"25A. (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;"*

³ The proposed section 25A(6) of the OAPO in the draft Bill (Annex A of the Consultation Paper):

"(6) In this section —

...

***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;"*

Recommendation 9⁴

“We recommend:

- (a) that section 14(1)(c) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005) should be adopted in the Hong Kong offence, subject to the substitution of the words ‘a risk’ for ‘an appreciable risk’ in the provision; and*
- (b) in line with Recommendation 8 above, that the words ‘or neglect’ should be added after ‘unlawful act’ in sub-section (1)(c) of the new provision.”⁵*

Recommendation 10⁶

“We recommend that:

- (a) section 14(1)(d) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005) should be adopted in the Hong Kong offence; and*
- (b) the word ‘such’ should be added before ‘harm’ in the new provision.”⁷*

⁴ See paras 7.41 to 7.46 of the Consultation Paper for the reasons for making the recommendation.

⁵ The proposed section 25A(1)(c) of the OAPO in the draft Bill (Annex A of the Consultation Paper):

*“25A. (1) A person (**defendant**) commits an offence if—*

...

(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”.

⁶ See paras 7.47 to 7.51 of the Consultation Paper for the reasons for making the recommendation.

⁷ The proposed section 25A(1)(d) of the OAPO in the draft Bill (Annex A of the Consultation Paper):

*“25A. (1) A person (**defendant**) commits an offence if—*

...

(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.”.

Number of responses to Recommendation 8(a) and (b)

6.2 Of the Respondents who have expressly stated their stance on Recommendation 8(a), 94% (15/16) support it.

	Number	Percentage (%)
Agree	15	13%
Oppose	1	1%
Neutral/No Comment	89	79%
Other Comments	8	7%
<u>Total</u>	<u>113</u>	<u>100%</u>

6.3 Of the Respondents who have expressly stated their stance on Recommendation 8(b), 100% (14/14) support it.

	Number	Percentage (%)
Agree	14	12%
Oppose	0	0%
Neutral/No Comment	99	88%
Other Comments	0	0%
<u>Total</u>	<u>113</u>	<u>100%</u>

Comments from Respondents on Recommendation 8

Adding “or neglect” in Recommendation 8(a)

6.4 All but one of the Respondents who have expressly indicated their stance support adding the words “or neglect” after “unlawful act” in the proposed offence as proposed in Recommendation 8(a). They support the recommendation because adding the words “or neglect” would enable the proposed offence to apply where serious harm to the victim is caused by an abuser’s “neglect”, which may not constitute an “unlawful act” under the existing laws of Hong Kong for the purposes of the proposed offence. A social service organisation has made the following observations:

“In recent years, deaths or injuries of children caused by neglect have occurred from time to time. According to the Child Protection Registry Statistical Reports 2017 and 2018, for neglect cases, the majority of abusers or suspected abusers were parents of the victims, and children within the age group of 0 to 2 years old were at the highest risk. In 2017 and 2018, for this age group, there were 167 and 150 newly registered neglect cases respectively. In these cases, there was no lack of abusers or suspected abusers with undesirable hobbies, like drug abuse, alcoholism and gambling.”

The proposed offence would then cover neglect of a vulnerable person who is an elderly (such neglect is not caught by section 27 of the OAPO which only protects children from neglect).⁸

6.5 A social service organisation, however, opposes to adding the words “or neglect”, because, in its opinion, “neglect” to a certain degree is an act of unintentional fault and it is disproportionately severe to impose 15-20 years’ imprisonment because of neglect.

Adopting “a person of full legal capacity” in Recommendation 8(b)

6.6 All the Respondents who have expressly indicated their stance support 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” as proposed in Recommendation 8(b). While most of them have not expressly set out their reasons, a legal professional body considers that the recommendation is suitable in the context of the proposed offence.

Our analysis and response on Recommendation 8

Adding “or neglect” in Recommendation 8(a)

6.7 We note the Respondents’ overwhelming support for Recommendation 8(a) for the good reasons as set out above.

6.8 Nevertheless, a Respondent opposes to adding “or neglect” after “unlawful act” because in its opinion, it is disproportionately severe to impose 15-20 years’ imprisonment because of neglect.

6.9 However, we consider that a high maximum penalty is justified for cases of neglect for the following reasons:

⁸ Neglect of a child is an offence under section 27(1) of the OAPO and would thus constitute an “unlawful act” under the proposed offence as an “act” is defined to include an “omission”.

- (a) The proposed offence applies only where the consequence was severe (ie where the victim died or suffered serious harm (say in a permanent vegetative state)) as a result of the neglect.
- (b) The defendant's failure to take reasonable steps to protect the victim from harm has to be "*so serious that a criminal penalty is warranted*".

The proposed offence applies only where there is a serious dereliction of the duty to protect a child or vulnerable person from death or serious harm. It is about serious dereliction that the defendant is to be held criminally liable. As such, the proposed offence only applies to cases where right-thinking persons would consider there is a need for criminal punishment as opposed to civil proceedings or internal disciplinary action.

6.10 With the overwhelming support of the Respondents and the Respondent's concern being addressed above, we recommend retaining Recommendation 8(a).

Adopting "a person of full legal capacity" in Recommendation 8(b)

6.11 All the Respondents who have expressly indicated their stance support Recommendation 8(b) on replacing the phrase "*an adult of full legal capacity*" with "*a person of full legal capacity*" in the definition of an "*unlawful act*" to cover children of 10 to 18 years of age committing the relevant "*unlawful act*". We, therefore, also recommend retaining Recommendation 8(b).

Respondents' queries and suggestions

6.12 Although Respondents overwhelmingly support Recommendation 8, some of them have raised a number of queries and suggestions on, *inter alia*, the meaning of "*unlawful act*" or "*neglect*" and also how these terms are applied in abuse cases. We will deal with these queries and suggestions in the paragraphs below.

I. Explanations and examples of "unlawful act" or "neglect"

6.13 Some Respondents suggest that specific explanations and illustrative examples of the terms "*unlawful act*", "*omission*" and "*neglect*" should be given to enable the public to understand these terms.

6.14 In deciding to adopt the generic terms of "*unlawful act*", "*omission*" and "*neglect*", we have looked into the English experience. When the English Law Commission⁹ formulated its model, it set out a list of offences which may be committed against a victim by the abuser in the schedule to its draft bill,

⁹ See para 3.11 of the Consultation Paper for the discussion on the English Law Commission's model.

including murder, manslaughter, wounding, assault, and sexual offences. Instead of listing these offences, the enacted English model stipulates that an “*unlawful*” act is one that constitutes an offence. We agree that this generic approach has the advantage of not limiting the type or nature of the conduct or offence that may constitute the “*unlawful act*”.¹⁰

6.15 With the benefit of the English experience, we consider it preferable to use the term “*unlawful act*” rather than to provide for a schedule of offences as it is not possible to list all the offences that could be committed by abusers. For the same reasons, we are also not in favour of setting out a list of the types of “*omission*” or “*neglect*” in the proposed offence.

6.16 However, we understand some of the Respondents’ suggestion of providing specific explanations and illustrative examples on these terms so as to assist them and the public in understanding their scope. To address a similar suggestion, the UK Ministry of Justice has published circulars which provide some explanations on the application of “*unlawful act*” and “*neglect*”, for example:

- (a) The “*unlawful act*” which triggers the offence will in the vast majority of cases be an offence against the person (such as grievous bodily harm).
- (b) Where there are already criminal offences of wilful ill-treatment or neglect, then wilful neglect is also an “*unlawful act*”. (This is because “*act*” is defined to include “*omission*” which covers “*neglect*”).¹¹

(In the Hong Kong context, “*unlawful act*” covers the offences in section 27(1) of the OAPO and section 65(1) of the Mental Health Ordinance (Cap 136).)¹²

¹⁰ See paras 3.43 and 7.36 to 7.40 of the Consultation Paper for the discussion on “*An unlawful act or neglect*”.

¹¹ UK Ministry of Justice, “*Domestic Violence, Crime and Victims (Amendment) Act 2012*” (Circular no 2012/03 June 2012), Annex A (Home Office Circular 9/2005), at para 24. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/219903/circular-03-12-dvcv-act.pdf (accessed on 5 April 2021).

Examples given include:

- (a) Section 1 of the Children and Young Persons Act 1933 (cruelty or neglect of a child under 16);
- (b) Section 127 of the Mental Health Act 1983 (ill-treatment or neglect of a patient receiving treatment for a mental disorder); and
- (c) Section 44 of the Mental Capacity Act 2005 (ill-treatment or neglect of a person who lacks capacity).

¹² Section 65(1) of the Mental Health Ordinance (Cap 136) provides: “[a]ny attendant, nurse, servant or other person employed in a mental hospital who ill-treats or wilfully neglects any patient shall be guilty of an offence and shall be liable on summary conviction to a fine at level 2 and imprisonment for 2 years.”

- (c) Where a vulnerable adult dies as a result of a serious neglect, it would constitute gross negligence manslaughter.

6.17 In light of the English experience, the relevant authorities in Hong Kong could issue similar circulars to frontline care personnel, explaining the application of the terms “*unlawful act*” and “*neglect*” with examples of offences and types of neglect that may constitute abuse.

6.18 As a matter of fact, SWD’s *Procedural Guidelines for Handling Elder Abuse Cases* already sets out a list of offences related to elderly abuse, including various offences under the OAPO (for physical abuse) and sexual offences under the Crimes Ordinance (Cap 200).¹³ This would surely assist frontline care personnel in getting a clearer idea of the scope of “*unlawful acts*”.

II. Whether “neglect” is confined to failure to “provide adequate food, clothing or lodging”

6.19 Some Respondents ask whether “*neglect*” is confined to failure to “*provide adequate food, clothing or lodging*” as stated in section 27(1) of the OAPO. We note that the meaning of “*neglect*” was discussed in the case of *R v Sheppard* by the House of Lords which held as follows:

“Neglect of a child means, according to the ordinary use of language, a failure to bestow proper care and attention upon the child. ... It is not possible to set any absolute standard, though it might not be difficult to recognise a certain minimum below which no reasonably conscientious parent would fall. By section 1(2)(a),¹⁴ however, it is deemed to constitute neglect of a child in the relevant manner that the parent ‘has failed to provide adequate food, clothing, medical aid or lodging for him.’ In my opinion this deeming provision sets certain objective standards which certainly cover the largest part of the field of neglect. It is unnecessary to consider how much further the field may extend. The test stated, in relation to each type of provision mentioned, is that of adequacy, a word which itself conveys the idea of a minimum standard. It is necessarily to be implied that the child had need of the provision in question.”¹⁵ (emphasis added)

6.20 To assist the court in determining whether the minimum standard for neglect has been reached, the relevant authorities, professionals and stakeholders in the care services sectors could issue guidelines to set out the standard for neglect. Indeed, the SWD’s *Procedural Guide for Protecting*

¹³ SWD’s *Procedural Guidelines for Handling Elder Abuse Cases* (revised 2021), at paras 5.1 to 5.6. Available at: https://www.swd.gov.hk/en/index/site_pubsvc/page_elderly/sub_csselderly/id_serabu/seelder/ (accessed on 5 April 2021).

¹⁴ Section 1 of the Children and Young Persons Act 1933.

¹⁵ *R v Sheppard* [1981] AC 394, at 418.

Children, apart from explaining the meaning of “neglect”,¹⁶ also includes a set of “Frequently Asked Questions about the Definition of Child Maltreatment” which illustrates the different scenarios where a child may suffer from neglect.¹⁷ Similarly, neglect of the elderly has been explained in the SWD’s *Procedural Guidelines for Handling Elder Abuse Cases*.¹⁸ These guidelines/guides would assist frontline care personnel in understanding the scope of “neglect”.

III. “Act” includes “a course of conduct”

6.21 Some Respondents ask whether an “unlawful act” or “neglect” is a long-term, occasional or single occurrence. We would like to point out that the word “act” is defined in the proposed offence to include “a course of conduct”. This would include a systematic series of assaults which

¹⁶ SWD, *Protecting Children from Maltreatment - Procedural Guide for Multi-disciplinary Co-operation (Revised 2020)*, at p 27-28. Available at: https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/id_1447/ (accessed on 5 April 2021).

“[Neglect] refers to a severe or repeated pattern of lack of attention to a child’s basic needs that endangers or impairs the child’s health or development.

Neglect may be caused by the following forms:

- (a) Physical neglect includes failure to provide necessary food/clothing/shelter, failure to prevent physical injury/suffering, lack of appropriate supervision, and leaving a young child unattended. The revised 2020 version also includes ‘improper storage of dangerous drugs resulting in accidental ingestion by a child or allowing a child to stay in a drug-taking environment resulting in inhalation of the dangerous drugs by a child.’*
- (b) Medical neglect includes failure to provide necessary medical or mental health treatment to a child.*
- (c) Educational neglect includes failure to provide education or ignoring the educational/training needs arising from a child’s disability. Training needs is included in the 2020 version of the Procedural Guide.*
- (d) Emotional neglect is now put under the scope of psychological harm/abuse in the revised 2020 version of the Procedural Guide.”*

¹⁷ See above, at p 33 to 37. The *Procedural Guide for Protecting Children* contains a set of “Frequently Asked Questions about the Definition of Child Maltreatment” including questions on maltreatment relating to neglect:

- “4. At what age a child is considered neglect when being left unattended at home or elsewhere?*
- 5. Does school non-attendance of children/adolescents constitute neglect?*
- 6. Does it constitute neglect or psychological harm/abuse if parent(s) cannot fulfill a child’s basic/psychological needs due to mental/emotional/intellectual problems or chronic illness, or reject the required training of a child due to inability in accepting the child’s special needs?*
- 7. Does it constitute neglect if a pregnant woman is found to have abused drugs/alcohol during pregnancy or have suspected dangerous drugs/drug-taking equipment at home, or if a newborn’s urine sample is tested positive for dangerous drugs, etc.?*
- 8. For children with chronic/serious illness or in poor health, will it constitute medical neglect if the parents fail to comply with medical advice for their children to receive treatment or if they make use of alternative therapy for their children?”*

¹⁸ SWD’s *Procedural Guidelines for Handling Elder Abuse Cases* (revised 2021), at para 2.4, see above at footnote 13.

cumulatively cause the death of, or serious harm to, the victim.¹⁹ Therefore, the proposed offence would cover long-term abuses as well as a single or occasional occurrence.

6.22 We must, however, reiterate that although the proposed offence would cover a single or occasional occurrence, it does not cover accidents which the defendant could not have anticipated or avoided. This is because a defendant would not be liable under the proposed offence if he does not have reasonable grounds to believe that serious harm would be caused to the victim.

IV. Separate provision of neglect for vulnerable persons not necessary

6.23 A Respondent suggests that instead of adding “*or neglect*” after “*unlawful act*”, a separate “*neglect*” provision for vulnerable persons with an interpretation of “*neglect*” should be made. With the overwhelming support on adding “*or neglect*” after “*unlawful act*”, and the reasons set out above, we do not think this suggestion desirable. Rather, it is preferable to deal with both children and vulnerable persons in the single provision of the proposed offence since the purpose for protecting these two categories of victims is the same.

6.24 Besides, this is also consistent with the approaches of all the three models in South Australia, England and New Zealand which apply to both children and vulnerable adults. The New Zealand Law Commission has robustly stated its reasons for adopting this approach:

*“[w]e are proposing significant reforms to the laws relating to child neglect and ill treatment – and also, to the neglect and ill treatment of equally vulnerable adults (eg, the elderly or impaired). There is no defensible rationale, in our view, for distinguishing between the two categories of victim.”*²⁰

V. Elderly care institutions: manpower-shortage, resources and guidelines

6.25 Some Respondents are concerned about how care institutions could protect themselves from inadvertently contravening the proposed offence, especially when, in the face of manpower shortage, the elderly may often be left alone in their rooms.

6.26 We notice that the Government has allocated an increasing amount of resources in the community and residential care services for the elderly.²¹ Besides, in May 2019, the Working Group on the Review of

¹⁹ See para 3.46 of the Consultation Paper for the discussion on “*Unlawful act*” in the English model.

²⁰ New Zealand Law Commission, *Review of Part 8 of The Crimes Act 1961: Crimes Against the Person (Report 111)*, at para 5.3.

²¹ LWB & SWD: *Administration’s paper on Measures to enhance community and residential care services for the elderly* (January 2021), at para 2: There is an approximately 17% increase in the estimated recurrent expenditure on elderly services in 2020-21 compared to the 2019-20 revised estimate, and an approximately 60% increase compared to the 2017-18 actual expenditure. Available at:

Ordinances and Codes of Practice for Residential Care Homes recommended upgrading the statutory minimum staffing requirements in respect of care homes.²²

6.27 Furthermore, the *Procedural Guidelines for Handling Elder Abuse Cases* was revised in 2019 and further revised in 2021 in view of the development of welfare services. This would provide updated guidance to carers and elderly care institutions on how to handle elder abuse cases and neglect cases. We believe that these measures would assist elderly care institutions to avoid from inadvertently committing the proposed offence. The issues of resources and supporting measures are further addressed in Chapter 9.

Our Final Recommendation 8

6.28 Other than the overwhelming support of the Respondents, we have also addressed in our above analysis and response their queries and suggestions in the light of experience in overseas jurisdictions and other relevant materials. We therefore recommend retaining Recommendation 8.

Final Recommendation 8

We recommend adopting in the proposed offence the concept of, and definitions relating to, “unlawful act” in section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005),²³ subject to the following amendments:

- (a) the addition of the words “or neglect” after “unlawful act” in the first sub-section of the proposed offence;²⁴**
- (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”.²⁵**

<https://www.legco.gov.hk/yr20-21/english/panels/ws/papers/ws20210111cb2-598-3-e.pdf> (accessed on 11 March 2021).

²² LWB: “*Proposed Amendments to Ordinances for Residential Care Homes for the Elderly and Residential Care Homes for Persons with Disabilities*” (December 2019), at 4 (Recommendation 3), available at:

[https://www.lwb.gov.hk/en/other_info/Information_paper_\(Eng\).pdf](https://www.lwb.gov.hk/en/other_info/Information_paper_(Eng).pdf) (accessed on 11 March 2021).

²³ See discussion on paras 4.99 to 4.104 and footnote 73 of Chapter 7 of the Consultation Paper on the South Australian amendment of “unlawful act”.

²⁴ The proposed section 25A(1)(a) of the OAPO in the draft Bill (Annex 1 of this Report):
“25A. (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;”.

²⁵ The proposed section 25A(6) of the OAPO in the draft Bill (Annex 1 of this Report):
“25A. (6) In this section—

...

Comments from Respondents on Recommendation 9

Respondents supporting Recommendation 9(a) and (b)

6.29 A majority of the Respondents (69%, 11/16) who have expressly stated their stance on Recommendation 9(a) support it. Their reason for supporting the Recommendation is that it can raise the vigilance of carers so that abuse cases with potential risk of causing serious harm to the victims can be identified at an early stage. This could enable the relevant authorities to intervene earlier to prevent the abuses from escalating. In addition, they also support that the proposed offence should not target accidents.

	Number	Percentage (%)
Agree	11	10%
Oppose	5	4%
Neutral/No Comment	88	78%
Other Comments	9	8%
<u>Total</u>	<u>113</u>	<u>100%</u>

6.30 All the Respondents (100%, 10/10) who have expressly stated their stance on Recommendation 9(b) support it. While expressing its support, a women's group is concerned that the meaning of "*neglect*" is not easily comprehensible such that people may commit the proposed offence inadvertently.

	Number	Percentage (%)
Agree	10	9%
Oppose	0	0%
Neutral/No Comment	102	90%
Other Comments	1	1%
<u>Total</u>	<u>113</u>	<u>100%</u>

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;”.

Respondents opposing Recommendation 9(a)

6.31 On the other hand, some Respondents have expressly opposed Recommendation 9(a). The reasons for their objections are set out below.

Mens rea of “was, or ought to have been aware” not appropriate

6.32 A social service organisation is of the view that the *mens rea* of “was, or ought to have been aware” of a risk of serious harm to the victim (ie the South Australia model) adopted in the Consultation Paper is not appropriate. Instead, the Respondent proposes adopting the *mens rea* that a defendant “knew” that the victim is at risk (ie the New Zealand model). According to the Respondent, the term “ought to have been aware” suggests adopting an “objective test” (taking into account of the defendant’s past understanding of the victim and the victim’s family), which is more difficult to apply than the subjective test that the defendant “knew” that the victim is at risk.

Qualifying “risk” of serious harm

6.33 Moreover, some Respondents suggest that the word “risk” should be qualified. A legal professional body proposes adding “appreciable”, “real” or “significant” to qualify “risk” and makes the following observations:

- (a) The South Australian model has the word “appreciable” without which would “water down” the requirements for the proposed offence.
- (b) The English Law Commission refers to a “real” risk.
- (c) The English corresponding offence has the adjective “significant” qualifying “risk”.

Other comments from Respondents

6.34 In addition, some Respondents have made the following comments without indicating support or opposition to Recommendation 9.

Personal circumstances of defendant relevant

6.35 A Government department observes that it could be difficult to gather evidence to prove some elements of the proposed offence, including a defendant’s awareness of the act that kills or harms the victim and the action that should be regarded as reasonable steps to protect the victim from harm. It suggests that the following factors should be considered:

- (a) A young defendant or a defendant with disability may not be aware of the act, or be able to take reasonable steps to protect the victim, whereas an adult or a person with no disability may do so.
- (b) A defendant may genuinely believe that the consequence of the act may not result in the victim's death or seriously harming the victim.
- (c) A defendant may be subject to serious domestic violence by the abuser and is unable to take reasonable steps to protect the victim.
- (d) An abuser may exert authority on the defendant such that the defendant is fearful of taking reasonable steps to protect the victim.

Accident

6.36 While noting that the proposed offence does not target accident, some Respondents are concerned that it could be difficult to differentiate accidents from serious harm caused by the negligence of the carers and that parents and family members living with the victims would be at risk of prosecution for accidents.

Our analysis and response on Recommendation 9

Mens rea of “was, or ought to have been aware” substituted; Personal circumstances of defendant relevant

6.37 We note the Respondent's argument for opposing Recommendation 9(b), ie the *mens rea* of “was, or ought to have been aware” is not appropriate; and the suggestion of taking into account of the personal circumstances of defendants. As already elaborately discussed under Final Recommendation 3, the *mens rea* of the proposed offence should be “knew, or had reasonable grounds to believe” that there was a risk of serious harm to the victim (replacing “was, or ought to have been, aware” as proposed in the Consultation Paper).²⁶ This revised *mens rea* is an objective test with a subjective element (ie, to be applied from the viewpoint of a defendant and not the strict test of an objective bystander).²⁷

²⁶ See the discussion under the heading of “Knowledge of risk not required: for better protection of potential victims” in paras 3.18 to 3.21 of Chapter 3 (Final Recommendation 3).

²⁷ The court would therefore take into consideration factors such as a defendant's ability and genuine belief, any threat or violence from the abuser, and power difference between the defendant and the abuser. See the discussion under the heading of “Knew, or had reasonable grounds to believe” in paras 3.24 to 3.26 of Chapter 3 (Final Recommendation 3).

“Risk” of serious harm

6.38 As to Respondents’ suggestion of qualifying “risk” with an adjective (“appreciable”, “significant” or “real”), we are of the view that there is no need to do so for the reasons set out below.

6.39 Although the corresponding English offence qualifies “risk” by adding “significant”, the Court of Appeal, in interpreting the term “risk” in another statute, held as follows:

*“there is no need to provide any paraphrase of the statutory concept of ‘risk’ ... [the term ‘risk’ already suggests that] the risk must be a material or real risk; put otherwise, it must not be trivial, fanciful or hypothetical.”*²⁸

The Court of Appeal said in the case of *R v Porter*:

*“In our view it is not necessary to provide any paraphrase of the statutory concept of risk ... What is important is that the risk which the prosecution must prove should be real as opposed to fanciful or hypothetical ... There is no obligation under the statute to alleviate those risks which are merely fanciful.”*²⁹

6.40 Likewise, the New Zealand corresponding offence only has the word “risk” without being qualified by an adjective. In the opinion of its Ministry of Justice, the word “risk” already carries the meaning that the risk should be a “real or appreciable” risk of harm:³⁰

*“It is also likely, based on existing relevant case law, that the Court would require that it was not just ‘a risk’ but a ‘real or appreciable’ risk of harm. In other words there needs to be an immediate causal connection between [the defendant]’s unlawful act or omission to perform a legal duty and the risk of harm.”*³¹

²⁸ *Balfour Beatty Infrastructure Services Ltd, Enterprise (AOL) Ltd v Health and Safety Executive* [2014] EWCA Crim 2684, at para 46. In this case, the defendant was convicted of failing to ensure the health and safety at work of non-employees under section 3(1) of the *Health and Safety at Work Act 1974* which provides: it shall be the duty of every employer to conduct his undertaking in such a way as to ensure so far as is reasonably practicable that persons not in his employment, who may be affected thereby, are not thereby exposed to risks to their health or safety.

²⁹ *R v Porter* [2008] EWCA Crim 1271, at para 16. The Court of Appeal ruled on section 3(1) of the *Health and Safety at Work Act 1974*. See *Balfour Beatty Infrastructure Services Ltd*, at footnote 28.

³⁰ See New Zealand Ministry of Justice, *Crimes Amendment Bill (No 2): Report of the Ministry of Justice* (July 2011), at 10. Available at: https://www.parliament.nz/resource/en-nz/49SCSS_ADV_00DBHOH_BILL10599_1_A195677/5df9fef0c1d97406d8230e9cda8d6628a608fa4f (accessed on 21 March 2021).

³¹ See also para 5.67 of the Consultation Paper for the discussion on the New Zealand model.

6.41 Although the proposed offence is modelled on the South Australian corresponding offence which adopts “*appreciable risk*”, we do not see the need to have this or any adjective before the word “*risk*” because the revised *mens rea* of “*knew, or had reasonable grounds to believe*” that there was a risk of serious harm intrinsically means that the risk must be “*appreciable*”.

6.42 In our opinion, the word “*risk*” is already sufficient to limit the proposed offence to cases where a defendant “*knew, or had reasonable grounds to believe*” that serious harm would be caused to the victim. In other words, the proposed offence does not apply to an accident which a defendant did not know or had no reasonable grounds to believe that would happen. In addition, a further safeguard in the proposed offence to prevent a parent or a carer from being charged for an accident is that his failure to take such reasonable steps had to be so serious that a criminal penalty is warranted.³²

Our Final Recommendation 9(a) and (b)

6.43 We note the support of the Respondents on Recommendation 9(a) and 9(b) (69% and 100% respectively), and have also addressed the Respondents’ concerns as set out above. We recommend retaining Recommendation 9(a) subject to Final Recommendation 3(c) on revising the *mens rea*.

6.44 As the Respondent’s concern on the meaning of “*neglect*” has already been addressed earlier in this chapter in relation to Recommendation 8(a), we recommend retaining Recommendation 9(b).

Final Recommendation 9

We recommend:

- (a) that section 14(1)(c) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005) should be adopted in the proposed offence, subject to Final Recommendation 3(c) and the substitution of the words “*a risk*” for “*an appreciable risk*” in the provision; and
- (b) in line with Final Recommendation 8 above, that the words “*or neglect*” should be added after “*unlawful act*” in sub-section (1)(c) of the proposed offence.³³

³² Section 25A (1)(e) of the proposed offence.

³³ The proposed section 25A(1)(c) of the OAPO in the draft Bill (Annex 1 of this Report):
“25A. (1) A person (**defendant**) commits an offence if—

Number of responses to Recommendation 10

6.45 All Respondents who have expressly stated their stance support Recommendation 10(a) and Recommendation 10(b) ((100%, 7/7) and (100%, 9/9) respectively) without giving detailed reasons.

Recommendation 10(a)

	Number	Percentage (%)
Agree	7	6%
Oppose	0	0%
Neutral/No Comment	80	71%
Other Comments	26	23%
<u>Total</u>	<u>113</u>	<u>100%</u>

Recommendation 10(b)

	Number	Percentage (%)
Agree	9	8%
Oppose	0	0%
Neutral/No Comment	104	92%
Other Comments	0	0%
<u>Total</u>	<u>113</u>	<u>100%</u>

Comments from Respondents on Recommendation 10

6.46 In addition, 23% of all the Respondents (ie 26/113) have provided their comments and suggestions without clearly indicating whether they support or oppose Recommendation 10(a). The following paragraphs set out their comments and suggestions.

...

- (c) *the defendant knew, or had reasonable grounds to believe, that there was a risk that serious harm would be caused to the victim by the unlawful act or neglect;*”.

Meaning of “steps that the defendant could reasonably be expected to have taken in the circumstances” unclear

6.47 Some Respondents consider that the meaning of the test “*steps that the defendant could reasonably be expected to have taken in the circumstances*” (“Such Steps”) is unclear and further explanation should be given on:

- (a) the types of Such Steps that a defendant should take to protect the victim; and
- (b) the standard of care expected of a carer in taking Such Steps.

6.48 They suggest that the relevant professional sectors should prescribe clear guidelines with a definition of Such Steps, which should be issued to the social welfare sector, the educational sector and the public:

- (a) The existing guidelines should be reviewed to make it user friendly and updated from time to time. There is a concern that these guidelines are only useful for professionals with training and experience in dealing with children and families with problem of abuse. However, they are not suitable for untrained frontline workers for children.
- (b) The guidelines should clarify what Such Steps are and the specific point in time at which Such Steps should be taken. This is because abuse cases resulting in serious harm to the victims can be complex, and may involve numerous stages and take a long time to lead to serious harm or death.
- (c) The guidelines should set out what official documents and records are required to prove that Such Steps have been taken by frontline carers and professional carers.

Practical difficulties in reporting suspected abuse cases

6.49 Some Respondents, particularly those in the care service sector, have reflected that they have encountered the following practical difficulties in reporting suspected abuse cases:

- (a) Whether reporting to the supervisors/management of the care institution is sufficient, without taking protective measures to protect the victim.
- (b) Whether it is necessary to report to the Police.
- (c) How to prove that the case has been reported.
- (d) It is often difficult to report against family members, particularly in elder abuse cases. In considering whether to report the abuse, the social worker has to take into account the impacts on the

long-term relationship between the elder and his family members, his ability to cope with his emotion, and his future needs for care.

- (e) How to protect the “reporter” who has reported the suspected abuse case to the authorities.
- (f) It is difficult to reconcile the duty to report an abuse with the duty of confidentiality towards a victim, which is imposed on hospitals and medical staff under the common law, the Personal Data (Privacy) Ordinance (Cap. 486) and codes of conduct of professional bodies.

Defendant’s circumstances undermining ability to take Such Steps

6.50 Moreover, some Respondents comment that a defendant’s circumstances may affect his ability to take Such Steps:

- (a) Personal circumstances of defendants
 - (i) A defendant may lack the ability to take Such Steps because of his youth, old age or disability.
 - (ii) Domestic violence

Given the often unequal power dynamic within a household (whether economically or physically), women are often victims of domestic violence. Apart from physical risk, she also has to face the economic reality, and the difficulty of finding a safe accommodation for herself and the abused children. Therefore, her ability to take Such Steps to protect the victim is often limited.
 - (iii) Domestic workers

Domestic workers may not be able to take Such Steps which an ordinary person may do because of power imbalance and duress from their employers. The situation may be further exacerbated if an employer threatens to withhold wages, terminate the employment contract, or report the worker to the Police if the worker takes any steps to protect the victim. Moreover, if they choose to act as witnesses in the trial of abuse cases, they have to bear the financial burden of returning to Hong Kong to testify.
- (b) Circumstances of the care institution
 - (i) When a victim is being taken care of by various carers, it is difficult to tell what Such Steps should be taken by each carer. For example, a victim may be taken care of by a care institution, his family, a social worker and other professional carers.

- (ii) Problem of understaffing in care institutions coupled with poor facilities may limit the steps that a defendant could reasonably take.

Victims' circumstances

6.51 A victim's circumstances may also make it difficult for the carers to take Such Steps to protect him:

- (a) A vulnerable person (eg an elderly) or the parent/guardian/family members of the children and vulnerable persons may refuse to follow the professional advice of the medical or health-care staff.
- (b) A victim may have a tendency to harm himself or is suicidal.

Our analysis and response on Recommendation 10

6.52 We note that there is no opposition to Recommendation 10(b). We have carefully considered the comments and suggestions of the Respondents on Recommendation 10(a) and note the various concerns raised by them.

Objective test with subjective element (personal circumstances of defendants)

6.53 Some Respondents are concerned that a defendant, because of his personal circumstances, may not be able to take "*steps that [an ordinary person] could reasonably be expected to have taken in the circumstances*". In their opinion, a defendant's personal circumstances should be taken into account when considering whether he has failed to take Such Steps to protect the victim. We must point out that the test of "*Such Steps*" recommended in the Consultation Paper³⁴ is meant to be flexible enough to do that. In other words, the test of whether a defendant has failed to take Such Steps should be a partly objective test taking into account of the subjective element of the defendant.³⁵

6.54 With the same test as the "*Such Steps*" test, the tests in both the South Australian³⁶ and English³⁷ models have the same effect. As explained

³⁴ See para 7.50 of the Consultation Paper for the relevant discussion under the heading of "*Defendant's failure to take steps was so serious that a criminal penalty is warranted*".

³⁵ Ward and Bird, *Domestic Violence, Crime and Victims Act 2004 – A Practitioner's Guide* (2005), at para 3.27.

³⁶ See paras 4.48 to 4.49 of the Consultation Paper for the relevant discussion under the headings of "*Reasonable steps taken*" and "*Unreasonable to expect steps to be taken*" in relation to the South Australian model.

³⁷ See paras 3.52 to 3.55 of the Consultation Paper for the relevant discussion under the heading of "*Defendant's failure to take steps*" in relation to the English model.

by the Attorney General,³⁸ the South Australian equivalent test takes into consideration a defendant's age and circumstances, and whether he is under duress or subject to domestic violence in considering whether he has taken "*steps that he ... could reasonably be expected to have taken in the circumstances*".³⁹ Similarly, the English Court of Appeal has held that the corresponding English offence requires "*close analysis of the defendant's personal position*"⁴⁰ in deciding whether he has taken "*steps as he could reasonably have been expected to take*".⁴¹

Changing the test to failure to "take reasonable steps"

6.55 We, however, note the New Zealand⁴² model which has adopted the test "*fails to take reasonable steps to protect the victim*" to provide for a level of subjectivity. In explaining this, the New Zealand Ministry of Justice said:

*"...This provides for a level of subjectivity. ... it recognises that culpability is based on a failure to protect as opposed to causing the harm or omitting to perform a legal duty to protect the victim. In these circumstances it is appropriate for the Court to have regard to personal factors that might have contributed to the failure to act even though they knew of the risks."*⁴³ (emphasis added)

6.56 Both the above New Zealand test and the "*Such Steps*" test allow the taking into account of a defendant's personal circumstances, ie whether his ability to take steps to protect the victim has been affected by his tender age, old age, disability, presence of domestic violence, power imbalance or duress (as in the case of domestic workers). In our opinion, the New Zealand test has the advantages of being more easily understood, and being succinct and simpler in language. On reflection, we propose to amend the proposed offence such that a defendant would be liable only if he has "*failed to take reasonable steps*" in the circumstances to protect the victim as stipulated in the proposed section 25A(1)(d) in the draft Bill.⁴⁴ This would tally with, in terms of

³⁸ South Australian Hansard debates, House of Assembly, 30 June 2004, at 2626, *per* Hon M J Atkinson (Attorney General). Available at: <http://hansardpublic.parliament.sa.gov.au/#/search/1/2004> (accessed on 13 April 2021).

³⁹ Section 14(1)(d) of the *Criminal Law Consolidation Act 1935*.

⁴⁰ *R v Khan* [2009] 4 All ER 544, at para 33.

⁴¹ Section 5(1)(d)(ii) of the *Domestic Violence, Crime and Victims Act 2004*.

⁴² See para 5.72 of the Consultation Paper for the discussion on the failure to take "*reasonable steps*" under the New Zealand model.

⁴³ Report of the Ministry of Justice of New Zealand: *Crimes Amendment Bill (No 2)* (July 2011), at 11. Available at: <https://www.parliament.nz/resource/0000169964> (accessed on 13 April 2021).

⁴⁴ See the draft Bill (Annex 1 of this Report). The revised section 25A(1)(d) reads: "(d) ~~the defendant failed to take steps that the defendant could reasonably be expected to~~

both substance and language, the revised *mens rea* “*had reasonable grounds to believe*” as already elaborately discussed under Final Recommendation 3 which also enables the court to take into account a defendant’s personal circumstances (ie not purely an objective bystander test). Furthermore, for clarity, we propose to split paragraph (d) under the original proposed section 25A(1) in Annex A of the Consultation Paper into two separate paragraphs ie paragraphs (d) and (e). Consequentially, we also propose to substitute “*to do so*” in paragraph (e) with “*mentioned in paragraph (d)*” to directly refer to the “*defendant’s failure*” to “*take reasonable steps*” in the said “*paragraph (d)*”⁴⁵.

Defendant’s characteristics

6.57 In discussing a defendant’s personal circumstances, we have also considered whether his own characteristics should be taken into account. To this end, we note that a defendant’s own characteristics are relevant to the determination of whether he is under duress as succinctly set out in *Archbold Hong Kong*:

“... the standard by which a person’s reaction to duress is to be judged contains an objective element, namely, whether in all the circumstances a person of reasonable firmness, sharing the appellant’s characteristics, could not be reasonably expected to resist.”⁴⁶ (emphasis added)

6.58 As a matter of public policy, it is essential to limit the defence of duress by means of an objective criterion formulated in terms of reasonableness and the law requires a defendant to have the steadfastness reasonably expected of the ordinary citizen in his situation.⁴⁷ Therefore, inherent weakness is inconsistent with the requirement of an objective reasonable person test.⁴⁸ The Court of Appeal in *R v Bowen* held:

~~have taken~~ **reasonable steps** in the circumstances to protect the victim from such harm;”

⁴⁵ The proposed section 25A(1)(e), split from the original section 25A(1)(d) in the Consultation Paper, reads as: “(e) *the defendant’s failure ~~to do so~~ mentioned in paragraph (d)* was, in the circumstances, so serious that a criminal penalty is warranted.”

⁴⁶ *Archbold Hong Kong* (2021), at para 16-91.

⁴⁷ *R v Graham* [1982] 1 All ER 801, at 806. In this case, Lord Lane CJ said, “Consistency of approach in defences to criminal liability is obviously desirable. Provocation and duress are analogous. ... [For provocation, the] law requires a defendant to have self-control reasonably to be expected of the ordinary citizen in his situation. ... So too with self-defence, in which the law permits the use of no more force than is reasonable in the circumstances.” (at 806).

⁴⁸ *R v Bowen* [1996] 4 All ER 837, at 843, citing *R v Horne* [1994] Crim LR 584.

*“the question is: would an ordinary person sharing the characteristics of the defendant be able to resist the threats made to him? ... The mere fact that the accused is more pliable, vulnerable, timid or susceptible to threats than a normal person are not characteristics with which it is legitimate to invest the reasonable/ordinary person for the purpose of considering the objective test.”*⁴⁹

6.59 In considering what characteristics are relevant, the Court of Appeal set out the following principles after considering the relevant authorities:

“The defendant may be in a category of persons who the jury may think less able to resist pressure than people not within that category. Obvious examples are age, where a young person may well not be so robust as a mature one; possibly sex, though many women would doubtless consider they had as much moral courage to resist pressure as man; pregnancy, where there is added fear for the unborn child; serious physical disability, which may inhibit self protection; recognised mental illness or psychiatric condition, such as post-traumatic stress disorder leading to learned helplessness. ...

*Characteristics due to self-induced abuse, such as alcohol, drugs or glue sniffing, cannot be relevant.”*⁵⁰

6.60 In light of the above jurisprudence on duress and other defences, we are of the view that a defendant’s characteristics should be relevant for the court in determining whether a reasonable person in all the defendant’s circumstances (including his characteristics) would, like the defendant, have failed to take reasonable steps. As to the relevant characteristics to which the court should have regard, we consider that the above examples (youth, pregnancy, physical disability, recognised mental illness or psychiatric condition⁵¹) as set out in *R v Bowen* should be relevant to this failure to “take reasonable steps” test, while inherent weakness such as being timid and characteristics due to self-induced abuse are not.

6.61 To reflect the above legislative intent, we recommend adding new sub-sections (3A) and (3B) to the proposed section 25A in the draft Bill to specify that the factors for determining “*the reasonable steps in the circumstances*” include: (a) circumstances of the case (including the defendant’s personal circumstances), and (b) the steps that a reasonable person sharing the defendant’s characteristics could be expected to have taken

⁴⁹ *R v Bowen* [1996] 4 All ER 837, at 844.

⁵⁰ Same as above.

⁵¹ For example, “*battered woman syndrome*”. In *R v Emery* (1993) 14 Cr App R (S) 394, Lord Taylor CJ noted: “*medical science recognises a condition known as post-traumatic stress disorder, which can result from prolonged serious violence and abuse, particularly of a woman by her partner. It comprises what is known to the doctors as ‘learned helplessness’, and the condition is more generally known as a ‘battered woman syndrome’.*” (at 395).

in the circumstances. For (b), only the characteristics of the defendant that are relevant to his ability to take such steps are to be taken into account.

Meaning of the test

6.62 Some Respondents comment that the meaning of the “*Such Steps*” test is unclear. We have just proposed above to change the test to failure to “*take reasonable steps*”. In any event, we consider that it would be impossible, under either test, to make an exhaustive list of all possible types of steps that a defendant could take in the circumstances to avoid committing the proposed offence. Instead, a better approach is to adopt a generic term “*reasonable steps*” which would allow the court to take into consideration all possible types of steps, than listing the steps or providing for a definition in the legislation. This would enable the court to gradually develop the jurisprudence on the meaning of the term.

Guidelines on various relevant matters

6.63 Some Respondents suggest that updated guidelines should be prescribed by relevant professional sectors to provide reference to frontline care workers and professionals. In fact, SWD and the Education Bureau⁵² have issued various procedural guides, guidelines and circulars for handling various types of abuse cases.⁵³ In particular, the *Procedural Guide for Protecting Children* (reviewed and updated in 2020) (“Guide”) has set out the steps that the relevant professionals could take to protect a child victim,⁵⁴ including a list of immediate child protection actions which social workers may take in case of emergency (such as sending the child to hospital, arranging for residential care and reporting to the Police).⁵⁵ It also specifies the roles different professional disciplines could play in safeguarding the child’s safety (eg the roles of social service, services in clinics and hospitals, child psychiatry service, clinical psychological service and education service).

⁵² Education Bureau Circular No. 1/2020: *Handling Suspected Cases of Child Maltreatment and Domestic Violence*.

⁵³ See the guidelines/guides set out under “*What amounts to reasonable steps*” in paras 2.20 to 2.21 of Chapter 2 (Final Recommendation 1).

⁵⁴ These include flowcharts on: (1) Identification and reporting of a suspected child maltreatment case, (2) Conducting initial assessment and immediate child protection actions, (3) Immediate child protection actions and investigations, and (4) Conducting the multi-disciplinary case conference on protection of child with suspected maltreatment and follow-up services. See *Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation* (Revised 2020), at 43 to 46. Available at: https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/id_1447/ (accessed on 7 April 2021).

⁵⁵ *Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation* (Revised 2020), at Chapter 6. See footnote 54 above.

6.64 Likewise, the *Procedural Guidelines for Handling Elder Abuse Cases* (revised in 2021) provides updated guidelines on the procedures of intervention into and follow-up services for suspected elder abuse cases. It also sets out the responsibilities and major roles of various disciplines in handling elder abuse cases at different stages in the section on “*Multi-disciplinary Collaboration on Handling Elder Abuse Cases*”.⁵⁶ This would address some Respondents’ concern that it may be difficult to tell what reasonable steps should be taken when a victim is being taken care of by various carers.

6.65 Some Respondents comment that guidelines like the Guide are only useful for trained professionals. To address this concern, we consider that Hong Kong could issue circulars similar to those issued by the UK Ministry of Justice and Home Office⁵⁷ which set out a list of non-exhaustive examples of reasonable steps that may be useful for non-professional, including:

- “• *reporting suspicions of abuse to the Police*
- *contacting social services. ...*
- *making sure that the child or vulnerable person is treated promptly and appropriately for any injuries or illnesses which they may suffer*
- *explaining concerns to their family GP [General Practitioner] or health visitor*
- *contacting their teacher, head teacher or school nurse*
- *contacting organisations such as the NSPCC [National Society for the Prevention of Cruelty to Children] or Childline*
- *ringing one of the other voluntary agencies that support families, such as Home-Start*
- *contacting grandparents, an aunt or uncle, or another responsible adult member of the family*
- *exploring concerns with neighbours or others who may have contact with the person who is at risk*
- *making sure that alcoholism or drug dependence in other members of the household are acknowledged and appropriately treated*

⁵⁶ *Procedural Guidelines for Handling Elder Abuse Cases* (Revised 2021), at 23 to 25, 35 to 49. Available at: https://www.swd.gov.hk/en/index/site_pubsvc/page_elderly/sub_csselderly/id_serabu_seelder/ (accessed on 7 April 2021).

⁵⁷ UK Ministry of Justice, “*Domestic Violence, Crime and Victims (Amendment) Act 2012*” (Circular no 2012/03 June 2012), Annex A (Home Office Circular 9/2005). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/219903/circular-03-12-dvcv-act.pdf (accessed on 28 March 2021).

- *attending anger management or parenting classes if appropriate, or ensuring other members of the household attend such classes*".⁵⁸

6.66 As to the practical difficulties raised by some Respondents in reporting suspected abuse cases, we note that the Guide has also contained procedures for the reporting of child maltreatment to social workers, the SWD or the Police,⁵⁹ with sample reporting forms (for reference). Other concerns raised by the Respondents are the protection of informants and the need to reconcile with the duty of confidentiality. On the former, the Guide provides that the identity and personal data of the informant should not be disclosed to a third party unless such disclosure is essential in the litigation process or for the protection of the child or other persons.⁶⁰ As to the latter, the Guide provides guidance on information sharing and confidentiality, with an explanation on the exemptions under the Personal Data (Privacy) Ordinance (Cap. 486).⁶¹ We trust that with the enactment of the proposed offence, the relevant authorities and sectors could update their existing guidelines and issue new ones (in case of need), together with some training and education measures.

6.67 Incidentally, some Respondents note that a defendant's ability to take reasonable steps to protect the victim may be limited in institutional settings because of insufficient manpower or poor facilities. We note that the Government has pledged to provide resources to improve the condition of care institutions. This is further discussed in Chapter 9 (on resources and training).

Failure to take reasonable steps: so serious that criminal penalty is warranted

6.68 Some Respondents suggest that further explanation should be given on the standard of care expected of a carer in taking the reasonable steps. On the required standard of care, the proposed offence requires a high threshold that a defendant would be liable only if his failure to take the reasonable steps was so serious that a criminal penalty is warranted, following the South Australian model. What would amount to "*so serious that a criminal penalty is warranted*" would be for the court to decide after considering all the circumstances of the case. As explained by the South Australian Attorney General, this high threshold intends to cover only serious failure to take steps,

⁵⁸ Same as above, at para 25.

⁵⁹ *Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation* (Revised 2020), at 56 to 60, 69. See footnote 54 above.

⁶⁰ *Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation* (Revised 2020), at 60. See footnote 54 above.

⁶¹ Personal data may be used where it is for the purpose of detection or prevention of crime under section 58 of the Personal Data (Privacy) Ordinance (Cap 486), and for protection of the data subject or any other individuals from serious physical and/or mental harm under section 59 of Cap 486. See *Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation* (Revised 2020), Annex 2, at paras 8 to 9. See footnote 54 above.

such that:

“the accused’s failure to protect the victim from [serious harm] involved such a great falling short of the standard of care that a reasonable person in his or her position should be expected to exercise, that the failure merits criminal punishment.”

*Some might say that people should not be held criminally responsible for their negligence. But they forget that the law already holds people criminally responsible for their negligence in the offence of manslaughter.”*⁶² (emphasis added)

6.69 The Court of Final Appeal has considered what “amounts to a crime” in *HKSAR v Mak Wan Ling*⁶³ involving gross negligence manslaughter. The Court did not accept the appellant’s argument that the formulation of *mens rea* of “gross negligence manslaughter” was circular, in the sense of “the jury being told in effect to convict of a crime if they thought a crime had been committed”. The appellant argued:

“this is contrary to the norm that a jury is directed as to what the law defines a crime to be so that its task is to determine the facts and then apply the law, as directed, to those facts.”

The Court rejected the argument and explained:

*“the test of how far conduct must depart from accepted standards to be characterised as criminal” involves “necessarily a question of degree” which is “supremely a jury question”.*⁶⁴

As held by the Court, this offence requires proof that in all the circumstances the defendant’s conduct “fell so far short of what could reasonably be expected of him so that such conduct is properly characterised as grossly negligent”.⁶⁵

⁶² South Australian Hansard debates, House of Assembly, 30 June 2004, at 2627, per Hon M J Atkinson (Attorney General). See footnote 38 above. See paras 7.47 to 7.51 of the Consultation Paper for the relevant discussion under the heading of “Defendant’s failure to take steps was so serious that a criminal penalty is warranted”.

⁶³ *HKSAR v Mak Wan Ling* [2019] HKCFA 37.

⁶⁴ See *HKSAR v Mak Wan Ling* [2019] HKCFA 37, at paras 30, 31, 34 and 35. See also: the jury is to “assess the degree to which the defendant’s conduct was negligent in all the circumstances” (ie to assess how far “it fell short of the minimum standard of care reasonably to be expected” of him) (at para 35).

⁶⁵ *HKSAR v Mak Wan Ling* [2019] HKCFA 37, at para 38.

6.70 Furthermore, *Archbold Hong Kong* has the following commentary on gross negligence manslaughter:

“Criminal prosecutions arising out of negligence should only be brought where there is a proper foundation for those charges and where right-thinking persons would consider there is a need for criminal punishment as opposed to civil proceedings or internal disciplinary action.”⁶⁶ (emphasis added)

Applying this principle to the proposed offence, a defendant should not be charged under the proposed offence if civil proceedings or internal disciplinary action is sufficient to address his failure to take reasonable steps to protect the victim.

6.71 The South Australian Attorney General emphasised that it was the defendant’s failure to protect involved such a great falling short of the standard of care which a reasonable person in his position should be expected to exercise, that the failure merited criminal punishment. To address the concern that the *“failure...was... so serious that... a criminal penalty is warranted”* may be circular, we believe that the clarification⁶⁷ in the above Court of Final Appeal decision is compelling. Applying this clarification to our present issue, it is a question of degree to assess whether a defendant’s failure to protect the victim fell so far short of the reasonable steps in the circumstances that a criminal penalty is warranted. We consider that this clarification does not only encapsulate the legislative intent behind the concept of *“failure...was... so serious that... a criminal penalty is warranted”*, but also clarifies that *“so serious”* refers to a defendant’s failure, not the consequences which are already reflected by the fact that the victim has died or suffered serious harm.

6.72 A defendant would also not be liable if the failure to take reasonable steps is a result of the victim’s decision. In *H Ltd v J and Another*,⁶⁸ the resident of a care institution made known her intention to end her life by ceasing to take sustenance and medication. The care institution sought a declaration on the extent to which it could lawfully comply with the resident’s direction. The South Australian court held that the resident’s own intended refusal to accept sustenance did not render the care institution’s failure to provide the sustenance a contravention of the corresponding South Australian offence. The court however, expressly left open the question of whether the care institution would attract liability should the resident revoke her direction and it becomes aware, or ought to have become aware, that its staff members themselves were not providing appropriate care for the resident:

⁶⁶ *Archbold Hong Kong* (2021), at para 20-179.

⁶⁷ The question of degree is whether in all the circumstances the defendant’s conduct *“fell so far short of what could reasonably be expected of him so that such conduct is properly characterised as grossly negligent”*.

⁶⁸ *H Ltd v J and Another* [2010] SASC 176. See paras 6 to 9 of Appendix III of the Consultation Paper for the discussion of the case.

“70. ... [the corresponding South Australian offence] applies only to a defendant’s failure to take steps to protect a victim from the consequences of the unlawful conduct of another. If [the victim] embarks on her proposed course of conduct such conduct that she may engage in will not be unlawful for the reasons I have given. The bare fact that [the victim] ceases to accept sustenance does not make [the care institution]’s failure to provide it a contravention of [the corresponding South Australian offence]. More difficult questions would arise if [the care institution] were themselves not providing appropriate care for the [victim] should the direction be revoked. I need not consider those issues in order to make the declaration sought in these proceedings, which will be limited to the operation of [the corresponding South Australian offence] on the direction alone, absent any such complicating circumstances.” (emphasis added)

6.73 Therefore, we consider that whether a defendant would be liable under the proposed offence due to his failure to take reasonable steps to protect the victim from serious harm would depend on all the circumstances, including circumstances of both the defendant and the victim. However, the defendant’s failure to take such steps had to be so serious that a criminal penalty is warranted. In this regard, frontline care personnel could refer to the *“Points to Note When an Elderly Person Refuses Professional Intervention”*⁶⁹ in the *Procedural Guidelines for Handling Elder Abuse Cases*.

Our Final Recommendation 10

6.74 For the reasons set out above, Recommendation 10 is retained with the revisions discussed in this Chapter to fine-tune the wording of the proposed offence and to specify the factors for determining the *“reasonable steps in the circumstances”*.

⁶⁹ *Procedural Guidelines for Handling Elder Abuse Cases* (Revised 2021), at para 4.1 to 4.7 of Chapter 3 (p 20 to 21). Available at: https://www.swd.gov.hk/en/index/site_pubsvc/page_elderly/sub_csselderly/id_serabu_seelder/ (accessed on 7 April 2021).

Final Recommendation 10

We recommend:

- (a) adopting section 14(1)(d) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005), with the revisions set out in paragraph (b) below, as the proposed section 25A(1)(d) and (e)⁷⁰ in the draft Bill.
- (b) the revisions are as follows:
 - (i) splitting paragraph (d) under the original proposed section 25A(1) into two separate paragraphs ie paragraphs (d) and (e);
 - (ii) substituting “*reasonable steps*” for “*steps that he or she could reasonably be expected to have taken*” and adding “*such*” before “*harm*” in the proposed section 25A(1)(d);
 - (iii) substituting “*mentioned in paragraph (d)*” for “*to do so*” in the proposed section 25A(1)(e); and
 - (iv) adding subsections (3A) and (3B)⁷¹ in the proposed section 25A in the draft Bill to specify the factors for determining the “*reasonable steps in the circumstances*” for the purposes of its subsection (1)(d).

⁷⁰ The proposed section 25A(1)(d) and (e) of the OAPO in the draft Bill (Annex 1 of this Report):

“25A. (1) A person (**defendant**) commits an offence if—

...

(d) the defendant failed to take reasonable steps in the circumstances to protect the victim from such harm; and

(e) the defendant’s failure mentioned in paragraph (d) was, in the circumstances, so serious that a criminal penalty is warranted.”

⁷¹ The proposed section 25A(3A) and (3B) of the OAPO in the draft Bill (Annex 1 of this Report):

“(3A) For subsection (1)(d), the factors for determining the reasonable steps in the circumstances include—

(a) the circumstances of the case (including the defendant’s personal circumstances); and

(b) the steps that a reasonable person sharing the defendant’s characteristics could be expected to have taken in the circumstances mentioned in paragraph (a).

(3B) For subsection (3A)(b), only the characteristics of the defendant that are relevant to defendant’s ability to take steps in relation to the risk mentioned in subsection (1)(c) are to be taken into account.”

Chapter 7

Evidential matters

The Sub-committee's Recommendation 11 in the Consultation Paper

7.1 This Chapter discusses the responses on the Sub-committee's Recommendation 11¹ in the Consultation Paper:

"We recommend that a provision along the following lines should be adopted in the Hong Kong offence 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):

'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).'"²

Number of responses to Recommendation 11

7.2 Of the Respondents who have expressed a stance on Recommendation 11, 79% of them (11/14) support it.

	Number	Percentage (%)
Agree	11	10%
Oppose	3	3%
Neutral/No Comment	95	84%
Other Comments	4	3%
<u>Total</u>	<u>113</u>	<u>100%</u>

¹ See paras 7.52 to 7.56 of the Consultation Paper for the reasons for making the recommendation.

² The proposed section 25A(4) of the OAPO in the draft Bill (Annex A of the Consultation Paper):

"25A. (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)."

Comments from Respondents on Recommendation 11

Respondents supporting Recommendation 11

7.3 A majority of the Respondents who have expressly stated their stance support Recommendation 11. A legal professional body comments that the recommendation is suitable if the proposed offence is to be adopted. Furthermore, a social service organisation observes as follows:

“We very much agree that the spirit of this legislative amendment is to protect the fundamental human rights of vulnerable victims on the one hand, and on the other, to protect the right to a fair trial of those allegedly involved in their deaths or serious harm. In our view, the offence enacted under the ordinance must achieve that balance by targeting the wrongdoer in failing to offer sufficient protection to the victim while not letting the suspect receive an unfair trial resulting in miscarriage of justice.”

Respondents opposing Recommendation 11

7.4 Respondents who have expressly stated that they oppose Recommendation 11 are social service organisations. Their reasons are as follows:

- (a) Since it is not necessary for the prosecution to prove who did the unlawful act or neglect, there are concerns that the proposed offence would infringe the defendant's right to a fair trial. In particular, an innocent person may be convicted as a result of the shifting of the onus of proof and diminution of right to silence, privilege against self-incrimination and presumption of innocence.
- (b) The prosecution will choose to charge a bystander instead of the perpetrator of the abuse as the prosecution will be encouraged to *“take the easy option by not actually trying to go full throttle on finding the actual perpetrator.”*

Comments from other Respondents

7.5 Other Respondents who have commented on Recommendation 11 without expressly indicating whether they support or oppose the recommendation are concerned that the proposed offence may have implications on defendants' right to a fair trial.

Our analysis and response on Recommendation 11

7.6 We take some Respondents' concerns in relation to defendants' right to a fair trial seriously. Indeed, the Consultation Paper has already dealt with such concerns. For the reasons set out below and those elaborated in

the Consultation Paper,³ we are satisfied that the proposed offence strikes the right balance between the need to protect children and vulnerable persons and defendants' right to a fair trial.

A new offence of “failure to protect”

7.7 Modelled on the corresponding South Australian offence, the proposed offence creates a new offence of “*failure to protect*” that is different from the offence of committing the abuse itself. The South Australian government explained the interplay between this new offence of “*failure to protect*” and an offence of committing the unlawful act itself (ie a causative offence of the abuse) in the Parliament:

“If each of two suspects owed a duty of care to the victim and each can be shown to have failed to take steps to protect the victim when he or she should have been aware that the victim was at an appreciable risk of harm, each one is a perpetrator of this new offence.

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.”⁴

7.8 Since the proposed offence of “*failure to protect*” is a new offence with different elements from the causative offence of the abuse, there is no shifting of the onus of proof as the prosecution is still required to prove the elements of the proposed offence in relation to all the defendant(s). Therefore, there is no injustice to the defendant(s) if the elements of the proposed offence are proved beyond reasonable doubt against each of them.

Not recommending procedural or evidential reform

7.9 In adopting the South Australian model, we do not introduce any procedural or evidential reform as under the English model which is criticised for undermining defendants' right to a fair trial.⁵ Specifically, there is nothing

³ See paras 7.57 to 7.65 of the Consultation Paper for the discussion on the “*Human rights issues*”.

⁴ South Australian Hansard debates, Legislative Council, 17 February 2005, at 1157, *per* P Holloway. Available at: <http://hansardpublic.parliament.sa.gov.au/#/search/1/2005> (accessed on 13 April 2021).

⁵ See paras 3.87, 3.119 to 3.127 of the Consultation Paper for the discussion on the human rights issues of the English model. See also UK Ministry of Justice, “*Domestic Violence, Crime and Victims (Amendment) Act 2012*” (Circular no 2012/03 June 2012), Annex A (Home Office Circular 9/2005), at para 40: “*The Parliamentary Joint Committee on Human Rights looked carefully at whether the procedural measures would be compatible with the [European Convention on Human Rights] requirements*

in our recommendations that would allow the court to draw adverse inference against a defendant where he fails to give evidence or refuses to answer questions, or allow the prosecution to defer answering whether there is a case to answer on the charge of murder or manslaughter until conclusion of the defence case.⁶

7.10 There is thus no basis to say that the proposed offence would undermine defendants' right to a fair trial, ie the right to silence, privilege against self-incrimination and presumption of innocence of the defendant.

Providing charging options against perpetrator and bystander

7.11 There are also concerns that the proposed offence would encourage the prosecutor to take the easy option of charging a bystander instead of the perpetrator of the abuse. We must point out that the proposed offence aims to give the prosecution an alternative charge (lest the only possible charge would be murder, manslaughter or an offence of causing serious harm), and thus to prompt the suspects to break their silence.⁷ Therefore, the prosecution will have several charging options in abuse cases, including the proposed offence of *"failure to protect"* and other causative offences of the abuse. Where a perpetrator is not convicted of any causative offence(s), the jury may return an alternative verdict on the proposed offence⁸ where appropriate. The Attorney General explained in the South Australian Parliament:

*"... this law will allow the prosecution several charging options in cases like these. The choice will depend on the facts of each case. One or both suspects may be charged with both the causative offence and the offence of criminal neglect in the alternative, or either offence on its own. In some cases, only one suspect may be charged."*⁹

7.12 Similarly, the English corresponding offence¹⁰ can be combined on the same indictment with a charge of murder, manslaughter, or other charges

to provide a fair trial (ECHR Article 6). They concluded that the measures would be compatible with a fair trial ...". Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/219903/circular-03-12-dvcv-act.pdf (accessed on 7 April 2021).

⁶ See paras 3.79 to 3.85, and 7.59 to 7.60 of the Consultation Paper for the discussion on the reform to the law of evidence and procedure under the English model.

⁷ South Australian Hansard debates, House of Assembly, 12 October 2004, at 335, *per* Hon M J Atkinson (Attorney General). Available at: <http://hansardpublic.parliament.sa.gov.au/#/search/1/2004> (accessed on 13 April 2021).

⁸ Section 51(2) of the Criminal Procedure Ordinance (Cap.221).

⁹ See footnote 7 above.

¹⁰ Section 5(2) of the *Domestic Violence, Crime and Victims Act 2004*.

arising as a result of the death or serious physical harm of the victim.¹¹ If the corresponding English offence is charged alongside murder or manslaughter of which a defendant is convicted, a jury will not need to enter a verdict in respect of the corresponding English offence.¹² The policy goal remains that of charging perpetrators with murder or manslaughter if appropriate:

*“Although the new offence will enable charges to be brought against all those in the household who had a responsibility for the death of a child or vulnerable adult, even where no charges were previously possible, the policy goal remains that the person who has caused the child’s or vulnerable adult’s death should be identified and convicted of murder or manslaughter if appropriate.”*¹³

7.13 Policy goal aside, real cases under the English model introduced in 2004 are of referential value to Hong Kong. These cases indicate that the prosecution has not chosen the easy option of only charging a bystander with the corresponding English offence (without charging the perpetrator with a causative offence of the abuse (eg murder or manslaughter)). Depending on the evidence, both bystanders and perpetrators would be charged with the offences which are appropriate for them. First, in *R v Khan*,¹⁴ the perpetrator (K) was convicted of the causative offence of murder of his 19-year-old wife (S), while K’s mother, two of K’s sisters (who were also S’s cousins) and the husband of one of K’s sisters, were convicted of allowing S’s death contrary to the English corresponding offence.¹⁵

7.14 In *R v Morgan and Cole*,¹⁶ the defendants, parents of a nine weeks old baby boy who while in their care died at home, were acquitted of murder and manslaughter. However, they were convicted of the corresponding English offence of causing or allowing the death of a child, and the offence of cruelty to a child.¹⁷ The court noted as follows:

“36 ... By acquitting of murder and manslaughter the jury revealed that it could not be sure which of the defendants had caused the child’s death. By convicting on [the corresponding English offence] the jury determined that both defendants bore criminal responsibility for the death.”

¹¹ Richard Ward and Roger Bird, *Domestic Violence, Crime and Victims Act 2004 – A Practitioner’s Guide* (2005), para 3.11.

¹² See footnote 11 above. See also para 3.63 of the Consultation Paper for the discussion on “*Murder, manslaughter and section 5*” of the English model.

¹³ UK Ministry of Justice, “*Domestic Violence, Crime and Victims (Amendment) Act 2012*” (Circular no 2012/03 June 2012), Annex A (Home Office Circular 9/2005), at para 30. See footnote 5 above.

¹⁴ *R v Khan* [2009] 4 All ER 544 (CA).

¹⁵ See paras 3.94 to 3.97 of the Consultation Paper for the discussion on *R v Khan* [2009] 4 All ER 544 (CA).

¹⁶ *R v Morgan and Cole* [2020] EWCA Crim 378, [2020] 2 Cr.App.R.9.

¹⁷ Section 1 of the *Children and Young Persons Act 1933* (the equivalent of section 27 of the OAPO in Hong Kong).

7.15 The above cases under the English model negate the concerns that the proposed offence would encourage prosecutors to take the easy option of only charging a bystander (without charging the perpetrator with the causative offence(s), such as murder, manslaughter or ill-treatment or neglect of a child under section 27 of the OAPO).

7.16 However, we note a concern that a defendant may try to assert a “reasonable possibility” that he is the perpetrator of the abuse (and thus not the culpable bystander), and should therefore not be liable under the proposed offence which targets culpable bystanders. As discussed in the Consultation Paper¹⁸, both the South Australian and English models have provisions to prevent this “perverse outcome”. The corresponding South Australian offence specifically provides:

“... the jury may find the defendant guilty of the charge of criminal neglect even though of the opinion that the unlawful act [that caused the victim’s death or serious harm] may have been the act of the defendant.”¹⁹

The South Australian Attorney General explained the intent behind this provision:

“As mentioned, the offence of criminal neglect may be charged on its own or as an alternative to a charge of the causative offence (that is, murder, manslaughter or any other offence of which the gravamen is that the defendant caused or was a party to causing the death of, or serious harm to, the victim).

When a person is charged with criminal neglect, the assumption is that the unlawful act that killed or harmed the victim was committed by someone else. 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 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.”²⁰ (emphasis added)

¹⁸ See the discussion in paras 7.52 to 7.56 of the Consultation Paper under the heading of “Reasonable doubt as to who committed the unlawful act or neglect”.

¹⁹ Section 14(2) of the *Criminal Law Consolidation Act 1935*.

²⁰ South Australian Hansard debates, House of Assembly, 12 October 2004, at 334, per Hon M J Atkinson (Attorney General). Available at: <http://hansardpublic.parliament.sa.gov.au/#/search/1/2004> (accessed on 13 April 2021).

7.17 We agree with the South Australian Attorney General that such a “*perverse outcome*” should be prevented from happening, and the above provision in South Australia can specifically rule this out. To explicitly address the concern on this “*perverse outcome*”, we recommend adding analogous wording with similar effect by way of a new paragraph (b) in the proposed section 25A(4) of the draft Bill: “*the defendant may be convicted of the offence regardless of whether the defendant did or may have done the unlawful act or neglect*”.

Charge reflecting criminality of defendant’s conduct

7.18 In addition, when the prosecution chooses the charge(s) to prosecute, the charge(s) should reflect the criminality of a defendant’s conduct. The *Prosecution Code* stipulates:

“When choosing charges to be prosecuted, the prosecution should attempt to reflect adequately the criminality of the conduct alleged, in a manner that is both efficient and that will enable the court to do justice between the community and the accused.”²¹

7.19 Therefore, where a defendant is the perpetrator of the abuse, the prosecution should choose the charge that reflects the culpability of the perpetrator, ie the causative offence. In addressing similar concerns, the South Australian government explained that:

“The government does not accept the criticism that the bill encourages police not to investigate properly a report that a child has died or been seriously harmed in apparently non-accidental circumstances. Inadequate investigation would, of course jeopardise the prosecution case for intentional harm or death, but it would also lessen the chances of conviction for criminal neglect. ...

The government does not accept the criticism that the bill will encourage the prosecution to present a weak case. The prosecution has no interest in doing this. If it can establish guilt of primary charge, it will attempt to do so. That a lesser charge is available does not influence the prosecution to present a weak case on the higher charge. If that were the case, we would have very few murder trials.”²²

²¹ Department of Justice of Hong Kong, *Prosecution Code* (2013), at 8.1. Available at: <https://www.doj.gov.hk/en/publications/pdf/pdcode1314e.pdf> (accessed on 14 March 2021).

²² South Australian Hansard debates, Legislative Council, 17 February 2005, at 1157 to 1158, *per* P Holloway. See above at footnote 4.

7.20 In conclusion, we do not see the need to be concerned that the proposed offence would encourage the prosecution to present a weak case (in taking the easy option of only charging a bystander) or the Police not to investigate the abuse case properly.

Our Final Recommendation 11

7.21 Recommendation 11 has received a majority support from the Respondents. As set out above, we have addressed concerns raised in the responses, having regard to relevant materials and overseas experiences (including court cases). We recommend retaining Recommendation 11 with clarification in a new paragraph (b) in the proposed section 25A(4) of the draft Bill.

Final Recommendation 11

We recommend that a provision along the following lines should be adopted in the proposed offence 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):

“In proceedings for an offence under subsection (1) –

- (a) it is not necessary for the prosecution to prove who did the unlawful act or neglect mentioned in subsection (1)(a); and***
- (b) the defendant may be convicted of the offence regardless of whether the defendant did or may have done the unlawful act or neglect.”***²³

²³ The proposed section 25A(4) of the OAPO in the draft Bill (Annex 1 of this Report):

“25A. (4) *In proceedings for an offence under subsection (1)—*

- (a) it is not necessary for the prosecution to prove who did the unlawful act or neglect mentioned in subsection (1)(a); and***
- (b) the defendant may be convicted of the offence regardless of whether the defendant did or may have done the unlawful act or neglect.”***

Chapter 8

Maximum penalties for the proposed offence and procedural matters

The Sub-committee's Recommendations 12, 13 and 14 in the Consultation Paper

8.1 This Chapter discusses the responses on the Sub-committee's following recommendations in the Consultation Paper:

Recommendation 12¹

*"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."*²

Recommendation 13³

*"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."*⁴

¹ See para 7.69 of the Consultation Paper for the reasons for making the recommendation.

² The proposed section 25A(5)(a) of the OAPO in the draft Bill (Annex A of the Consultation Paper):

"25A. (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".

³ See para 7.70 of the Consultation Paper for the reasons for making the recommendation.

⁴ The proposed section 25A(5)(b) of the OAPO in the draft Bill (Annex A of the Consultation Paper):

"25A. (5) A person convicted of an offence under subsection (1) is liable on conviction on indictment to—

...

(b) if the victim suffers serious harm— imprisonment for 15 years."

and Recommendation 14⁵:

“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;*
- (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.”⁶*

Number of responses to Recommendations 12 and 13

8.2 Both recommendations have overwhelming support from 94% (15/16) of the Respondents who have expressly stated their stance as shown in the two tables below respectively.

Recommendation 12

	Number	Percentage (%)
Agree	15	13%
Oppose	1	1%
Neutral/No Comment	94	83%
Other Comments	3	3%
<u>Total</u>	<u>113</u>	<u>100%</u>

⁵ See para 7.71 of the Consultation Paper for the reasons for making the recommendation.

⁶ See sections 88 and 92 of the *Magistrates Ordinance* (Cap 227).

Recommendation 13

	Number	Percentage (%)
Agree	15	13%
Oppose	1	1%
Neutral/No Comment	95	84%
Other Comments	2	2%
<u>Total</u>	<u>113</u>	<u>100%</u>

Comments from Respondents on Recommendations 12 and 13

Respondents supporting Recommendations 12 and 13

8.3 The Respondents' reasons for supporting the recommendations are that the maximum penalties recommended for the proposed offence are necessary to deter abuses and to reflect the seriousness of the offence. In particular, a legal professional body comments that the recommended maximum penalties appear reasonable.

Respondent opposing Recommendations 12 and 13

8.4 A social service organisation opposes both recommendations on the ground that it may not be in the interests of a child that his parent or carer is imprisoned. The organisation opines that it would be better for the offender to be "*reformed and rehabilitated*". It suggests putting in place counselling and rehabilitative treatment programs similar to those provided to offenders in domestic violence cases.⁷

Comments from other Respondents

8.5 Some Respondents have made the following comments and suggestions without clearly indicating whether they support or oppose the recommendations:

⁷ Under sections 3(1A), 3A(5) and 3B(3) of the *Domestic and Cohabitation Relationships Violence Ordinance* (Cap189), a court may require the respondent to participate in any programme, approved by the Director of Social Welfare, that is aimed at changing the attitude and behaviour of the respondent that led to the granting of an injunction against molestation.

- (a) The best interests of children need to be of “*central importance*”. This is particularly important when considering the length of the imprisonment of a parent or carer as this can have a detrimental impact on the child’s development.
- (b) The penalty for a perpetrator of the abuse should be heavier than an offender who fails to protect the victim.
- (c) Counselling, rehabilitative programs and pre-release preparatory programs should be available to offenders to assist them in transiting out of the correctional institution, and to reduce the risk of committing abuse again.

Our analysis and response on Recommendations 12 and 13

Classical principles of sentencing - retribution, deterrence and prevention of abuses

8.6 The courts must have regard to the classical principles of sentencing in deciding how best to dispose of a case.⁸ Lawton LJ summarised these classical principles as follows:

“Retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which has the greatest importance in the case with which he is dealing.”⁹

8.7 We note the principles of retribution, deterrence and prevention. The proposed offence targets a serious crime resulting in dire consequences where a victim has died or has suffered serious harm (for example, in a severely brain-damaged or even permanent vegetative state). We are of the view that the proposed maximum penalties are proportionate to the severity of the crime. This is particularly so since a defendant’s failure to take the reasonable steps to protect the victim from harm has to be so serious that a criminal penalty is warranted. The proposed maximum penalties allow the court to impose a sentence that reflects the gravity of the crime committed and its dire consequences so as to seek retribution against the offender and also to deter and prevent abuses of children and vulnerable persons. We must point out that the proposed penalties are the highest that the court may impose and the court can always choose a lower penalty if the circumstances of the case so warrant.

⁸ *HKSAR v Chu Frankly* [2018] 6 HKC 229. See also I Grenville Cross and Patrick Cheung, *Sentencing in Hong Kong* (LexisNexis 9th ed 2020), at para 6-8.

⁹ *R v Sargeant* (1974) 60 Cr App R 74, at 77.

Interests of child victim

8.8 We also note some Respondents' opinion that the best interests of a child victim should be of "*central importance*" in sentencing the offender. Nonetheless, Stock JA (as he then was) in the Court of Appeal case of *HKSAR v Chan Kin Chung & Anor*,¹⁰ adopted a balanced approach to sentencing – "*proper regard to essential sentencing principle and policy*" and "*full regard to the seriousness of the crime*", and he continued to say that in exceptional cases the court might give ameliorating effect to the fact that the sentence would deprive children of all parental care:

"37. A balanced approach to sentencing is one that has proper regard to essential sentencing principle and policy, which includes the principle that the adverse effect of imprisonment upon an offender's family will not normally be taken into account; and is one that has full regard to the seriousness of the crime, although not ignoring credible evidence that may justify a merciful sentence. There can be no definitive or exhaustive list of the type of circumstances in which release or earlier release of a single parent, or of one of two imprisoned parents, will be appropriate by reason of the needs of the young child or children."

"29. That there are exceptional cases in which a sentencer may take into account, and give ameliorating effect to, the fact that the sentence will deprive children of all parental care, and to the consequence of that deprivation, is beyond doubt."
(emphasis added)

8.9 In a similar vein, in sentencing the offender for the ill-treatment or neglect of a child under section 27 of the OAPO, the court also took into account the crucial factor of the need to protect the young and the vulnerable and to deter abuse or neglect of them, as well as other crucial factors of the interests of the child:

*"A crucial factor that must be taken into account when sentencing for [the offence under section 27 of the OAPO] is the need to protect the young and the vulnerable, as well as the need to deter abuse or neglect of them. Other crucial factors to be taken into account are the age and circumstances of the child; the relationship between the offender and the child as well as the responsibility the offender had for the child; the nature, degree and duration of the ill-treatment or neglect of the child; the suffering and injury to the child; and the long term prospects it will have on the child both physically and psychologically."*¹¹
(emphasis added)

¹⁰ *HKSAR v Chan Kin Chung & Anor* [2002] 4 HKC 314.

¹¹ *HKSAR v Wong Wing-man Mandy alias Wang Xuexin and another* (HCCC 76/2017), at para 142, per Zervos J (as he then was).

8.10 The detrimental impact of imprisoning a parent or carer on the child's development is also one of the relevant considerations in the sentencing guidelines on the corresponding English offence issued by the Sentencing Council for England and Wales:

“Parental responsibilities of sole or primary carers

In the majority of child cruelty cases the offender will have parental responsibility for the victim.

When considering whether to impose custody the court should step back and review whether this sentence will be in the best interests of the victim (as well as other children in the offender's care). This must be balanced with the seriousness of the offence and all sentencing options remain open to the court but careful consideration should be given to the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence. This may be of particular relevance in lower culpability cases or where the offender has otherwise been a loving and capable parent/carer.

Where custody is unavoidable consideration of the impact on the offender's children may be relevant to the length of the sentence imposed. For more serious offences where a substantial period of custody is appropriate, this consideration will carry less weight.”¹² (emphasis added)

8.11 Under the above guidelines, when considering whether to impose custody on the parent or carer, the English court would balance the interests of the child with the seriousness of the offence. This approach is comparable to the “*balanced approach*” as articulated by Stock JA (as he then was) above.

8.12 On the ground, the SWD provides a wide range of welfare services and support programmes for victims of child abuse, spouse/cohabitant battering, sexual violence and family violence. These include support from medical social workers and psychologists as well. The SWD also cooperates with the Police to set up the Witness Support Programme to support abused children who have to give evidence in court through a live television link system.¹³

¹² The Sentencing Council for England and Wales, *Child Cruelty Definitive Guideline*, at 9. Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Child-Cruelty-definitive-guideline-Web-1.pdf> (accessed on 25 March 2021).

¹³ SWD website. Available at: https://www.swd.gov.hk/vs/index_e.html#s4 (accessed on 31 March 2021).

Imprisonment for the proposed offence appropriate

8.13 The reason for opposing Recommendations 12 and 13 is that imprisoning a child's parent or carer may not be in the child's interest. The Respondent's suggestion is to provide counselling and rehabilitative treatment programs for offenders similar to those under the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189). Under Cap 189, a respondent is required to participate in the programme approved by the Director of Social Welfare that is aimed at changing his attitude and behaviour of molestation.¹⁴

8.14 We must, however, point out that the severity of the conduct in question under Cap 189 is very different from that of the proposed offence. Cap 189 provides protection against molestation by a spouse, relative or cohabitant in domestic and cohabitation relationships. In contrast, the proposed offence aims at protecting children and vulnerable persons against serious abuses that caused the victim's death or serious harm. We do not think that for a serious crime resulting in a victim's death or serious harm, mere counselling and rehabilitative treatment programs are sufficient to serve the purposes of retribution, deterrence and prevention of abuses. In any event, Cap 189 (including its counselling programmes) can be invoked if it is applicable.

Bystander failing to protect not necessarily less culpable than perpetrator of abuse

8.15 Some Respondents suggest that the penalty for a perpetrator should be heavier than a bystander. The English Court of Appeal in *R v Mills*¹⁵ considered whether a bystander who just failed to protect was necessarily less culpable than the perpetrator of abuse. In this case, three offenders were convicted of allowing the death of a vulnerable adult (a man with significant learning difficulties) who was living with them. The three offenders were all aware of the violence being inflicted on the victim by the son of one of them, but did nothing to assist the victim. Instead, they fed him painkillers to keep him sedated. While the perpetrator was convicted of murder, the three offenders were sentenced to ten, seven and three years of imprisonment respectively under the corresponding English offence. The Court of Appeal held:

“Causing or allowing a child or vulnerable adult to die [ie the corresponding English offence] is a serious offence, in some cases as serious an offence as the most serious offence of manslaughter. It is an offence that can be committed in a wide variety of circumstances and for the purposes of sentence, an offender's culpability must be assessed very carefully. This will involve an assessment of all the circumstances including the

¹⁴ Sections 3(1A), 3A(5) and 3B(3) of the *Domestic and Cohabitation Relationships Violence Ordinance* (Cap 189).

¹⁵ *R v Mills* [2017] EWCA Crim 559, [2017] 2 Cr App R (S) 7 (38).

nature of the relationship between the offender and the victim and the nature of ... the breach of duty towards the victim. ...

*We also reject the offenders' assertion that allowing a child or vulnerable adult to die is necessarily less culpable than causing a child or vulnerable adult to die. It will depend on all the circumstances.*¹⁶ (emphasis added)

8.16 With the benefit of the English Court of Appeal's analysis, we therefore cannot accept the suggestion that the penalty for a perpetrator should be heavier than a bystander as the latter who just fails to protect is necessarily less culpable than the former. In assessing the culpability of a defendant under the proposed offence, the court would likely, in referring to the English approach, assess all the circumstances including the nature of the relationship between the offender and the victim, and the nature of the breach of duty towards the victim.

Rehabilitation of offenders

8.17 Some Respondents also suggest providing support to offenders to assist them in transiting out of the correctional institution, and to reduce the risk of committing abuse again. We understand that the Correctional Services Department runs a comprehensive range of rehabilitation programmes for persons in custody including young offenders, drug dependents and persons with violent behaviour. There are also various pre-release vocational training courses and post-release supervision schemes for offenders. Moreover, the department also works closely with rehabilitation synergistic partners to provide rehabilitation programmes.¹⁷ Separately, the SWD also provides counselling service and educational programmes for batterers to help them to avoid using violence again.¹⁸

8.18 All these programmes, schemes and courses vividly illustrate that the notion of rehabilitation is well entrenched in the criminal justice system. The combined effect of our recommended maximum penalties and these rehabilitation measures would help achieve the purposes of retribution, deterrence, prevention and rehabilitation. Hopefully, this could enhance the protection to children and vulnerable persons against abuses.

¹⁶ *R v Mills*, see above, at paras 54 to 55. See also *Blackstone's Criminal Practice 2021*, at para B1.84.

¹⁷ Correction Services Department web-site: *Hong Kong Fact Sheet: Correctional Services*. Available at https://www.csd.gov.hk/english/pub/pub_hkfs/pub_hkfs.html (accessed on 31 March 2021).

¹⁸ SWD website. Available at https://www.swd.gov.hk/vs/index_e.html#s4 (accessed on 31 March 2021).

Our Final Recommendations 12 and 13

8.19 These two recommendations have received overwhelming support. We have also addressed Respondents' arguments for opposing, concerns and suggestions, with reference to overseas experience, relevant literature and judicial authorities, and thus recommend retaining Recommendations 12 and 13.

Final Recommendation 12

We recommend that where the victim dies as a result of the unlawful act or neglect, the maximum penalty for the proposed offence should be 20 years' imprisonment.¹⁹

Final 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 proposed offence should be 15 years' imprisonment.²⁰

Number of responses to Recommendation 14

8.20 All the Respondents (100% (12/12)) who have expressly stated their stance on Recommendation 14(a) to (e) support it.

¹⁹ The proposed section 25A(5)(a) of the OAPO in the draft Bill (Annex 1 of this Report):
"25A. (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".

²⁰ The proposed section 25A(5)(b) of the OAPO in the draft Bill (Annex 1 of this Report):
"25A. (5) A person convicted of an offence under subsection (1) is liable on conviction on indictment to—
...
(b) if the victim suffers serious harm— imprisonment for 15 years.".

	Number	Percentage (%)
Agree	12	11%
Oppose	0	0%
Neutral/No Comment	101	89%
Other Comments	0	0%
<u>Total</u>	<u>113</u>	<u>100%</u>

8.21 Most of the Respondents who support Recommendation 14 have not given detailed reason. A legal professional body comments that the proposed venues of trials appear reasonable if the proposed offence is to be adopted.

Our Final Recommendation 14

8.22 In view of the overwhelming support of the Respondents who have not raised concerns, we recommend retaining Recommendation 14.

Final Recommendation 14

We recommend that:

- (a) the proposed offence should be an indictable offence;**
- (b) cases involving the proposed offence should not be heard summarily in the Magistrates' court;**
- (c) cases involving the proposed offence resulting in serious harm to the victim should be triable in either the District Court or the High Court;**
- (d) cases involving the proposed offence resulting in 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.**

Chapter 9

Collateral measures and Respondents' other observations

9.1 Many Respondents are concerned that merely using legislative means to strengthen the deterrence of abuses may not necessarily reduce the risk of harm to children or vulnerable persons; it may instead increase the pressure on their carers. They suggest that the Government should in parallel put in place sufficient resources and support, training and education, and promotion and publicity so as to enhance the protection for children and vulnerable persons generally. This chapter will first consider their comments and suggestions on these collateral measures and then discuss their other incidental observations.

Respondents' comments and suggestions on collateral measures

Resources and support

9.2 Some of the Respondents comment that the enactment of the proposed offence may further exacerbate the existing problem of scant resources and support for protecting children and vulnerable persons. They suggest that the Government should inject substantially more resources in care services, and the SWD should intervene earlier in abuse cases and collaborate with the stakeholders by providing relevant resources and support. In particular, the Respondents make the following suggestions:

- (a) The special needs of **children and vulnerable persons**, such as the elderly and mentally incapacitated persons, should be taken into account when providing care services for them. In particular, their interests should be safeguarded during the judicial process, from collection of evidence to prosecution and trial of the proposed offence.
- (b) Appropriate social services, for example day child care service, home-based training, parental education, etc, should be provided to reduce the pressure on **parents and carers**.
- (c) Apart from the victim, the **abuser and the whole family** also need assistance in order to protect the child and vulnerable person in the long term. This is because family relationship may deteriorate in a family suffering from abuse.

- (d) There should be support to subvented or private ***institutions*** for children, elderly and disabled persons to improve their manpower and facilities, train their staff and obtain legal advice.
- (e) Community support, psychological services and legal services should be available to ***those traumatised*** by the incidents of abuses eg parents and teachers.

Training and education

9.3 The Respondents also suggest that the Government should strengthen the training and education for the following professionals, carers and care personnel:

- (a) Professional and volunteer carers (including care service providers, domestic helpers and foster parents), teachers, social workers and health-care personnel, from governmental and non-governmental sectors - There should be formal training, licensing and regulatory regimes for babysitters to ensure their quality.
- (b) Police officers and investigators - There should be appropriate training on child safeguarding (including sensitivity training on gender issues, child development and psychological needs).
- (c) Judicial officers and lawyers - Few of them are experienced in child protection or child welfare law.

9.4 Training and education on the proposed offence should cover the following aspects:

- (a) the scope of various concepts in the proposed offence (including what amounts to abuse, *“neglect”*, *“duty of care”*, the circumstances in which there will be a risk of *“serious harm”*, *“reasonable steps”*, *“vulnerable person”* etc);
- (b) early identification of child abuse (including indicators of risks of harm, risky environments and situations, characteristics of victims and offenders);
- (c) examples to illustrate the application and coverage of the proposed offence;
- (d) reporting procedures (including notification mechanism, reporting and recording procedures, steps to follow-up the cases and investigation of cases);
- (e) practical guidelines/guides/codes of practice (providing clear instructions and time frame for handling abuse cases of children, the elderly and mentally incapacitated persons) that are reviewed and updated; and
- (f) social service units from which assistance can be sought.

9.5 Furthermore, training and education on child safeguarding and child rights generally should be provided to raise the awareness of child protection, in particular:

- (a) systematic and in-depth child safeguarding and protection training for carers and professionals in governmental and non-governmental sectors;
- (b) community programs by qualified professionals; and
- (c) child rights education in schools (which should be compulsory) and to the public (so that child rights would be included in their policies and practices).

Promotion and publicity

9.6 Some Respondents suggest that there should be strong promotional efforts from the Government to educate the public on the legal aspects of the proposed offence. In particular, there should be clear explanation to the public that bystanders may be caught by the proposed offence if they do nothing and allow the abuse to occur (so as to encourage them to report abuse cases promptly such that relevant authorities could intervene earlier). In particular, they suggest:

- (a) establishing a collaboration platform among relevant departments and social welfare organisations to facilitate discussion and future implementation of the proposed offence, with the Elderly Commission and the Guardianship Board playing a more active role in promoting public education;
- (b) conducting publicity and public education programmes so that carers, relevant professionals and stakeholders, and members of the public would be more vigilant in the protection of children and vulnerable persons and prevention of abuses; and
- (c) conducting extensive promotional activities, such as holding seminars in various districts, producing announcements in the public interest, websites and pamphlets (including brief version of the proposed offence with examples to illustrate its application for the public).

Our analysis and response on collateral measures

9.7 We in general agree with Respondents' suggestions that sufficient resources and support, training and education, and promotion and publicity should be provided in parallel with the proposed offence so as to enhance the protection for children and vulnerable persons, although these collateral measures are outside this project's terms of reference. We also have the following remarks.

Resources and support

9.8 We note the Government's statement in the 2020-21 Budget: "*the current-term Government spares no effort to enhance social welfare services*", and the recurrent expenditure in this area has increased by 26 per cent, from \$65.3 billion in 2017-18 to \$82.3 billion in 2019-20.¹ The SWD is responsible for implementing the Government's policies on social welfare and for developing and co-ordinating social welfare services, including family and child welfare services, services for the elderly, rehabilitation services for people with disabilities, medical social services, and services for young people etc.² We are of the view that the Government (SWD in particular) should consider Respondents' suggestions on providing more resources and support.

9.9 Regarding the suggestion on providing support to children and vulnerable persons during the judicial process, there are existing code, guidelines and procedures on the prosecution and trial of abuse cases which already take care of the interests of children and vulnerable persons (eg specific provisions in the *Prosecution Code* on vulnerable witnesses³ and domestic violence cases⁴). Moreover, as noted in the English model, the Crown

¹ *The 2020-21 Budget, Budget Speech by the Financial Secretary*, the Hon Paul MP Chan moving the Second Reading of the Appropriation Bill on 26 February 2020, at para 147. Available at: <https://www.budget.gov.hk/2020/eng/budget29.html>, (accessed on 9 February 2021).

² *Hong Kong: The Facts – Social Welfare*. Available at: https://www.swd.gov.hk/en/index/site_pubpress/page_fact/, (accessed on 5 February 2021).

³ Department of Justice of Hong Kong, *Prosecution Code (2013)*, see 14: Victims of crimes and vulnerable witnesses. Available at: https://www.doj.gov.hk/en/publications/prosecution_ch14.html, (accessed on 3 April 2021):

"14.7 *Vulnerable witnesses who may or may not be victims of crime should be treated with similar respect for their rights, expectations and personal circumstances. They include children, persons with mental disabilities and witnesses in fear. It may be appropriate for protection to be provided to vulnerable witnesses or victims of crime by way of:*

- a. giving evidence by live television link;*
- b. playing electronically pre-recorded video evidence;*
- c. a screen;*
- d. a closed hearing;*
- e. an expedited hearing;*
- f. a continuous hearing;*
- g. support persons;*
- h. informality in court conduct;*
- i. special security measures."*

See also:

Department of Justice Hong Kong, *The Victims of Crime Charter*. Available at: https://www.doj.gov.hk/en/publications/pdf/vcc_e.pdf (accessed on 3 April 2021).

Department of Justice Hong Kong, *The Statement on the Treatment of Victims and Witnesses (2009)*. Available at:

<https://www.doj.gov.hk/en/publications/pdf/tvw20090901e.pdf> (accessed on 3 April 2021).

⁴ See the *Prosecution Code*: prosecutors should have regard to the *Guidelines for Prosecuting Domestic Violence Cases* (at para 17.1). In prosecuting domestic violence cases, the prosecution must consider the safety of the victim, any children and

Prosecution Service has issued guidance on the prosecution of the corresponding English offence⁵ which refers also to the Victims' Code. The guidance may provide useful reference for Hong Kong in prosecuting under the proposed offence.

9.10 In relation to the giving of evidence, the Evidence (Amendment) Bill 2018⁶ was introduced to give more protection to vulnerable witnesses by empowering the court to admit hearsay evidence of a declarant who is unfit to be a witness because of the declarant's age, physical or mental condition, provided that the court is satisfied with the reliability of the evidence. This will further protect the interests of children and vulnerable persons in the judicial process.

Training and education

9.11 We agree with the Respondents' suggestion that training and education should be strengthened for carers (including parents and foster parents, babysitters, domestic helpers), care personnel in care institutions, relevant professionals and stakeholders (such as teachers, social workers, health-care personnel, police officers, lawyers and judicial officers) in both governmental and non-governmental sectors. There should also be collaboration with NGOs.

9.12 We understand that the SWD organises different training programmes for frontline professionals to enhance their knowledge in handling domestic violence and abuse cases⁷. In addition, the SWD, the Police and the Education Bureau also regularly run joint training programmes.⁸ In designing

other persons involved, the situation of the family and the likely effect of any prosecutions on its members (at para 17.2).

⁵ Crown Prosecution Service, *Child Abuse (non-sexual) - prosecution guidance* (14 February 2020). Available at: <https://www.cps.gov.uk/legal-guidance/child-abuse-non-sexual-prosecution-guidance> (accessed on 3 April 2021).

⁶ See para 8.20 of the Consultation Paper for the discussion on "*Protection of the vulnerable in the giving of evidence in court proceedings*". The Evidence (Amendment) Bill 2018 was introduced into the Legislative Council on 4 July 2018. A Bills Committee was formed to scrutinise the bill and its report was considered by the House Committee on 5 June 2020. See Law Reform Commission of Hong Kong web-site. Available at: <https://www.hkreform.gov.hk/en/implementation/index.htm#51> (accessed on 9 February 2021).

⁷ See para 8.8 of the Consultation Paper for the discussion on "*On-going training for those handling cases involving family violence*".

⁸ See Hong Kong Police Force web-site. Available at: https://www.police.gov.hk/ppp_en/04_crime_matters/child/functions.html (accessed on 17 February 2021).

See Legislative Council question by the Dr Hon Elizabeth Quat and reply by the Secretary for Labour and Welfare, Dr Law Chi-kwong, LCQ3: *Protection of children from physical and sexual abuses* (24 January 2018). Available at: <https://www.info.gov.hk/gia/general/201801/24/P2018012400462.htm> (accessed on 17 February 2021).

their programmes, we trust that the relevant authorities would have regard to the suggestions made by the Respondents on the training targets and content.

9.13 As to the suggestion on practical guidelines for handling abuse cases, the SWD and the Education Bureau have reviewed and updated various guidelines/guides/circulars on the handling of abuse cases.⁹ In addition, the Police has also issued guidelines to frontline officers setting out the circumstances under which a child abuse victim should be referred to medical and social services.¹⁰ We trust that with these guidelines/guides/circulars, frontline care personnel and professionals should have a clearer idea of what steps should be taken to protect children and vulnerable persons.

Our remarks

9.14 We in general share the above concerns and suggestions raised by the Respondents, albeit outside this project's terms of reference. To complement the enactment of the proposed offence, we thus encourage the Government to provide further training to carers, care services sectors, relevant stakeholders and professionals; and educate the public to promote awareness and understanding of the proposed offence.

Respondents' other observations

9.15 Apart from responding to the Recommendations on the proposed offence, some Respondents have also commented and put forward suggestions on other broader issues about more comprehensively protecting children and vulnerable persons. While these issues are outside this project's terms of reference, we set out their comments and suggestions in this chapter for the information of the Government and other relevant organisations in considering how to further enhance the protection.

Reporting of abuse

9.16 The Sub-committee explored this issue in the Consultation Paper both from the angles of voluntary reporting and mandatory reporting.¹¹

⁹ Under the heading of "*What amounts to reasonable steps*" in paras 2.20 to 2.21 of Chapter 2 (Final Recommendation 1). Education Bureau Circular No. 1/2020: *Handling Suspected Cases of Child Maltreatment and Domestic Violence*. Available at: <https://applications.edb.gov.hk/circular/upload/EDBC/EDBC20001E.pdf> (accessed on 3 April 2021).

¹⁰ *Second Report of the Hong Kong Special Administrative Region under the Convention on the Rights of the Child*, at para 201. Available at: https://www.cmab.gov.hk/en/issues/child_report2.htm (accessed on 16 February 2021).

¹¹ See paras 8.25 to 8.79 of the Consultation Paper for the discussion on "*Reporting of abuse*".

Although there is no recommendation on this issue in the Consultation Paper, some Respondents have indicated their stance on whether they support mandatory reporting or not.

Respondents supporting mandatory reporting

9.17 Twenty Respondents have expressed their views on this issue. Among them, 11 Respondents (55%, 11/20) support mandatory reporting of abuse. In particular, a social service organisation comments that this is particularly important for young children from age 0 to 3 who have yet to enter school and are largely “invisible” except where they receive vaccinations in Government or private clinics.

Respondents suggesting studying mandatory reporting further

9.18 Eight Respondents (40%, 8/20) consider that the Government should study further to explore whether to put in place a mandatory reporting mechanism after fully consulting stakeholders for the following reasons:

- (a) Mandatory reporting mechanism by legislative means, a highly complex and controversial issue, requires thorough consideration of its wide ranging implications (including different options on how to handle the related issues, liabilities and rights of different parties, public interest, social inclination and whether such legislation may effectively solve the problems and achieve the desired results).
- (b) There should be wide consultation and in-depth discussion to collect the opinions of relevant sectors and stakeholders, including views of the children.

9.19 The SWD should enhance the general understanding of existing reporting channels and procedures, and the Government should consider undertaking a full review of the existing guidelines. In addition, we note that the Ombudsman recommended in its 2019 report that the Government should explore the feasibility of mandatory reporting of suspected child abuse.¹²

Respondent not supporting mandatory reporting

9.20 A social service organisation (5%, 1/20) comments that it is not prudent to impose a mandatory reporting duty on professionals to report suspected abuse, “*but ... child abuse issue should be a compulsory subject in the induction training for the relevant professions*”.

¹² Office of The Ombudsman, Hong Kong *Direct Investigation Report on Mechanism for Identifying and Reporting Suspected Child Abuse Cases* (October 2019). Available at: https://ofomb.ombudsman.hk/abc/en-us/direct_investigations (accessed on 11 April 2021).

Features of mandatory reporting mechanism

9.21 *Imposing duty to report abuses* - Some Respondents¹³ suggest imposing a duty to report abuses on a broad spectrum of persons/institutions/sectors as “*the range of duty bearers involved in providing care to a child is broad*”, ie:

- (a) health-care, social welfare and educational sectors;
- (b) professionals including teachers, social workers, medical practitioners and persons who provide professional services to children;
- (c) persons responsible for the care and welfare of children, including persons with parental responsibility, childminders and private tutors, owners and operators of child care centres, domestic helpers, casual babysitters and one-off volunteers; and
- (d) care institutions

Placing the responsibility to report child abuse on institutions would make it easier for the employees to bring up child safeguarding concerns more openly within the institutions and report the abuses when necessary. However, it could be particularly challenging for professionals to report abuses within the institutions they work in, as reporting institutional abuses externally may potentially affect the institutions’ reputation and funding. Therefore, there should be detailed reporting guidelines to clarify the lines of accountability on reporting within institutions.

9.22 *Reporting mechanism and its objective* - The objective of setting up a mandatory reporting mechanism should be to handle high-risk cases rather than all suspected cases. Therefore, there should be a well-defined case triage system and clear assessment tools/protocol, so that abuse cases may be referred to various units according to their different risk levels. Respondents have the following suggestions:

- (a) Mandatory reporting in stages:
 - (i) The first stage is to report cases of children from 0 - 5 years old who suffer from physical abuse and sexual abuse.
 - (ii) The second stage is to report cases of children under 18 years old who suffer from all types of abuses.

¹³ A social service organisation notes that many jurisdictions have mandatory reporting systems in place for child abuse, and have clearly defined those required to report the case. For example, “*health practitioners, teachers, social workers, police officers and employees of an organisation formed for religious purposes, etc.*” are incorporated into the mandatory reporting system under section 30 of the Children and Young People (Safety) Act 2017 (South Australia).

- (iii) The reporting mechanism should initially apply to professionals who have frequent contact with children, and can be reviewed to consider requiring the public to report abuses.
- (b) Legislative and administrative processes should be put in place to prevent abuse of the mandatory reporting mechanism.
- (c) The criteria for mandatory reporting of child abuse cases should be clearly laid down.
- (d) Complementary support to protect the safety of children and vulnerable persons after the abuse is reported should be enhanced:
 - (i) Better residential care services for the children and elderly are required.
 - (ii) The care plans of abused children should be subject to mandatory judicial review so that the court could regularly monitor the long-term welfare of children receiving residential child care services.
- (e) Protection of privacy of victims is important.
- (f) Protection for whistleblowers

Whistleblowers of abuses could be victimised by their institutions and the abusers, eg dismissal from work. In particular, domestic helpers may not incline to report abuses if they work for the abusers and are possible victims of the abusers. To protect whistleblowers, it should be an offence to discriminate or victimise persons who report abuses in good faith.¹⁴
- (g) Abusers should be required to receive counselling and parenting education by law, and be supervised by social workers so as to prevent the recurrence of child abuse.
- (h) It is not always necessary to report abuses to the Police, and it should be sufficient to report to relevant Government departments (eg schools notifying the SWD to follow up).
- (i) Save for cases of malicious intent, imposing criminal liability on a person who fails to report abuse may be counterproductive and unnecessary. Rather, it should be clearly set out in law as a civil duty. (In contrast, a social service organisation comments that criminal sanction should be imposed if professionals fail to fulfil the mandatory duty to report.)

¹⁴

For example, provisions to protect whistleblowers similar to section 156 (anonymity of complainants) and section 157 (offences under section 156) of the Crimes Ordinance (Cap 200), and protection against victimisation of reporters of sexual assault under the Sex Discrimination Ordinance (Cap.480).

Reforming other areas of law

9.23 Apart from reporting of abuse, some Respondents have also made other comments and suggestions on reforming other areas of law to enhance the protection of children and vulnerable persons generally:

Children -

- (a) overall reviewing child protection laws, including criminal, civil and family laws;
- (b) amending the Protection of Children and Juveniles Ordinance (Cap.213) which has not been substantially amended since 1993;
- (c) legislating to implement the United Nations Convention on the Rights of the Child;
- (d) legislating to ban corporal punishment completely; and
- (e) adding the proposed offence in Schedule 2 of the Social Workers Registration Ordinance (Cap.505) which lists offences that disentitle persons from continuing to be registered social workers.

Vulnerable persons -

- (a) expediting the reform on “*hearsay evidence*” by the Evidence (Amendment) Bill 2018¹⁵ to protect vulnerable persons in giving evidence in court; and
- (b) to protect vulnerable persons from sexual abuses,¹⁶ putting forward the responses to the LRC’s Consultation Papers on Review of Sexual Offences to the Government for consideration as a matter of urgency.

Measures on protection of children and vulnerable persons

9.24 Some Respondents have put forward suggestions on how policies and practices should be improved to provide better protection to children and vulnerable persons:

¹⁵ The Sub-committee revisited the law reform proposal in the LRC Report on Hearsay in Criminal Proceedings in para 8.20 of the Consultation Paper. See above at footnote 6 for the latest position of this bill.

¹⁶ The LRC Report on the *Review of Substantive Sexual Offences* was published in December 2019, which has been referred to the Government for consideration.

Children -

- (a) setting up an independent statutory Children's Commission¹⁷ to deal with children's affairs and formulate children's policies;
- (b) collecting data on abuse cases and analysing the trends of child abuse, neglect, ill-treatment, domestic violence and other important issues that affect fundamental rights of children;
- (c) establishing child safeguarding policy in care institutions;
- (d) introducing a "*children's advocate*" in family proceedings to ensure that children's best interests are adequately protected;
- (e) engaging children in formulating child-centred laws, policies and practices;
- (f) enhancing the mechanism for reviewing child death cases;
- (g) establishing an information platform on child protection;
- (h) improving co-operation between the prosecution, the SWD and civil society to ensure that cases of serious harm are identified and prevented;
- (i) removing the requirement that a social worker must first obtain the consent of the victim of abuse or the guardian before making referral; and
- (j) regularising the "*Pilot Scheme on Social Work Service for Pre-primary Institutions*".

Vulnerable persons -

- (a) enhancing the role of the SWD and the Guardianship Board in monitoring the protection of vulnerable persons; and
- (b) transforming the Working Group on Elder Abuse into a select committee, with members from the Police and private elderly services industry.

Our remarks

9.25 We agree with the Respondents that legislative means alone is not sufficient to prevent abuses and to protect children and vulnerable persons. Indeed, joint efforts of all relevant authorities, carers and care institutions,

¹⁷ The Commission on Children was set up by the Government on 1 June 2018 which aims to "*ensure that our society can respect and safeguard children's rights, interests and well-being, listen to their voices, and let them enjoy healthy and happy growth and optimal development so as to achieve their fullest potential.*" See Commission on Children web-site. Available at: <https://www.coc.gov.hk/en/welcome.html> (accessed on 11 April 2021).

stakeholders and the public are necessary to ensure that abuses are spotted and prevented. Although the proposed offence is no panacea, it will send a clear and unequivocal message that there is zero tolerance for abuses of children and vulnerable persons. We hope that the publication of this Report will prompt society at large to realise that concerted efforts are needed to protect the most vulnerable, preferably by way of prevention or at least nipping abuses at the bud. As stated in the Consultation Paper, “[t]he most vulnerable in society often cannot speak for themselves, so we must speak for them”.¹⁸

¹⁸ See para 8.79 of the Consultation Paper.

Chapter 10

Summary of our Final Recommendations

Final 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).

Final Recommendation 2

Subject to the views of the Law Draftsman, we recommend that the proposed offence of “*Failure to protect a child or vulnerable person where the child’s or vulnerable person’s death or serious harm results from an unlawful act or neglect*” should be comprised in a new section of the Offences against the Person Ordinance (Cap 212) and should be located earlier in the Ordinance than section 27 of that Ordinance, to indicate the more serious nature of the proposed offence.

Final 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);
- (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; and
- (c) that section 14(1)(c) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005) should be adopted in the proposed offence subject to the substitution of the *mens rea* “*knew, or had reasonable grounds to believe,*” for “*was, or ought to have been, aware*” in the provision.

Final Recommendation 4

We recommend that under the proposed offence:

- (a) the scope of “*victim*” should cover “*a child*” and “*a vulnerable person*”;
- (b) “*child*” should be defined as “*a person under 16 years of age*”; and
- (c) “*vulnerable person*” should be defined as “*a person aged 16 years or above whose ability to protect himself or herself from an unlawful act or neglect is significantly impaired for any reason, including but not limited to age, physical or mental disability, illness or infirmity*”.

Final Recommendation 5

We recommend that the proposed offence should apply in cases involving either the death of the victim, or where the victim has suffered serious harm.

We are not in favour of the inclusion of a statutory definition of “*serious harm*” within the terms of the proposed offence.

We recommend that “*harm*” should be defined to include psychological or psychiatric harm.

Final 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 the concept of “*member of the same household*” who has “*frequent contact*” with the victim used in section 5 of the English Domestic Violence, Crime and Victims Act 2004, should be used as alternative bases for liability under the proposed offence.

Final Recommendation 7

We recommend that no specific minimum age for the defendant should be stipulated in the proposed offence, in line with the approach in section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005).

We recommend that the consent of the Secretary for Justice to prosecute under the proposed offence is required.

Final Recommendation 8

We recommend adopting in the proposed offence the concept of, and definitions relating to, “*unlawful act*” in section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005), subject to the following amendments:

- (a) the addition of the words “*or neglect*” after “*unlawful act*” in the first sub-section of the proposed offence;
- (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*”.

Final Recommendation 9

We recommend:

- (a) that section 14(1)(c) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005) should be adopted in the proposed offence, subject to Final Recommendation 3(c) and the substitution of the words “*a risk*” for “*an appreciable risk*” in the provision; and
- (b) in line with Final Recommendation 8 above, that the words “*or neglect*” should be added after “*unlawful act*” in sub-section (1)(c) of the proposed offence.

Final Recommendation 10

We recommend:

- (a) adopting section 14(1)(d) of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005), with the revisions set out in paragraph (b) below, as the proposed section 25A(1)(d) and (e) in the draft Bill.
- (b) the revisions are as follows:
 - (i) splitting paragraph (d) under the original proposed section 25A(1) into two separate paragraphs ie paragraphs (d) and (e);
 - (ii) substituting “*reasonable steps*” for “*steps that he or she could reasonably be expected to have taken*” and adding “*such*” before “*harm*” in the proposed section 25A(1)(d);
 - (iii) substituting “*mentioned in paragraph (d)*” for “*to do so*” in the proposed section 25A(1)(e); and
 - (iv) adding subsections (3A) and (3B) in the proposed section 25A in the draft Bill to specify the factors for determining the “*reasonable steps in the circumstances*” for the purposes of its subsection (1)(d).

Final Recommendation 11

We recommend that a provision along the following lines should be adopted in the proposed offence 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):

“In proceedings for an offence under subsection (1) –

- (a) it is not necessary for the prosecution to prove who did the unlawful act or neglect mentioned in subsection (1)(a); and*
- (b) the defendant may be convicted of the offence regardless of whether the defendant did or may have done the unlawful act or neglect.”*

Final Recommendation 12

We recommend that where the victim dies as a result of the unlawful act or neglect, the maximum penalty for the proposed offence should be 20 years' imprisonment.

Final 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 proposed offence should be 15 years' imprisonment.

Final Recommendation 14

We recommend that:

- (a) the proposed offence should be an indictable offence;
- (b) cases involving the proposed offence should not be heard summarily in the Magistrates' court;
- (c) cases involving the proposed offence resulting in serious harm to the victim should be triable in either the District Court or the High Court;
- (d) cases involving the proposed offence resulting in 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.

(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.

¹ These draft provisions are possible amendments to the Offences against the Person Ordinance (Cap.212) and are included to assist in explaining the proposed offence in this Report. They are not the final version for the legislative process if legislation were to be introduced to give effect to the proposed offence.

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 knew, or had reasonable grounds to believe, that there was a risk that serious harm would be caused to the victim by the unlawful act or neglect;
 - (d) the defendant failed to take reasonable steps in the circumstances to protect the victim from such harm; and
 - (e) the defendant’s failure mentioned in paragraph (d) 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.
- (3A) For subsection (1)(d), the factors for determining the reasonable steps in the circumstances include—
 - (a) the circumstances of the case (including the defendant’s personal circumstances); and
 - (b) the steps that a reasonable person sharing the defendant’s characteristics could be expected to have taken in the circumstances mentioned in paragraph (a).

- (3B) For subsection (3A)(b), only the characteristics of the defendant that are relevant to defendant's ability to take steps in relation to the risk mentioned in subsection (1)(c) are to be taken into account.
- (4) In proceedings for an offence under subsection (1)—
- (a) it is not necessary for the prosecution to prove who did the unlawful act or neglect mentioned in subsection (1)(a); and
 - (b) the defendant may be convicted of the offence regardless of whether the defendant did or may have done the unlawful act or neglect.
- (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;
- harm** includes psychological or psychiatric harm;
- 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, age, physical or mental disability, illness or infirmity.
- (7) A prosecution for an offence under subsection (1) may only be started by or with the consent of the Secretary for Justice.”.

List of Respondents to the Consultation

Responses were received from the following Respondents, arranged in alphabetical order:

1. Advancing human rights in Hong Kong through the UN Universal Periodic Review process (Hong Kong UPR Coalition)
2. Against Child Abuse
3. Agency for Volunteer Service
4. Asian Academy of Family Therapy
5. The Association for the Advancement of Feminism
6. Association Concerning Sexual Violence Against Women
7. The Boys' and Girls' Clubs Association of Hong Kong
8. Caritas Hong Kong (Child Care Service)
9. Caritas Hong Kong (Family Service)
10. Caritas Hong Kong (Rehabilitation Service)
11. Caritas Hong Kong (Services for the Elderly)
12. Caritas Hong Kong (Youth and Community Service)
13. Chan, Carol
14. Cheng, Wai Chung
15. Cheung, James
16. Cheung, Klaudy
17. Chong, Yiu Kwong (Solicitor) (Senior Lecturer, The Education University of Hong Kong)
18. The Christian New Being Fellowship Ltd
19. Commission on Children
20. Committee on Child Abuse
21. Constitutional and Mainland Affairs Bureau
22. Correctional Services Department
23. Council of Non-profit Making Organizations for Pre-primary Education
24. Department of Health
25. District Fight Crime Committee (Wong Tai Sin District)
26. Duty Lawyer Service
27. Early Childhood Education Administrators Association (Hong Kong)
28. Ebenezer School and Home for the Visually Impaired
29. Education Bureau
30. Elderly Commission

31. The Elderly Services Association of Hong Kong
32. Equal Opportunities Commission
33. Evangel Children's Home
34. Evangelical Lutheran Church Social Service – Hong Kong
35. Family Council
36. Family Value Foundation of Hong Kong Limited
37. The Federation of Medical Societies of Hong Kong
38. Government of South Australia, Attorney-General's Department
39. HELP for Domestic Workers
40. Hong Kong Bar Association
41. Hong Kong Christian Kindergarten Teachers' Association
42. Hong Kong Christian Service
43. The Hong Kong College of Family Physicians
44. The Hong Kong Committee on Children's Rights
45. The Hong Kong Council of Social Service
46. Hong Kong Doctors Union
47. Hong Kong Early Childhood Education Administrative Professional Association
48. Hong Kong Early Childhood Educators Association
49. Hong Kong Family Welfare Society
50. Hong Kong Federation of Education Workers
51. Hong Kong Federation of Women's Centres
52. The Hong Kong Federation of Youth Groups, Youth Crime Prevention Centre
53. The Hong Kong Joint Council of Parents of the Mentally Handicapped
54. Hong Kong Kindergarten Association
55. The Hong Kong Medical Association
56. Hong Kong Police Force
57. Hong Kong Professionals and Senior Executives Association
58. Hong Kong Professional Teachers' Union
59. Hong Kong Public Doctors' Association
60. Hong Kong Sheng Kung Hui Welfare Council Limited
61. Hong Kong Single Parents Association
62. Hong Kong Society for the Protection of Children
63. Hong Kong Special Schools Council
64. The Hong Kong Taoist Association
65. Hong Kong Women Development Association Limited
66. Hong Kong Women Doctors Association
67. Hong Kong Young Women's Christian Association
68. Hospital Authority

69. Immigration Department
70. Justice Centre Hong Kong
71. Kwan, Kelly
72. Labour and Welfare Bureau & Social Welfare Department
73. Labour Department
74. Lai, Oi Ning Irene
75. Lau, Miu Chun Kari
76. Lau, Sze Man Katherine
77. Lau, Michelle
78. The Law Society of Hong Kong
79. Legal Aid Department
80. Leung, Leung
81. Marwah, Azan (Barrister)
82. The Medical Council of Hong Kong
83. Mother's Choice
84. New People's Party
85. Non-Profit-Making Kindergarten Council of Hong Kong
86. Or, P
87. Parents for The Family Association
88. PathFinders
89. (Philippine Consulate General in Hong Kong)
Consulate General of the Republic of the Philippines Hong Kong
90. Plan International Hong Kong
91. Po Leung Kuk
92. Privacy Commissioner for Personal Data, Hong Kong
93. Professional Association of Masters of Education in Early Childhood
Education of The Education University of Hong Kong
94. Rehabilitation Advisory Committee
95. Richmond Fellowship of Hong Kong
96. SAHK (formerly known as The Spastics Association of Hong Kong)
97. Sai Kung District School Heads Association
98. The Salvation Army Carer Association
99. Sau Po Centre on Ageing, The University of Hong Kong
100. Save the Children
101. Scout Association of Hong Kong
102. Security Bureau
103. Social Workers Registration Board
104. Society for Community Organization
105. The Society for Truth and Light
106. Supplementary Medical Professions Council

- 107. Tai Po & North District Early Childhood Education (ECE) Principal Association
- 108. Tsuen Wan, Kwai Chung & Tsing Yi District Kindergarten Heads Association
- 109. Tuen Mun District Kindergarten Heads Association
- 110. Tung Wah Group of Hospitals
- 111. Women's Commission
- 112. The Women's Foundation
- 113. Yuen Long Kindergarten Heads Association

