

LRC releases report on causing or allowing the death or serious harm of a child or vulnerable adult

The Law Reform Commission of Hong Kong (LRC) published a report today (September 10) recommending 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 proposed offence). The LRC also recommends that the Government should review the maximum penalty for the offence of ill-treatment or neglect of a child under section 27 of the Offences against the Person Ordinance (Cap 212) with a view to increasing it as appropriate.

This report follows a study by the LRC's Causing or Allowing the Death of a Child or Vulnerable Adult Sub-committee, chaired by Ms Amanda Whitfort, which issued a consultation paper in May 2019. The Sub-committee has studied the laws and practices of other common law jurisdictions, in particular England, South Australia and New Zealand.

The proposed offence would impose criminal liability on bystanders to deal with the problem of "which of you did it" cases, where a victim of abuse dies or suffers serious harm and all accused parties are acquitted of murder, manslaughter or other causative offences because it cannot be proven beyond reasonable doubt which one of them is directly responsible. This is often further complicated by the silence of the suspects and other family members when the vulnerable victim cannot speak up for himself or herself.

Ms Whitfort said, "The proposed offence highlights the focus on protection of children and vulnerable persons by prevention and deterrence, rather than mere punishment of the perpetrator, by way of imposing criminal liability on those who fail to take reasonable steps to protect a child under 16 years of age or a vulnerable person over that age (including the elderly and persons with disabilities) from death or serious harm."

The proposed offence has the following main features:

- (1) It would apply in both a domestic setting where the defendant was a member of the victim's household and had frequent contact with the victim, and an institutional setting where the defendant owed a duty of care to the victim.

(2) The mental element of the proposed offence is that the defendant knew, or had reasonable grounds to believe, that there was a risk of serious harm to the victim, including psychological or psychiatric harm resulting from sexual assault. The subjective viewpoint of the defendant would be taken into account, and the proposed offence does not target accidents.

(3) Another element is that the defendant's failure to take reasonable steps to protect the victim from such harm falls so far short of the standard of care reasonably expected of him or her and was thus, in the circumstances, so serious that a criminal penalty is warranted. Factors for determining what the reasonable steps are include the defendant's personal circumstances and characteristics, such as his or her young age and whether he or she is subject to domestic violence or duress (as in the case of domestic helpers because of an imbalance of power).

(4) It carries high maximum penalties:

(a) 20 years' imprisonment in cases where the victim dies; and

(b) 15 years' imprisonment where the victim suffers serious harm, including being left in a permanent vegetative state.

As the proposed offence is based on the defendant's failure to take steps to protect the victim, it would not be necessary for the prosecution to prove whether the defendant was the perpetrator of the "unlawful act or neglect".

"Nonetheless, the prosecution still has to prove all the elements of the proposed offence beyond reasonable doubt. As such, the defendant's right to fair trial would not be undermined," Ms Whitfort emphasised.

The consent of the Secretary for Justice to prosecute the proposed offence is required to ensure that a decision to prosecute an underage defendant, for example an underage parent of a child victim, will be cautiously made.

The report also sets out the LRC's remarks on collateral measures to encourage the Government to provide further training and publicity on the proposed offence.

Ms Whitfort underscored, "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 a minimum, by requiring intervention at the earliest stage."

The report and the executive summary can be accessed on the website of the LRC at www.hkreform.gov.hk. Hard copies are also available on request from the Secretariat of the LRC at 4/F, East Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong.

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