

# THE LAW REFORM COMMISSION OF HONG KONG

## REPORT

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

#### EXECUTIVE SUMMARY

*(This executive summary is an outline of the Report. Copies of the full Report can be downloaded from the Commission's website at: <http://www.hkreform.gov.hk> or obtained from the Secretariat of the Law Reform Commission, 4th Floor, East Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong.)*

#### Consultation exercise

1. In May 2019, the Law Reform Commission's Causing or Allowing the Death of a Child or Vulnerable Adult Sub-committee published the Consultation Paper on Causing or Allowing the Death or Serious Harm of a Child or Vulnerable Adult ("**CP**"), pursuant to the terms of reference:

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

2. The Sub-committee recommends introducing a new offence of "*failure to protect*" to be added to the Offences against the Person Ordinance (Cap 212) ("**OAPO**") (the "**proposed offence**", see draft Bill at Annex 1 of the Report). The proposed offence imposes 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. The situation is often further complicated by the silence of the suspects and other family members when the victim cannot speak up for himself.

3. The Sub-committee received 113<sup>1</sup> responses from members of the public during the consultation. We are most grateful to all those who have commented on the CP.

## Structure of this Report

4. This Report consists of ten chapters making 14 Final Recommendations:

- (a) Chapter 1 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 the Report.

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<sup>1</sup> These are social service organisations; 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; teachers’ and parents’ groups; elderly services organisations; trade and business organisations; political organisation; consulate general and individuals.

## Chapter 2: Overview of the proposed offence of “Failure to protect”

5. Recommendation 1 in the CP recommends introducing 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”*. An overwhelming majority of the Respondents that have expressly stated their stance support Recommendation 1 to introduce the proposed offence because it will strengthen the protection of children and vulnerable persons who are at risk of being seriously abused. Respondents opposing Recommendation 1 are mostly social service organisations. Some Respondents have also raised their concerns and suggestions which are addressed in details in subsequent chapters of the Report. Recommendation 1 in the CP is maintained as **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).”*

## Chapter 3: Relationship with Offences against the Person Ordinance (Cap 212)

### ***Location of the proposed offence in the OAPO***

6. Recommendation 2 in the CP deals with the relationship of the proposed offence with the OAPO and recommends that the proposed offence should be comprised in a new section located earlier than section 27 of the OAPO to indicate its more serious nature. All Respondents, who have indicated their stance, support this recommendation which is therefore adopted as **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.”*

***Increasing maximum penalty of section 27 of the OAPO;  
Mens rea encompassing subjective viewpoint of defendants***

7. Recommendation 3(a) in the CP recommends retaining section 27 of the OAPO in its current form. A majority of the Respondents who have stated their stance support this recommendation. Recommendation 3(b) in the CP proposes that the Government should undertake a review of the maximum penalty under section 27(1)(a) of the OAPO with a view to increasing it as appropriate. There is overwhelming support for this recommendation. We therefore maintain Recommendation 3(a) and (b) in the Report.

8. To address some Respondents' concern, we in addition recommend in the Report the following revised *mens rea* of the proposed offence: a 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. This is to clarify that this objective test of "*reasonable grounds*" will take into account the viewpoint of the defendant, having regard to all the facts and circumstances known to him. Our **Final Recommendation 3** is as follows:

*"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."*<sup>2</sup>

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<sup>2</sup> The proposed section 25A(1)(c) of the OAPO in the draft Bill (Annex 1 of the 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

### *Victims under the proposed offence: children and vulnerable persons*

9. All Respondents who have expressly stated their stance agree with Recommendation 4(a) in the CP that the scope of victim should include a “child” or a “vulnerable person”. While some Respondents support the proposed definition of a “child” as “a person under 16 years of age” in Recommendation 4(b) in the CP, more of them consider that the age limit should be 18 years or as low as 14 or even 12 years. Nevertheless, we recommend retaining the age limit of 16 years for the following reasons:

- (a) This could ensure that the proposed offence and section 27 of the OAPO (which sets the age limit of victims at 16 years) are consistent as they will work in tandem.
- (b) Children of 16 years or above are able to express and protect themselves against abuses.
- (c) Uniformly raising the age limit to 18 years would involve diverse policy considerations that are beyond the purview of this study.
- (d) Respondents have different views on the age of maturity of children and there is no one single age that can be easily agreed on.

10. A majority of the Respondents who have expressly stated their stance on Recommendation 4(c) in the CP support the definition of “vulnerable person” to cover 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. In addition, we agree with some Respondents’ suggestion of adding “age” in the definition of “vulnerable person” to expressly cover the elderly.

11. For the reasons set out above, we recommend retaining Recommendation 4(a) and (b) in the CP and adding the word “age” to Recommendation 4(c), resulting in the following **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’.”<sup>3</sup>*

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<sup>3</sup> The proposed section 25A(1)(a) and (6) of the OAPO in the draft Bill (Annex 1 of the Report):

***Consequences inflicted on victims: death or serious harm  
(including psychological or psychiatric harm)***

12. All Respondents who have stated their stance support Recommendation 5 in the CP that the proposed offence should apply in cases involving the death of the victim, or where the victim has suffered serious harm. There is both support and opposition from Respondents on whether to include a statutory definition of “*serious harm*”. We do not see the need to include such a definition as it is not possible to define the term nor to have an exhaustive list, to cover all types of serious harm that may be suffered by victims of abuse cases. We also consider that there is no need to define “*serious harm*” to indicate that the harm is “*really*” serious harm as the degree of seriousness has already been encapsulated in the word “*serious*” and would thus exclude minor injuries.

13. We, however, agree with some Respondents that “*harm*” should include psychological or psychiatric harm, which would include harm resulting from sexual assault. Therefore, our **Final Recommendation 5** comprises Recommendation 5 in the CP and this elaboration on “*harm*”:

*“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.”<sup>4</sup>*

*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.”<sup>5</sup>*

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

<sup>4</sup> The proposed section 25A(1)(a) of the OAPO in the draft Bill (Annex 1 of the 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;”.

<sup>5</sup> The proposed section 25A(6) of the OAPO in the draft Bill (Annex 1 of the Report):

“(6) In this section –

**harm** includes psychological or psychiatric harm;”.

## Chapter 5: Defendants of the proposed offence

### *Defendants of the proposed offence: domestic and institutional settings*

14. Recommendation 6 in the CP recommends that defendants of the proposed offence should cover:

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

A majority of the Respondents who have expressly stated their stance support this recommendation. Respondents supporting the recommendation agree that the proposed offence should apply to both settings. They also suggest a wide spectrum of persons who should have a “*duty of care*” to the victim, including domestic worker, social worker, school teacher, healthcare professional etc.

#### *Domestic settings*

15. For domestic settings, we consider the scope justifiable as it is reasonable that a person in those circumstances should be expected to take some action, not simply stand by and do nothing. Moreover, an extended meaning of “*member of the same household*” should be adopted to cater for modern lifestyle and increasingly flexible family arrangements such that the proposed offence should also apply in the following circumstances:

- (a) where a person visits the household so often and for such periods of time that it is reasonable to regard him as a member of it;
- (b) 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.

#### *Institutional settings*

16. We propose that a defendant has a “*duty of care*” to the victim only if he:

- (a) is a parent or guardian of the victim; or
- (b) has assumed responsibility for the victim’s care.<sup>6</sup>

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 or management of a care institution should be liable would depend on the circumstances in each case.

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<sup>6</sup> The proposed section 25A(2) of the OAPO in the draft Bill (Annex 1 of the Report).

17. The proposed offence only covers serious abuses and cases where the failure to take reasonable steps was, in the circumstances, so serious that a criminal penalty is warranted. As care institutions are already regulated under the existing regulatory regime, we do not expect that the duties and workload of the carers and care institutions would increase significantly.

18. We recommend adopting Recommendation 6 in the CP as our **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.”<sup>7</sup>*

### **No specific minimum age of defendant**

19. Recommendation 7 in the CP recommends that no minimum age for the defendant should be stipulated. While some Respondents support this, more Respondents consider that the minimum age for the defendant should be set at 16 or 18 years, with a few Respondents suggesting setting it 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 for the following reasons:

- (a) The minimum age of criminal responsibility is already set at 10 years in the Juvenile Offenders Ordinance (Cap 226).
- (b) Children must be protected from abuses even when the defendants are their underage parents.
- (c) Some elements of the proposed offence would allow the court to recognise differences in awareness and power between children and adult, and would thus provide some possible defences for underage defendants. For example:
  - (i) 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; and

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<sup>7</sup> The proposed section 25A(1)(b) of the OAPO in the draft Bill (Annex 1 of the 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;”.



- (ii) it would have been unreasonable to expect a child-accused to take any steps to protect the victim where, for example, the other adult suspect exerted authority over that child or the latter was under duress.
  - (d) There are safeguards to protect the interests of underage defendants in both prosecution and sentencing.
  - (e) This would provide better protection to children of parents under 16, as it is not possible to charge parents under 16 for ill-treating and abusing their children under section 27 of the OAPO.
20. To ensure that a decision to prosecute an underage defendant under the proposed offence is cautiously made, we recommend requiring the consent of the Secretary for Justice to prosecute.
21. For the above reasons, our **Final Recommendation 7** is as follows:

*“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.”<sup>8</sup>*

## Chapter 6: The operation of the proposed offence

### ***Unlawful act or neglect of abuser***

22. Recommendation 8(a) in the CP recommends that the proposed offence should apply where a victim dies or suffers serious harm as a result of “an unlawful act or neglect”. All but one of the Respondents who have indicated their stance support this recommendation because adding the words “or neglect” after “unlawful act” would enable the proposed offence to apply where the serious harm to the victim is caused by an abuser’s “neglect”, which may not constitute an “unlawful act” under the existing laws. To assist frontline care personnel in understanding the scope of “neglect”, guidelines may be issued by stakeholders to set out the standard for neglect. For Recommendation 8(b) in the CP, all the Respondents who have expressly indicated their stance support adopting “a person of full legal capacity”. The proposed definition of “unlawful act” in section 25A(6) would cover acts committed by persons of 10 to 18 years of age. We therefore recommend retaining Recommendation 8(a) and (b) in the CP as our **Final Recommendation 8**:

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<sup>8</sup> The proposed section 25A(7) of the OAPO in the draft Bill (Annex 1 of the 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.”

*“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;<sup>9</sup>*
- (b) the replacement of the phrase ‘an adult of full legal capacity’ with ‘a person of full legal capacity’ in the definition of an ‘unlawful act’.<sup>10</sup>”*

**“Risk” of serious harm; not target accident**

23. Recommendation 9(a) and (b) of the CP recommends that the proposed offence applies where 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. A majority of the Respondents and all Respondents who have expressly stated their stance support Recommendation 9(a) and (b) respectively. We are of the view that there is no need to qualify “risk” of serious harm, as suggested by some Respondents since the word “risk” already carries the meaning that the risk should be a “real or appreciable” risk. In addition, there is a safeguard in the proposed offence to prevent a parent or a carer from being charged for an accident: his failure to take such reasonable steps had to be so serious that a criminal penalty is warranted.

24. We therefore recommend retaining Recommendation 9(a) and (b) in the CP as our **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*

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<sup>9</sup> The proposed section 25A(1)(a) of the OAPO in the Bill (Annex 1 of the 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;”.*

<sup>10</sup> The proposed section 25A(6) of the OAPO in the Bill (Annex 1 of the Report):

*“25A. (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;”.*

- (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.”<sup>11</sup>*

***Failure to take reasonable steps: so serious that warrants a criminal penalty***

25. Recommendation 10 in the CP recommends that the proposed offence only applies when a defendant’s failure to take “*steps that the defendant could reasonably be expected to have taken in the circumstances*” (“**Such Steps**”) to protect the victim was so serious that a criminal penalty is warranted. All Respondents who have expressly stated their stance support this recommendation. Some of the other Respondents have expressed the following concerns:

- (a) The meaning of Such Steps is unclear.
- (b) There are practical difficulties in reporting suspected abuse cases.
- (c) The circumstances of defendants or victims may make it difficult for the defendant to take Such Steps.

26. To address these concerns, we propose to amend the test in 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. There are two advantages of this test:

- (a) This would enable the court to take into account a defendant’s personal circumstances and his relevant characteristics (ie not purely an objective bystander test) which tallies with the revised *mens rea* “*had reasonable grounds to believe*” under Final Recommendation 3. 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. For example, a defendant’s ability to take reasonable steps may be affected by: tender or old age, pregnancy, physical disability, recognised mental illness or psychiatric condition, presence of domestic violence, power imbalance or duress (as in the case of domestic workers).

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<sup>11</sup> The proposed section 25A(1)(c) of the OAPO in the draft Bill (Annex 1 of the 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;*”.

- (b) This would allow the court to take into consideration all possible types of steps and to gradually develop the jurisprudence on the meaning of “reasonable steps”. For example, the court may take into account of the steps that relevant professionals could take to protect a victim as set out in various procedural guides, guidelines and circulars (eg those issued and updated by the Social Welfare Department and the Education Bureau, which deal with, *inter alia*, reporting of suspected abuse cases).

27. In addition, the defendant’s failure to take reasonable steps had to fall so far short of the standard of care that could reasonably be expected of him and was thus, in the circumstances, so serious that a criminal penalty is warranted. We further note that the Government has pledged to provide resources to improve the condition of care institutions faced with insufficient manpower or poor facilities, which would enhance their ability to take the reasonable steps. Based on Recommendation 10 in the CP (with some modifications), we make our **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)<sup>12</sup> 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*

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<sup>12</sup> The proposed section 25A(1)(d) and (e) of the OAPO in the draft Bill (Annex 1 of the 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.”*

- (iv) *adding subsections (3A) and (3B)<sup>13</sup> 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).”*

## Chapter 7: Evidential matters

### ***Not necessary to prove who did the unlawful act or neglect***

28. Recommendation 11 in the CP recommends that it is not necessary for the prosecution to prove who did the unlawful act or neglect. A majority of the Respondents who have expressly stated their stance support this recommendation. Some social service organisations oppose this recommendation because they are concerned that the proposed offence would:

- (a) infringe the defendants’ right to a fair trial, in particular, shifting of the onus of proof and diminution of right to silence, privilege against self-incrimination and presumption of innocence; and
- (b) encourage the prosecution to charge a bystander instead of the perpetrator of the abuse.

There is also a concern that a defendant may try to assert a “reasonable possibility” that he is the perpetrator and not the culpable bystander, and should therefore not be liable under the proposed offence which targets culpable bystanders.

29. For the reasons below, we are satisfied that the proposed offence strikes the right balance between the need to protect children and vulnerable persons and the defendants’ right to a fair trial:

- (a) There is no shifting of the onus of proof as the prosecution is still required to prove the elements of the proposed offence of “*failure to protect*” against all the defendants, albeit not the causative offence of committing the abuse.

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<sup>13</sup> The proposed section 25A(3A) and (3B) of the OAPO in the draft Bill (Annex 1 of the 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.”*

- (b) We do not introduce any procedural or evidential reform (as under the English model which is criticised for undermining the defendants' right to a fair trial).

30. Separately, we do not see the need to be concerned that the proposed offence would encourage the prosecution to take the easy option of only charging a bystander or the Police not to investigate the abuse case properly for the reasons below:

- (a) The proposed offence aims to give the prosecution more charging options in abuse cases, including the proposed offence of *"failure to protect"* and other causative offences of the abuse (eg murder, manslaughter or an offence of causing serious harm). In fact, real cases under the English model introduced in 2004 indicate that the prosecution has not chosen the easy option of only charging a bystander.
- (b) In addition, when the prosecution chooses the charge(s) to prosecute, the charge(s) should reflect the criminality of a defendant's conduct according to the Prosecution Code of the Department of Justice of Hong Kong.

31. We therefore recommend retaining Recommendation 11 in the CP with clarification in a new paragraph (b) in the proposed section 25A(4), to address the concern that the defendant may try to assert a "reasonable possibility" that he is the perpetrator and not the bystander, as our **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.'*<sup>14</sup>

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<sup>14</sup> The proposed section 25A(4) of the OAPO in the draft Bill (Annex 1 of the 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

### *Maximum penalties and venue for trial*

32. Recommendations 12 and 13 in the CP deal with the maximum penalties (ie 20 years if the victim dies and 15 years if the victim suffers serious harm) and Recommendation 14 in the CP sets out the venue for trial of the proposed offence. All the recommendations have overwhelming support from the Respondents who have expressly stated their stance.

33. We are of the view that the proposed maximum penalties would allow the court to impose a sentence that reflects the gravity of the crime committed so as to seek retribution against the offender and also to deter and prevent abuses of children and vulnerable persons. In exceptional cases, the court might give ameliorating effect to the fact that the sentence would deprive children of all parental care. In assessing the culpability of a defendant under the proposed offence, the court would likely 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. The combined effect of our recommended maximum penalties and existing rehabilitation measures provided by the Correctional Services Department would help achieve the purposes of retribution, deterrence, prevention and rehabilitation.

34. Therefore, we recommend retaining Recommendations 12, 13 and 14 in the CP as our Final Recommendations 12, 13 and 14, which are:

### *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.”<sup>15</sup>*

### *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.”<sup>16</sup>*

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<sup>15</sup> The proposed section 25A(5)(a) of the OAPO in the draft Bill (Annex 1 of the 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”

<sup>16</sup> The proposed section 25A(5)(b) of the OAPO in the draft Bill (Annex 1 of the 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.”

## **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**

35. 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. The proposed offence aside, we in general agree with the Respondents' suggestions that there should be in parallel sufficient resources and support, training and education, and promotion and publicity so as to enhance the protection for children and vulnerable persons. We have hence set out our remarks on these collateral measures, ie 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.

36. 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. These issues are reporting of abuse, reforming other areas of law and measures on protection of children and vulnerable persons. While these issues are outside this project's terms of reference, this chapter sets out their comments and suggestions for the information of the Government and other relevant organisations in considering how to further enhance the protection.



## **Our remarks**

37. 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, 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 the 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.