



**LAW REFORM COMMISSION:
CAUSING OR ALLOWING THE DEATH OR
SERIOUS HARM OF A CHILD OR VULNERABLE ADULT**

LAW SOCIETY'S SUBMISSION

SYNOPSIS

1. The preliminary views of the Law Society are that, instead of introducing a new offence under the Offences against the Persons Ordinance Cap 212 (OAPO), it might be better and simpler to amend Section 27 of OAPO.
2. We are not convinced of the justification put forward by the Law Reform Commission for the proposed offence, including those technical arguments that underpin the “ought to have been aware” wordings (the New Zealand legislation insists on the word “know”). In practical terms, most Section 27 OAPO convictions are on the basis the defendant must have been aware of what was going on. It is difficult to envisage those circumstances where a defendant would not be convicted under the Section 27 OAPO (because of inadequate evidence) but would be prosecuted and convicted under the proposed offence (under new Section 25A). If the evidence is strong enough that the jury can conclude the defendant did “know”, then they are likely to be able to convict of neglect under Section 27. If they are not clear they did know, how often can they conclude they “ought to have”? It could in practical terms invite a dangerously speculative decision, in relation to an offence with serious custodial consequence. Our reasoning is explained in details below.
3. We are concerned that the new offence would have the effect of lowering the hurdle requirement in favour of the prosecution. In this regard, we share the concerns expressed by the Law Society of South Australia when criminal neglect was proposed as a new offence in their Criminal Law Consolidation (Criminal Neglect) Amendment Bill in 2004.

“In debates on the 2004 Bill, the Opposition referred to concerns that had been expressed by the Law Society’s Criminal Law Committee; and it sought, unsuccessfully, to have the Bill referred to the Legislative Review Committee. The Law Society’s Committee had stated (in part):

‘The society is concerned that this legislation could encourage inadequate investigation by police and forensic experts; the presentation of weak prosecution cases; the criminalisation of innocent people; and the failure properly to prosecute an offender for the substantive offence for which they are truly guilty. One of the stated purposes of the bill is to get one or other of the parents of a child, for example, who did not commit the unlawful act occasioning death or serious harm to have an incentive to ‘say what seriously happened’. However, it is considered equally likely that the legislation will create an incentive to fabricate, to shift blame and to make false accusations. We envisage a likely consequence of the legislation is that persons potentially liable will seek to cast blame upon each other, leaving both liable to conviction for criminal neglect and potentially resulting in an innocent party suffering conviction on that charge while the perpetrator avoids conviction for the substantive offence.’¹

INTRODUCTION

4. The Law Reform Commission (“LRC”) in its Consultation Paper (“CP”) and Executive Summary (“ES”) recommends introducing a new criminal offence similar to those in some other jurisdictions. Unfortunately, although the preparation of the CP has taken 12 years, only a very short window for observations was suggested. As can be seen below, there are a number of matters upon which there are important issues to consider, and clarification from the LRC is needed. Hence any views at this stage should be regarded as preliminary.
5. The Law Society of Hong Kong has reviewed the CP and has the following comments. Questions are posed on the LRC’s intentions where matters are unclear and suggestions made. See below paragraphs 7; 10; 11; 15; 16; 19; 24; 25; 26; 39; 40; 46; 47; 49; 51; 52; 56; 57; 59; 63; 64; 65; 66; 67 and several of the Recommendations – R1; 3; 4; 5; 6; 7; 9; 10.

¹ See I Redmond, SA *Parliamentary Debates (LA)*, 8 December 2004, p1257; and R Lawson SA *Parliamentary Debates (LC)* 7 February 2005, p889

OVERVIEW OF RATIONALE

6. The starting point is that, without any doubt, the law should provide adequate protection to children and vulnerable persons. The issue is whether the proposed offence and sentencing proposals enhance it in a necessary and acceptable way and is the best way forward. For the reasons set out below, the proposed offence in the CP (certainly as drafted) may not without further deliberation be the right course in this respect, although sentencing increase for Section 27 of the Offences against the Persons Ordinance Cap 212 (“OAPO”) would be welcome.

IS THERE A NEED IN HONG KONG FOR THIS?

7. The statistics for child abuse in Hong Kong are set out at CP 1.34 and 1.35 (i.e. an average of c. 1,000 cases a year over 10 years) with a preponderance occurring at home. Elder abuse statistics are at CP 1.52. No statistics are given for other “vulnerable” persons. Unfortunately no statistics in Hong Kong are provided for crimes/prosecutions under the existing law, such as number or conviction rate. There is not necessarily a correlation between the other jurisdictions and Hong Kong. There have been a number of highly emotive, and sensationally publicised cases of child abuse, in horrific circumstances, in the United Kingdom (“UK”). There were also a series of gruesome cases reported in South Australia – (CP 4.92). See footnotes at p147 of CP – the highly publicised cases effected parliamentary deliberation. Death or serious injury of children is averaged at 3 cases per week in UK (CP 3.1). In Hong Kong deaths which may be related to abuse are in the region of 6 per annum. The other jurisdiction referred to which introduced legislation – New Zealand has one child killed every 5 weeks (CP 5.1) and child maltreatment figures are said to be amongst the highest in the world. As noted the legislation was “in response to a series of especially harrowing cases involving the deaths of young children” (see e.g. CP 5.2). Apparently, there has been no similar statistical difficulty or series of highly publicised cases and no outcry in Hong Kong matching that in UK, South Australia or New Zealand. Perhaps this is due to the numerical difference and lack of publicity suggesting prevalence, contrasted with the aforementioned UK, South Australia and New Zealand positions. Differences in Hong Kong society (e.g. paragraph 25-26 below) also require consideration. It is not a foregone conclusion that there is a pressing problem in Hong Kong requiring an unusual form of criminal legislation (there is no such legislation, for example, in other Australian states (CP 6.4)).

8. The effect of the proposed offence is to enable conviction of those who cannot be proved to have inflicted injury, or aided and abetted it, but who, the court/jury are sure, either must have known of it and (if not even possibly aided and abetted or caused) must have failed in a duty to prevent it or, take suitable steps, or more controversially, “ought to have been aware”. This second limb introduces fundamental criminal law considerations. The stated intention on the other hand is more narrowly to help the Court identify the culprit who inflicts the injury and evades conviction. The “ought to have been aware” is, however, obviously more likely to be used to target their partner or another household member. This controversial change does not seem to fulfil that stated objective. Indeed in South Australia the legislation caused some head scratching. See CP 7.55 – it was explained by the LRC that “A key to understanding the provision is to note that when a person is charged with criminal neglect, the assumption is that the unlawful act that killed or harmed the victim was committed by someone else”. It is not clear how this advances the purpose of convicting the culprit. It is no different when charging both under Section 27 OAPO, rather than one under a murder/manslaughter/wounding charge, save for a lower evidence threshold, which itself is arguably not called for.
9. Defendants can already be convicted. There is an existing offence (Section 27 OAPO – CP 2.26) (set out below at paragraph 38) of wilfully (i.e. knowingly and with intention) failing in a parental/custodial duty, by neglect. This has the same elements as the proposed Section 25A (CP page 299) save that “wilfully” is replaced by, inter alia, “ought to have been aware” removing the need for knowledge. Parents for example are regularly prosecuted under Section 27 OAPO for neglect or allowing injury to be inflicted by their partner.
10. It is opined by the LRC that the present law does not easily enable convictions in certain cases due to evidential difficulties (although there have been many successful prosecutions, particularly under Section 27 OAPO). In the UK amendments to the evidence law were part of the reform proposal. The new offence in UK worked so as to oblige a defendant to give an explanation, to help establish who actually inflicted the harm. That then was a fit with the dual charge, i.e. caused injury or ought to have known. A defendant would opt for giving an explanation so as not to risk conviction on the first limb. No evidential changes are however proposed in Hong Kong. On that basis, a large part of the rationale for a “dual” offence possibly disappears. In the circumstances, are the difficulties it introduces justifiable? (see below). Both parties could still be charged with the same offence when blame for infliction

of an injury is not clear (e.g. CP 5.113 and CP 5.119). When it is clear, there is no difficulty.

11. The LRC believes that the penalty in Section 27 OAPO is inadequate. This is correct. The sentence can be increased, and should be (see below). If the range of sentences then falls within those foreseeable in manslaughter charges, a large aspect of the perceived problem is possibly catered for.
12. As to other offences (murder, manslaughter, wounding, indecent assault, rape etc.) the LRC feels that there are evidential problems which make them difficult in some cases (see below). At the outset, we would mention that there is an issue over the LRC approach on this (see paragraphs 17-19 below). There is a great deal of time given to pointing at possible evidential difficulties. We feel this is rather overstated, for reasons given at various points below. This leads to a somewhat unbalanced approach. A lay reader might not appreciate that there are other sides to a number of points made on this question of evidence. It has to be remembered when reading that the proposal is not a proposal to amend current offences, or to reduce evidential requirements. It is to create an entirely new offence, with a controversial basis of guilt. In practice, in UK and foreseeably in Hong Kong, this offence will be used as a “fall back” second charge, in case the Prosecution fail on an existing serious charge because the evidence is lacking. Nevertheless, the sentence can be as high as the first targeted charge.

EVIDENCE OF OFFENCE

13. The evidential difficulty is explained at CP 2.1 and at CP 2.156 - 2.174, primarily that proof as to who caused injury is sometimes difficult to obtain, particularly in the domestic scenario, remembering spouses are not compellable witnesses and where the victim, a child or vulnerable person, cannot be expected to give evidence as a competent adult might.
14. The Court is left, for example, knowing that one of the parents must have inflicted injury, but not which, so cannot convict either (i.e. of the offence of inflicting the injury – they can still be convicted of neglect). Further, the other parent probably knew, but that cannot be proved to the criminal standard (in some cases – it often is in fact). Hence, the solution proposed is a new offence which obviates proof of facts required under existing offences, and even, intent to harm, or knowledge of it.

15. The proposed offence allows conviction if the defendant ought to have been aware of a risk – a much lower standard of proof or mens rea or actus reus. It is not necessary to establish as a fact that a defendant knew of a risk. It can even be that he/she did not know. However a jury/Court could decide he “ought to have been aware”, even if he/she was not. It must be intended that a Court/jury must be sure beyond a reasonable doubt that a defendant “ought to have known”. However, it is going to be an invitation – in cases where the position is not clear - to conjecture about what a defendant may have known or could have discovered, not what he/she did know. It does seem that if there is strong evidence that a parent “ought to have been aware”, their conduct could already be prosecuted under Section 27 OAPO. If the evidence is, on the other hand, very weak over whether the defendant “ought to have known”, then it should not in our view secure a conviction anyway. What degree of the rainbow will the offence cover?
16. The “speculative” nature of the wording risks a conviction which, unless the offence is very carefully drafted, may be based on a lower threshold of evidence than is safe. (The LRC notes the concerns which may occur to “defence Counsel” at CP 1.11). Is this proposed approach justifiable and necessary? For example, the New Zealand offence parallels the Hong Kong proposed offence, but (CP 5.55) quite reasonably has the element that the defendant “knows the victim is at risk”. If the facts are such that they demonstrate blame on the part of the defendant, a jury are likely to conclude that the defendant knew of the risk. If they do not consider he/she knew, how could a jury easily conclude the defendant ought to have known?
17. One manner in which the LRC supports the change as noted above appears to be unconvincing. A great deal of time is given to comment over suggested evidential problems. For example, on the face of it, many on the list of difficulties mentioned at CP 2.156 et seq are common to any charge of murder/manslaughter/assault/sexual offences (i.e. proving intent; cause of death; right to silence; corroboration in sexual cases). All offences would be easier to secure convictions for, if the evidential threshold were lower.
18. Similarly, for example, CP 2.174 is arguably wrong. There are cases prosecuted when a victim cannot give evidence. Matters such as unwilling victims CP 2.174 (a), pressure (b), memory lapse (c), anxiety over court appearance (d), are not confined to vulnerable persons cases. Types of offences face a variety of evidential difficulties because of their nature (see also e.g. paragraphs 53 and 55 below).

19. In essence, this is a public policy issue, but the very significant step of affixing criminal convictions and potentially heavy sentence on the basis of such thresholds is an important issue. It is a mixture of concern over the dangers of abuse of the vulnerable, coupled with some evidential difficulties which sometimes arise, that is the driver. To focus so extensively on evidential difficulties may be misleading. They are not universal. There are already many convictions. In that light, is a new offence needed in Hong Kong?

THE OFFENCE IN A DOMESTIC SCENARIO

20. There is no difficulty with the concept of harm arising from a deliberate “unlawful act” by a person but a concept of “ought to have been aware” may introduce unprecedented difficulties in the family/domestic context. “Most accidents happen in the home” is a truism. The offence is not confined to the classical child abuse scenario. It can apply in the case of one event. Many cases concern a death caused by a single incident (not necessarily a course of conduct), and the issue, for example, is whether it was a deliberate blow or e.g. a fall. For an example of a prosecution based on one incident with no suggestion of child abuse, see CP 5.92, a careless driving/excess alcohol case. There are already with the present evidential standard, situations, such as the notorious “cot death” wrongful convictions in England, wherein erroneous conclusions on sad accidents could lead to injustice.
21. The obvious difficulty with words such as “ought to have been aware” is that there is a significant issue of the degree involved. In any sort of “negligence” situation, it is very easy to be wise with hindsight and see what should have been done (see e.g. CP 5.82). Such scrutiny can place the person who is under suspicion in a position of having to justify their failure to act, which, given the misfortune which is now known, is a daunting prospect for them. They may already be suffering greatly from events. Parents may in any event feel doubt or shame, concerned that they could have helped avoid a misfortune. This needs to be borne in mind when considering some of the consequent and connected concerns about the effect of the proposed offence wording, set out below. In particular, we are concerned that the new concept with a lower evidence threshold is introduced with an additional watering down of the protections offered in other jurisdictions. The watering down is noted in our views on Recommendations 5 and 9 below.

22. A peculiarity of the domestic situation is that it is not uncommon for parties to domestic disputes (e.g. in custody/access arguments) to make false allegations against the other party. These are accompanied by reports to the police. Once a police report is made, not only will it be investigated by the Police, a Multi Disciplinary Case Conference (known as “MDCC”) will likely convene. The primary purpose of the convening of the MDCC is on protection and welfare of the child but there are cases where a MDCC was triggered off as a result of an abuse complaint to the Police which later turned out to be made on unfounded accusation. The “criminal” complaint is seen by the complainant as, by its very existence, something which enhances their prospects in Court, and the police must open a file and investigate, putting the other party in a serious difficulty (and similarly children can be manipulated see CP 2.168 footnote 130). On the other hand, given that an application for an ouster injunction for evicting a spouse or cohabitee (including former) under the Domestic And Cohabitation Relationships Violence Ordinance would be made easier (which will also strengthen an application for non-molestation) if a Police report has been filed before making that application, there would be much unethical temptation by an estranged party in a family proceedings to abuse the system and file false Police report against the other party.
23. Similarly, disputes in relation to treatment of the elderly (for example, by siblings, against each other, or by a family against a mistress) are not uncommon in the context of argument over a vulnerable persons’ assets/estate (cf CP 1.48).
24. Another peculiarity is that with high divorce rates, a parent may have limited contact through access, but not be part of the household. Under the proposed offence, not being part of the household, but having a parental responsibility, with limited opportunity to see children, would they be considered to bear any responsibility?
25. In this context one issue that may well strike the public as a matter for some debate is the notion of a “household”, that being a factor giving rise to a duty and liability. The Attorney General for South Australia noted that “it is possible to share a household with a child or vulnerable adult, especially for short periods of time or for limited purposes, without actually assuming any responsibility for that child or adult” (CP 4.51).
26. Will domestic helpers, for example, readily accept that they are automatically members of a household and responsible (as LRC says, CP 2.145),

irrespective of the limited extent of any influence, or authority, or agreed responsibility or involvement they have? Certainly there are cases where domestic workers are given care of children, and prosecutions have followed accordingly under existing law e.g. CP 2.146 (which has not been suggested as inadequate for that purpose). In that case (*HKSAR v Siti Fatimah*) [2008] HKCA 705 (CP 2.146 to 2.147) the Court considered the duty arose through her role as an employee assigned to child care. Indeed in *HKSAR v Law Wan-Tung* [2015] HKDC 210 (CP 2.148 to 2.152) the Court commented that domestic helpers should not be required to live with employers (CP 2.152). In such case the domestic helpers would visit the home to perform duties. Are they in the household then? Their duties are the same as if they lived there. Given the large number of domestic helpers in Hong Kong, particular attention has to be given to their exposure.

27. Another feature of the local scenario is that it is not uncommon for spouses or partners in a dysfunctional household to point the finger at each other to escape a conviction. See for example CP 2.134 in the case of *HKSAR v Wong Win Man* [2018] HKCFI 1484 and CP 4.4 *Macaskill case* [2003] SASC 61. In a situation where two defendants were seeking to suggest that the other, not they, were the one who “ought to have been aware”, it is not difficult at all to foresee fabrication of evidence putting the wrongly accused party in jeopardy of conviction. Interestingly when the Attorney General for South Australia gave examples of possible factual scenarios, all four included examples of one party trying to blame the other (CP 4.53 et seq.). Whilst this is set out in context of showing how a party may be forced to give evidence to explain matters, it is also a tacit acknowledgement of the inherent danger of fabrication in the context of this offence. Just one convincing liar could lead to a miscarriage of justice. The LRC notes this concern (CP 7.61) but then does not set out an answer to the concern.
28. A contrasting feature is that a spouse/partner may have such affection for their spouse/partner that they do not have an objective view of their behaviour, or may otherwise be under their influence (see e.g. CP 2.163).
29. Against that domestic background, issues for detailed consideration include the wording of the proposed offences, whether there is a need for a further offence, given the existing law, whether the matter might be dealt with by amendment or supplementation of existing law, rather than creation of a new offence, and also whether terms of the new offence might transgress the basic principles of criminal law too far to be acceptable.

THE DIVERSITY OF LEGAL OPTIONS OVER THE WORDING OF THE PROPOSED OFFENCE

30. A lot of work has clearly gone into the LRC CP. The preparation of the CP has taken more than 12 years. During that time legislation was reviewed from a number of jurisdictions involving any array of words which appear in the CP, which have been used in other jurisdictions' legislation in offences to the same end, and in the Hong Kong proposed offence, which do not always mean the same thing. As noted by the LRC (CP 3.134) there are "significant areas of divergence" between the jurisdictions.
31. The elements of the proposed offence are not ordinary. They involve introduction of criminality in a serious offence (not merely regulatory) when a defendant may be lacking knowledge or intent.
32. The LRC borrows part of its wording from South Australia. The offence is there entitled "criminal liability for neglect where death or serious harm results from an unlawful act" ("Criminal neglect"). The charge there is that the defendant has caused harm or "allowed" the harm to happen. The offence in UK was entitled "causing or allowing" the death of a child or vulnerable adult (CP 3.26). The word allowed does not enter the HK picture. "Allowing" perhaps conveys a more positive sense than "failure to protect", or "or ought to have known". There is also a difference perhaps between "serious injury" and "serious harm" (the proposed offence). The UK version is "serious physical harm". The offence has been judicially stated to mean "really" serious harm (CP 3.42). Amongst other differences, there is a difference between "risk" (Hong Kong) and "significant risk" (UK). See below.
33. Similarly, whilst UK confines the offence to serious "physical" harm, South Australia specifically includes "mental harm". The LRC selects simply "harm". It is clear from debate in South Australia that there was uncertainty over how "mental harm" would be reckoned (CP 4.24/25). Hong Kong Courts might be left to wrestle with that as the offence does not specify. Differences between these concepts go to the state of mind of the defendant, the action or inaction, or the facts to be proved. We revisit some of the choice of words below in relation to the Recommendations.

EXISTING LAW IN HONG KONG

34. Several crimes already exist in relation to causing harm to a child or vulnerable person, through murder (CP 2.6), manslaughter (CP 2.10), wounding (CP 2.64), assault, rape, indecent assault, and a variety of other offences, including Sections 26 and 27 OAPO.
35. For vulnerable persons other than children, the LRC only refers in particular (CP 2.3 and 2.35) to ill treatment of mental health patients under Section 136 of the Mental Health Ordinance. There is a reference to one manslaughter conviction (CP 2.128) of a bedridden 78 years old man by his son.
36. The vast majority of cases deal with the infliction of cruelty and death on children. The LRC sets out Sections 26 and 27 of the OAPO as amongst the most relevant offences. Sections 26 and 27 of the OAPO read as follows:-
37. **Section 26 OAPO (CP 2.31/2.32)**

“Exposing child whereby life is endangered

Any person who unlawfully abandons or exposes any child, being under the age of 2 years, whereby the life of such child is endangered, or the health of such child is or is likely to be permanently injured, shall be guilty of an offence and shall be liable:-

- (a) on conviction on indictment to imprisonment for 10 years; or
- (b) on summary conviction to imprisonment for 3 years. “

38. **Section 27 OAPO (CP 2.26 – 2.30)**

“Ill-treatment or neglect by those in charge of child or young person

- (1) If any person over the age of 16 years who has the custody, charge or care of any child or young person under that age wilfully assaults, ill-treats, neglects, abandons or exposes such child or young person or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, or any mental derangement) such person shall be guilty of an offence and shall be liable— (Amended 50 of 1991 s. 4)

- (a) on conviction on indictment to imprisonment for 10 years; or (Amended 22 of 1950 Schedule; 68 of 1995 s. 51)
- (b) on summary conviction to imprisonment for 3 years, (Amended 68 of 1995 s. 51)

and for the purposes of this section a parent or other person over the age of 16 having the custody, charge or care of a child or young person under that age shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing or lodging, he knowingly and willfully fails to take steps to procure the same to be provided by some authority, society or institution which undertakes to make such provision for necessitous children or young persons.

- (2) A person may be convicted of an offence under this section, either on indictment or by a court of summary jurisdiction, notwithstanding that actual suffering or injury to health or the likelihood of such suffering or injury to health was obviated by the action of another person.
- (3) A person may be convicted of an offence under this section, either on indictment or by a court of summary jurisdiction, notwithstanding the death of the child or young person in respect of whom the offence is committed.”

39. Is using an amended Section 27 OAPO instead a solution?

When one compares Section 26 and Section 27 OAPO with the proposed offence, there is obviously a large degree of overlap. The proposed offence is set out in the suggestion Section 25A of OAPO.

“25A. Failure to protect child or vulnerable person

- (1) A person (**defendant**) commits an offence if—
 - (a) a child or vulnerable person (**victim**) dies or suffers serious harm as a result of an unlawful act or neglect;
 - (b) when the unlawful act or neglect occurred, the defendant—
 - (i) had a duty of care to the victim; or
 - (ii) was a member of the same household as the victim and in frequent contact with the victim;
 - (c) the defendant was, or ought to have been, aware that there was a risk that serious harm would be caused to the victim by the unlawful act or neglect; and

- (d) the defendant failed to take steps that the defendant could reasonably be expected to have taken in the circumstances to protect the victim from such harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.
- (2) For subsection (1)(b)(i), the defendant has a duty of care to the victim only if the defendant—
 - (a) is a parent or guardian of the victim; or
 - (b) has assumed responsibility for the victim's care.
 - (3) For subsection (1)(b)(ii)—
 - (a) the defendant is to be regarded as a **member of the same household as the victim** if, despite not living in that household, the defendant visits it so often and for such periods of time that it is reasonable to regard the defendant as a member of it; and
 - (b) if the victim lives in different households at different times, **the same household as the victim** refers to the household in which the victim was living when the unlawful act or neglect mentioned in subsection (1)(a) occurred.
 - (4) In proceedings for an offence under subsection (1), it is not necessary for the prosecution to prove who did the unlawful act or neglect mentioned in subsection (1)(a).
 - (5) A person convicted of an offence under subsection (1) is liable on conviction on indictment to—
 - (a) if the victim dies— imprisonment for 20 years; or
 - (b) if the victim suffers serious harm— imprisonment for 15 years.
 - (6) In this section—
 - act** includes—
 - (a) an omission; and
 - (b) a course of conduct;
 - child** means a person under 16 years of age;
 - unlawful act** means an act that—
 - (a) constitutes an offence; or
 - (b) would constitute an offence if done by a person of full legal capacity;

vulnerable person means a person aged 16 years or above whose ability to protect himself or herself from an unlawful act or neglect is significantly impaired for any reason, including but not limited to, physical or mental disability, illness or infirmity.”.

40. Section 26 OAPO is very limited by the age of “under two years of age”. The same actus reus of exposing or abandoning a child is however present in Section 27 OAPO, to the age of 16. **Notably South Australia did not have a Section 27 equivalent which it could amend (CP 4.9, 4.99) nor did New Zealand (CP 5.3).**
41. One of the differences is that the existing Section 27 law only covers children or young persons, not vulnerable persons. That could be amended. Section 27 could be recast as an offence with a higher penalty, and with the elements of wilful conduct, grossly negligent conduct causing harm and failing to prevent harm, as separate items.
42. In Section 27, the concept of a child, being in custody, charge or care is similar to the proposed offence by a person “having a duty of care to the victim” (25(1)(a)(i)). Section 27 also contains the element of neglect which parallels the essence of the proposed section 25A(1)(c) and (d).
43. Section 27 refers to “*unnecessary suffering or injury (including injury to or loss of sight, or hearing, or limb, or organ of the body, or any mental derangement)*”. This would obviously overlap with the “serious harm” contemplated in the new offence (25A(1)(a)), but serious harm or suitable wording (below) could be included by amendment.
44. Further, the serious harm can arise through a course of conduct or omission (assault, ill treatment, neglect etc.) in Section 27, which corresponds with unlawful act or neglect in the proposed law (Section 25A(1)(b)).
45. Therefore, there are clearly going to be cases which fall within both offences, on the same set of facts. There is no suggestion in the CP that Section 27 OAPO is not effective. It is often the “safety net” for manslaughter charges, and effective in securing conviction.
46. A suggestion is amending and/or increasing the penalty for this Section 27 OAPO offence. Indeed the LRC contemplates this (ES:37) in tandem with a

new offence, not in substitution for it. It is not clear why, if there is a new offence, the penalty for Section 27 OAPO needs be increased. Presumably this is because it will be used as a fall back charge, and the sentence can reflect the seriousness of the greater charge circumstances. However, as in South Australia, it could be amended to cover both scenarios.

47. The material difference is the “ought to have been aware”. If this were considered a necessary and valid basis, it could be considered to be included in Section 27 OAPO. However, since for manslaughter, gross negligence may give rise to a criminal liability, should suitable wording to that effect be used instead of “ought to have been aware” which introduces novel difficulties and considerations? Gross negligence is the standard to be applied to the test of whether reasonable steps were taken (CP 7.5) (See comments on Recommendation 10 below). For example, in New Zealand, the LRC recommended that an objective gross negligence test should replace any reference to the word “wilfully” (CP 5.32 and 5.44). Why should any change to Hong Kong law not follow this type of course, by amending Section 27 OAPO?
48. In its report (e.g. ES paragraph 15) the LRC describes Section 27 OAPO as a “much lesser offence”, and the penalty as insufficient. It was amended from 2 years to 10 years imprisonment in 1995 (ES: 37). As noted a Judge has called for it to be increased. It is notable that in South Australia the proposal was first for a new offence (CP 4.102), but then it was decided to “roll together” (CP 4.103) the equivalent of Section 25A with a “lesser offence”. Similarly in New Zealand, it was decided to roll together proposals to strengthen the law with an existing “lesser” offence “so that there is a single offence capable of addressing the whole range of conduct” (CP 5.20). This makes sense.
49. If there were to be a separate offence, then one could consider that the consequent overlap could cause confusion.
50. Given that the Department of Justice (“D of J”) would have to select the appropriate offence, it will be interesting to see what the D of J considers it would do, by way of applying criteria in selection of the offence. Possibly the heavier penalty under the proposed law would mean that the new Section 25A would be used in more serious cases. However, it does not then necessarily make sense to suggest revising the sentence in Section 27 OAPO if it is to be used for lesser offences.

MANSLAUGHTER AND OTHER OFFENCES

51. The LRC refers to other relevant offences in Chapter 2 of CP. At CP 2.50 it deals with cases where murder or manslaughter had been charged (i.e. not a charge such as Section 27 OAPO). The first case noted is *Lane and Lane* (1986) 82 Cr App R5 (CA), and in a nutshell there was an acquittal because the presence of the two defendants could not be established at the time when the child was injured. This is given as an example of the evidential difficulties. Similarly with *Aston and Mason* [1992] 94 Cr App R 80 at CP 2.55 the case was dismissed because it was uncertain who committed the crime (CP 2.56), and in the next case, *Strudwick and Merry* at CP 2.57, there was no sufficient evidence as to which parent struck the fatal blow (CP 2.60). On the facts of these cases, however, might a jury in Hong Kong have found that either was guilty under Section 27?
52. A comment by the Court of Appeal in these cases, which remains of fundamental importance, is that there should not be a miscarriage of justice by the conviction of an innocent person. That remains the case in considering any dangers created by the proposed offence. The “ought to have been aware” element has to be scrutinised as a true danger in that respect. Even if a defendant gave credible evidence that they were not aware, they could still be guilty on such a basis. Ought that, for example, not be a defence?
53. In relation to manslaughter, there is a possibility as noted that the LRC overstates the position about difficulties. There are many cases in which manslaughter charges have secured convictions (examples are given at CP 2.61 in UK; CP 2.82 in Hong Kong; CP 2.108). Whilst these are cases resulting in manslaughter convictions, they are used to suggest difficulties over evidential requirements. It is somewhat odd that there is such emphasis on the difficulty of securing convictions, exemplified by convictions. No crimes are proven without a requirement for adequate evidence. The impression given is that the LRC is daunted by most evidentiary barriers (e.g. CP 281; CP 2.107; CP 2.116). As in the case of *Russell and Russell* (1987) 85 Cr App R388 in England, it is really a question of the available evidence. In the *Russell* case at CP 2.61, because both parents had from time to time used methadone to sedate their child, and the child was eventually killed by overdose of methadone, it was open to the jury to infer they were jointly responsible. In *Lam Wai Shu & Anor* [2007] HKEC 1788 at CP 2.82 the forensic evidence with partial admissions were enough to persuade a jury. Manslaughter can succeed if the prosecution have adequate evidence and as

the cases show they often do, from forensic evidence, witnesses, confessions and circumstances. Indeed, in cases where one party who was suspected gave evidence against the other, they could have been believed by the jury. The fact that they were not so believed was an issue of credibility of the witness, not an impossibility of proof. The present law can be employed when the evidence is adequate. One can be sure that it would be. The murder or manslaughter charge would be proved by the prosecution, in cases where the evidence was available. Indeed, for example, a manslaughter conviction was secured in *HKSAR v Takahashi Koyo* HCCC 113/2006 (CP 2.120) against both parents in relation to a single act of negligence with no history of child abuse.

54. There are no statistics on the success rate of manslaughter charges in relevant cases provided for Hong Kong.
55. There are further oddities in the LRC report which call into question the balance of its approach on this issue. It is stated (CP 2.17) that where defendants have pleaded guilty to manslaughter, they might not have been convicted if they had gone to trial. This is an oddity as it ignores the reality that the defendant would have been advised that the evidence was sufficient to expect a conviction, and therefore pleaded guilty. (e.g. *HKSAR v Chau Ming Cheong* [1983] HKLR 187 at CP 2.91; CP 2.117 *HKSAR v Ng Man Kwong* HCCC 277/2005). Similarly, the successful manslaughter prosecution in *HKSAR v Ng Tin Wah* (CP 2.102) is used to refer to difficulties in prosecutions (CP 2.107) which appear somewhat paradoxical as the defendant was convicted, but also illustrates the ability to secure a second conviction under Section 27 OAPO as well.
56. Notably it was late in the deliberations of the LRC, that the threshold for conviction for manslaughter was reduced with the substitution of an objective rather than a subjective test (CP 2.13). That could facilitate prosecution compared to the situation before November 2018. So, a parent has a positive duty (CP 2.12), and if grossly negligent on an objective basis, would be guilty (CP 2.13).
57. Coupled with this, as noted at CP 2.173, there is to be a change in the law of evidence with reception of reliable hearsay evidence. One reason for the change in the law of evidence suggested was precisely to aid in the case of vulnerable witnesses. Is there something to be said for awaiting developments in these areas before introducing yet a further fundamental change?

58. The LRC also considers the charge of inflicting grievous body harm with intent (CP 2.64). This is equivalent to our “Section 17 Wounding”. The issue in *Gibson* (1984) 80 Cr App R 24 (CA) – (CP 264) was whether because the injuries had been inflicted over a period on occasions, the parents being together most of the time, they must have known about the abuse, and failing to report was encouragement, rendering both the parent who committed the offence, and the other who “encouraged”, guilty of a joint enterprise to injure the child. On appeal, it was held that insufficient evidence existed to support the inference of active approval (i.e. encouragement). The Court of Appeal’s rationale was (CP 2.67) that when the evidence does not point to one of the parents rather than the other, and there was no evidence they were acting in concert, there was no alternative to a not guilty verdict. The same rationale was applied in the following case referred to by the LRC at paragraph CP 2.68, *R v S; R v C* [1996] Crim LR 346 (CA), in which the Court of Appeal again felt that the prosecution had failed to prove that one of the two parties had inflicted the injuries, and that the other had aided and abetted, or that there was a joint enterprise. This was a simple absence of evidence as to who exactly caused the injury. However, the circumstances were such that in Hong Kong a conviction under Section 27 OAPO could have been expected. Section 27 OAPO could have an increased penalty.
59. In summary, there is obviously no need for a new Section 25A 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 OAPO may still then be available.
60. **Hong Kong cases**
- A number of cases are reviewed by the LRC commencing at CP 2.72. It is noted that in the first, *HKSAR v Lam Lui Yin* DCCC 850/2005 (trial); [2007] 1 HKLRD 248 (CA) (sentence review), the defendant was not charged with manslaughter because the prosecution could not identify who inflicted fatal injuries. However, both parents were convicted under Section 27 OAPO. In view of the serious nature of child abuse, the Court of Appeal imposed a sentence of 4 years imprisonment on each of the defendants. The sentence which was imposed could have been up to 10 years imprisonment. Section 27 OAPO was therefore available to secure a conviction, and the penalty ceiling was not obtained in that particular case. It may be that had the maximum sentence under Section 27 OAPO been higher than 10 years, the sentence imposed would have been higher.

61. The next case referred to (*HKSAR v Au Yeung Wing-Yan and Chu Ka-Man* HCCC 67/2003) (CP 2.77) is one in which there was adequate evidence to secure a conviction for manslaughter, and accordingly a defendant pleaded guilty to the charge, and was sentenced to 7 years 10 months jail. That defendant's partner (the mother) was convicted under Section 27 OAPO, and was less culpable, having not inflicted the injuries. Nevertheless, the sentence was 6 years under Section 27 OAPO. That was based on neglect of duty as a mother, by not preventing abuse of the child. It is not clear that a prosecution under Section 25A would be any improvement on the result in that case.
62. Section 27 OAPO can be and is prosecuted in conjunction with manslaughter (e.g. CP 2.85).

CONSIDERATIONS ARISING FROM "OUGHT TO HAVE BEEN AWARE"

63. As noted above (paragraph 8) this phrase hardly helps serve the purpose of catching the culprit who inflicted injury. It is really just a reduction in the threshold of proof against the parties. That is scarcely needed. There is no doubt that Section 25A could encourage the prosecution of weaker cases, with the danger of the conviction of the innocent. An example of potential change is the case of *HKSAR v Gurung Hem Kumar* [2011] HKCFI 1251; HCCC 432/2010 (3 March 2011) at CP 2.124. Injuries were inflicted over a period by the father. Whilst it was clearly a case where it could be argued that the mother "ought to have been aware", the Court found that it was not clear whether the mother was aware. What would happen to her under Section 25A? Whilst clearly the Court did not consider she had committed any offence, if Section 25A is enacted, it would be easy to point a finger and for the mother to be prosecuted. The existence of bruising could lead to her conviction. Is that a desirable change? It is noteworthy that the New Zealand legislation did not take this route. It is a requirement that the defendant "knows" of the risk. That is subjective knowledge.
64. At CP 3.50 are discussions over the objective nature of the test proposed for Hong Kong. It is however said to be a question of whether the particular individual ought to have been aware, bearing in mind his own character (i.e. a subjective element). The offence contains no guidance on this. Nor does it list the factors (CP 3.53) to be considered. Does the LRC believe that a Court will look for guidance on these, to the UK or elsewhere, with a somewhat

divergent offence? Is it better to set these matters out? The Judge may not give the jury guidance (CP 3.55).

65. There is an issue not discussed in the CP in Section 25A. It is part of the offence, under sub-section (1)(d) that the defendant failed to take the steps that the defendant can reasonably be expected to have taken. If the defendant was aware of the serious harm as a result of an unlawful act, or neglect, then the steps that could be taken may be easy to devise. However, if the defendant was not aware, but “ought to have been aware”, then how could it be said that the defendant failed to take the steps that could reasonably be expected he would take – when he did not actually know? Is it the LRC intention that it is implied that if a person “ought to have been aware” then they should be treated as if they were fully aware? Is it intended that when considering whether or not the failure was so serious that a criminal penalty is warranted, the Court should take into account the fact that the defendant did not actually know or may not have known even though they “ought to have been aware”? Is it intended that should be within the phrase “in the circumstances”? As noted below at Recommendation 9, the position is made more extreme in the Hong Kong proposal, because the defendant need only be aware of a “risk”, not a “significant”, “appreciable” or “real risk” as suggested in the other jurisdictions.
66. The result that a person who actually had no knowledge could be convicted and treated in the same way as person who had knowledge is not discussed in the CP. How would the Judge direct the jury on this? Does this provision fail to give adequate guidance?
67. Recommendation 1

Recommendation 1

[The LRC] 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).

- (a) The LRC should consider whether the stated purpose can be achieved by amendment of Section 27 OAPO.
- (b) There is the question as to the proper title of the offence, so there is no danger of it being misunderstood to apply to those in a relatively blameless set of circumstances.
- (c) Since the same set of facts could fall within Section 27 OAPO (which is not so entitled), confusion over the co-relation of the two offences needs to be avoided.
- (d) The present draft wording has considerable difficulties.

68. Recommendation 2

Recommendation 2

Subject to the views of the Law Draftsman, [the LRC] 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) 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.

It is logical for a new offence to be set out in the position suggested (i.e. Section 25A) if the offence were adopted.

69. Recommendation 3

Recommendation 3

[The LRC] 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.

- (a) It is certainly correct that the Honourable Mr Justice Kevin Zervos (CP 2.140) did recommend an increase in the level of sentencing under Section 27 OAPO, in a particularly serious offence and that should be done.
- (b) As noted above, there is considerable overlap between the proposed Section 25A, and Section 27 OAPO.
- (c) The views of the D of J on how it would conduct prosecution if Section 27 OAPO penalty is increased, given the two avenues open to it would be welcome. Thereafter the relationship of Section 27 OAPO and Section 25A and how they could operate may be better understood and the recommendations explored in that light.
- (d) Section 27 OAPO could be amended to obviate the need for Section 25A.

70. Recommendation 4

Recommendation 4

[The LRC] 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*”.**

- (a) There is no inclusion of “old age” in the proposed Hong Kong definition, but presumably it is intended that would be covered by “infirmity”. (c.f. CP 1.37 “vulnerable” includes “elderly”). In UK, the phrase “through old age” is specifically included (CP 3.33). It is referred to in New Zealand definition (CP 5.36). Hong Kong faces an ageing population, so perhaps that would be a worthwhile inclusion.

- (b) We consider that the age limit under the term "*child*" and "*vulnerable person*" should be 18 years old.
- (c) The Hong Kong public might be surprised that under a UK authority (CP 3.94 *R v Khan* [2009] 4 All ER 544 (CA)) a fully fit adult could be held vulnerable if “dependent”. This is effectively included in Hong Kong by the phrase “for any reason“. This is an example of different law in Hong Kong from the South Australia model which would not include such a person (CP 4.21) (CP7.18). The LRC has also chosen the wider threshold of the vulnerable adult being under a significant impairment, (CP page 301) rather than the requirement in New Zealand of a more substantial type of impairment (CP 5.59). Is this widening of the offence desirable?
- (d) Section 27 OAPO could be extended to include vulnerable person.

71. Recommendation 5

Recommendation 5

[The LRC] 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.

[The LRC] are not in favour of the inclusion of a statutory definition of “*serious harm*” within the terms of the offence.

The LRC points out how other jurisdictions have included definitions of “serious harm”, but they prefer not to do so. In itself, the exclusion of a definition might not be of too much concern. However, at a number of points (dealt with herein below), the LRC does rather water down the legislation/wording in other jurisdictions. When one combines all of such alterations together, it may lead to a threshold for the offence in Hong Kong, which is lower than the other jurisdictions. For this reason, the wording should convey the sense of “*really*” serious harm. For example, an alternative as used elsewhere is “*serious injury*”. In New Zealand (ES 7.23) the word “*injury*” rather than “*harm*” is used. It might be thought that the word “*injury*” conveys a slightly different picture than “*harm*”. The definitions in other jurisdictions which the LRC refers to at e.g. CP and

ES7.21 and thereafter, are plainly used in South Australia, England and New Zealand to convey the degree of seriousness, and absence of definition could remove that sense. As can be seen at CP and ES 7.21, the South Australia definition has similarities to the ingredients in the Hong Kong Section 27 of the OAPO e.g. loss of a part of a body, serious disfigurement. The English and New Zealand Law Commissions made reference to grievous bodily harm as a touchstone, and a “natural meaning”, i.e. resulting in “*really*” serious bodily harm (CP 3.42; 7.22; 7.23). The proposed Hong Kong phraseology could specifically include the word “*really*” to convey the meaning (ES 7.22). See also comments on Recommendation 9 below, where “*appreciable risk*” (South Australia) or “*significant risk*” (UK) is demoted to “*risk*” in Hong Kong’s proposed offence. The purpose of this, the LRC itself notes (CP 3.44), is so that the defendant will not be liable for mere carelessness, they need to neglect a “*serious*” level of risk. Why not say so? “*Significant*” has been said in UK (CP 3.49) to bear its ordinary meaning. These changes need to be considered in the light of the “ought to have been aware” limb. Combined, there could be a substantial reduction in what needs to be proved, from the “*model*”.

72. Recommendation 6

Recommendation 6:

[The LRC] recommend that the concept of “*duty of care*” to the victim used in section 14 of the Criminal Law Consolidation Act 1935 in South Australia (as amended in 2005), and “*member of the same household*” who has “*frequent contact*” with the victim used in section 5 of the Domestic Violence, Crime and Victims Act 2004 in the United Kingdom, should be used as alternative bases for liability under the Hong Kong offence.

- (a) Rather than to leave a Court to try later to interpret legislative intention, as clear as possible guidance should be given on legislative intention. There is a real danger that the net could be cast too wide. For example, paragraph ES7.30 mentions that as drafted the offence would not preclude a domestic helper, or a staff member in an elderly care home, from being charged. There is plainly a difference between a domestic helper who may be a trained nurse, hired specifically to care for a family member (e.g. elderly and in need of assistance), and one who is merely a cook/cleaner with no agreed responsibility.

Similarly, could a staff member of an elderly care home be responsible for every person who is in care in that care home? Presumably there would need to be a specific contractual obligation for that domestic helper or staff member to deal with the particular victim. There is not a great deal of assistance given to any Court in the future in deciding precisely where the line is to be drawn. There will be no difficulty in a case of a parent or legal guardian, in the context of them being obliged to fulfil the duty of care to the victim if they are in a position to. However, for others who were merely in the “household” and do not have such a status, it is a more difficult question. ES paragraph 7.29, makes reference to “a member of the same household” (which is dealt with in sub-section 3(a) of the proposed offence). It includes those visiting often enough to regard them as a member of the household. Would a neighbour, who visits often, thereby acquire a duty of care and the liability? Would an elder child sibling who sometimes looks after a younger sibling, but prefers to spend most of their time going out to play with friends, thereby have a duty of care as a common householder?

- (b) It is noted at CP1.44 that a service provider (body/corporation) such as a care home could be liable. However, the definition does not specifically provide for this. Is that the LRC intention? In New Zealand a specific provision is included.

73. Recommendation 7:

Recommendation 7

[The LRC] 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).

It would seem unlikely that any person under 16 other than a parent also would be in a position of responsibility, or that it would be reasonable to consider them as placed in a position of responsibility, but as noted para 72(a) above it could expose child siblings to a prosecution. It is noteworthy that in New Zealand opposition to this raised the age to 18(CP 5.61). This is a debateable issue. In New Zealand a specific provision is included.

74. Recommendation 8:

Recommendation 8

[The LRC] 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;
- (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*”

This recommendation is suitable if the offence were adopted.

75. Recommendation 9:

Recommendation 9

[The LRC] 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.

- (a) This is another example where the LRC rather waters down the requirements for the offence in Hong Kong by the omission of the word “*appreciable*” in the recommendation (i.e. when combined with other alterations, to a multiplied effect). The South Australia model was so worded for good reason, so what is the good reason to depart from the model chosen?

- (b) The reasoning offered by the LRC in ES 7.45 is incorrect, because the South Australia model contains both the word “*appreciable*”, and the fact the defendant was or “ought to have been aware”. The word “*appreciable*” qualifies risk, raising the level of the risk that the defendant was or ought to have been aware of. The UK offence has the adjective “*significant*” qualifying risk (CP 3.28). It is not clear why the LRC want to differ.
- (c) It is notable (ES7.43) that in New Zealand the Law Commission considered that there should be knowledge of a risk of death, grievous bodily harm or sexual assault. It is also notable that in England (ES 7.42) the English Law Reform Commission wished to refer to a “*real*” risk. The words “*appreciable*” and “*real*” were suggested for a purpose. A commonly used phrase as we all know is “*there is always a risk*”. An “*appreciable*” or “*real*” or “*significant*” risk is an elevated standard. There is no good reason to create criminal behaviour when this factor is not present. Surely it is only if there is an appreciable risk (i.e. one that could be appreciated by the defendant) that there is any culpability.
- (d) If CP 7.46 is to be the position, then it should be made clear that it is the intention for the Court’s guidance. There is nothing in the wording of Section 25A which makes it clear that the Court should be taking into account the sensibilities of the particular defendant, according to his age, experience, intelligence, or otherwise. As is noted in relation to Recommendation 6, it is better not to leave this to the Court to ponder upon at a later date.

76. Recommendation 10:

Recommendation 10

[The LRC] 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.**

With regard to Recommendation 10, it is noted (ES 7.50) that what would need to be proved is that there has been “grossly” negligent failure. That does not specifically appear in Section 25A(1)(d). It could be inserted to make clear that is the requisite level of negligence that must be proved. It does not appear to follow from the wording of the sub-section that gross negligence is a direction that a Judge would feel obliged to give. If the LRC position is that is the direction which should be given, why not be clearer about it in Section 25A? For example, in New Zealand, wording was added for this reason (CP 5.68).

77. Recommendation 11:

Recommendation 11

[The LRC] 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).*”

Suitable if the offence were adopted.

78. Recommendations 12 and 13:

Recommendation 12

[The LRC] 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.

Recommendation 13

[The LRC] 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.

The recommended penalties appear reasonable.

79. Recommendation 14:

Recommendation 14

[The LRC] 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.**

The proposed venue of trial appears reasonable if the offence were to be adopted.

CONCLUSION

80. A number of questions are raised above and for the reasons implicit, at this point the Law Society is not convinced that the case for a new offence in the proposed format has yet been made out. As presently proposed, the wording has the difficulties set out above.
81. In considering the position and the Recommendations, our views as expanded upon above with reasons, include the following:-
- (a) There must be a mental element/mens rea and behaviour/actus reus involving deliberate or reckless conduct or omission sufficiently serious to warrant criminalisation. The present wording in the proposed offence does not satisfy this standard.**
 - (b) A charge based upon gross negligence would cover the normal scenario. It would not introduce difficulties occasioned by “ought to have been aware”, and it would not involve the difficulties of the odd approach of two different actus reus for conviction in the same charge i.e. the defendant caused the harm OR should have known and taken steps. A revision of Section 27 OAPO would possibly be preferable.**

- (c) If the defence give evidence which is accepted to the effect that they were not aware of the risk, should it be open for them to be convicted?**
- (d) The actus reus and mens rea of the proposed offence must be sufficiently clear to enable lawyers to advise clients with reasonable certainty.**
- (e) The present wording would benefit by being amended to ensure that a Court is clear as to the legislative intent and legal advice is facilitated.**
- (f) There have been changes in the law relating to manslaughter and will shortly be changes for hearsay evidence, which facilitate prosecution. These may transpire to reduce the need for a new Section 25A.**

The Law Society of Hong Kong

30 August 2019