THE LAW SOCIETY OF HONG KONG 香港律師會

MANDATORY REPORTING OF CHILD ABUSE BILL

THE SUBMISSION OF THE LAW SOCIETY

1. The Mandatory Reporting of Child Abuse Bill (the "Bill") was gazetted on 2 June 2023. It sets out the legislative framework for a mandatory reporting regime for child abuse cases. The Law Society has studied the Bill and the legislative proposals set out in the Legislative Council Brief "LWB CR CoC/ 8-3/ 1" dated 31 May 2023 (the "LegCo Brief"). We produce this submission in response.

2. Child abuses must be stopped; they have no place in the civilized society of Hong Kong. As such, we support the policy objectives of the Bill. Yet in formulating the legislative proposals to combat child abuses, there are issues which we submit should merit a closer attention from the Government.

The Bill

Whom to Protect?

3. Clause 2 of the Bill sets out the definition of "*child*" to mean a person below the age of 18. This age of 18 is said to have been chosen on consideration of the Protection of Children and Juveniles Ordinance (Cap. 213), a procedural guide promulgated by the Social Welfare Department as well as the United Nations Convention on the Rights of the Child and the World Health Organization definition (§ 10, Paper).

4. We ask that the age of 16 should be adopted.

What types of suspected cases to be reported?

5. Clause 4 of the Bill, in a summary, states that mandated reporters (as defined) should be required to make a report if, during the course of work, they have reasonable grounds to suspect that a child "has been suffering serious harm" or "is at real risk of suffering serious harm". We have no objection to the above principles on the identification of those cases that should be reported. The drafting of the Bill however raises queries as to how efficacious the above principles could be put out for the benefit of the child who could be subject to abuses.

6. First, Clause 4(3) lists out the circumstances that may "add to the seriousness of the harm" (the "adding seriousness" factors). See Clauses 4(3)(a) and (3)(b) below:

> *"4(3) … in determining whether the harm is serious, regard must be had to the degree and extent of the harm and all other circumstances of the case, and in particular, any of the following circumstances may add to the seriousness of the harm—*
>
> *(a) the harm persists for a substantial period or occurs frequently;*
>
> *(b) the act or omission that causes the harm—*
>
> *(i) appears to be premeditated; or*
>
> *(ii) appears to involve threat, coercion, sadism or any other unusual element."*

7. The notion of "adding" is not a legal concept and is not what criminal law embraces. It is an amateurish notion which does not sit well with other legal concepts in criminal law:

   (a) As we understand, the offence should be for "serious harm" caused to a child. If the Government intends that something is to be added to the offence, it is then unclear whether the Government is proposing another offence (called a serious "serious harm" offence)?

   (b) If these "adding seriousness" factors are not present, would that mean that the "serious harm" is not so serious?

(c) If the Government intends to say that the situations in Clauses 4(3)(a) and (3)(b) are *aggravating factors*, they should clearly say so. Criminal practitioners and the Courts are used to arguments on "aggravating factors" and there are precedent cases on the approach to aggravating factors.

(d) Or is the Government only suggesting that the Court could *take into account* those factors in Clauses 4(3)(a) and (3)(b) in considering whether a case has been made out? It is not clear.

(e) If a child suffers obviously minor and one-off physical injuries which are not worrying at all, should the Court still need to proceed to consider those "adding seriousness" factors in Clauses 4(3)(a) and (3)(b)? If the Court does not do so, would that be a ground of appeal?

(f) In any event, if the Government intends to put forward a serious "serious harm" offence, the penalty proposed should take into account and reflect the different degrees of "seriousness" as envisaged. This however is not the case (see Clause 4(5) which does not provide that the Court could or should take into account the "additional seriousness" factor).

It is not easy to understand what the Government intends to legislate in Clause 4(3). It is on the other hand fundamental that the Bill must not be ambiguous. Criminal Law requires precision. An accused must know very clearly the offences he is charged with.

8. Second the "Examples" set out in the Clause 4 are not helpful, and they confuse the readers.

"Examples—

Examples of an act or omission that may cause serious harm to a child are—

(a) inflicting physical injury on the child by violent means;

(b) forcing or enticing the child to take part in any act of asexual nature;

(c) intimidating, terrifying or denigrating the child in a severe or repeated way such that the child's psychological health is endangered or impaired; and

(d) neglecting the child's basic needs in a severe or repeated way such that the child's health or development is endangered or impaired."

9. The above Examples are laid out immediately after the Clause 4(3)(b) which proposes the "adding seriousness" to the harm. The Examples however are not related to the "adding seriousness" factors. The position of the Examples in the Bill is puzzling, if not confusing.

10. On the other hand, we are not aware of any criminal statutes setting out "examples" of criminal conducts. For one thing, each criminal case is unique and specific to its circumstances. An example cannot capture or be applied to each and every case. Instead of saving time, examples may invite parties to argue, to try to draw reference to and/or to compare their own cases with the Examples. That is not helpful.

11. We are not sure if these Examples are conclusive or legally binding, as if they were part of the statutory provisions. The status of these Examples is not clear to us.

12. If the Government considers that these Examples are important and should be brought to the attention to the public, those should appear in the guidelines (which are proposed in Clause 7).

13. If the Government's intention is to ask the Court to take these Examples into account in determining the degree and the extent of the harm caused to a child, a better way is to describe these as *factors* to be considered. In that case, the charges would be definitive and clear to the Prosecution, the Defence and the Court.

14. Third, and in any event, these "Examples" are not individual incidents for illustration. They are *de facto* principles and/or guidelines to be considered.

15. By way of a passing remark, Example (c) in the above refers to endangering of "psychological health". Psychological health is not

easily detected by ordinary people unless they are qualified medically or professionally. Including this guiding principle implies an obligation on the part of the mandated reporter to investigate. That is not the policy objective of the Bill.

16. The policy objective should be that once a person (specified in the legislation) notices that serious harms have been caused to a child, he should make a report (see paragraph 3 of the LegCo Brief). There is no need for him to investigate into e.g. how was the serious harm caused before he is to make a report. He should also not be given any obligations to assess the nature of the serious harm. On the other hand, the persons named in the Schedule are professionals and they have been trained in their respective specialties. It would be up to that individual (e.g. a teacher or a medical doctor), given his own knowledge and training in his own profession, to make a judgment call to report. To try to list out a matrix of "adding seriousness" factors, or by examples, is unhelpful and also impossible. It also defeats the original legislative intent.

Defence

17. Clause 5 sets out the defence. We propose a new limb of the defence in the following (sub-paragraph (c) below):

> *(1) If a specified professional is prosecuted under section 4(5) for contravening section 4(1) in respect of a child, it is a defence for the professional to establish that—*
>
> *(a) the professional had made a report before the time of the alleged contravention in respect of—*
> *(i) the same, or substantially the same, serious harm suffered by the child; or*
> *(ii) the same, or substantially the same, real risk of the child suffering serious harm; or*
>
> *(b) the professional honestly and reasonably believed that another specified professional <u>had</u> made a report before the time of the alleged contravention in respect of—*
> *(i) the same, or substantially the same, serious harm suffered by the child; or*

(ii) the same, or substantially the same, or

(c) there is a reasonable excuse of not making the report.

18. The third limb 5(1)(c) above is put forward to address those situations such as in a public hospital where there are a large number of out-patients and the preliminary examination by a health care professional prima facie does not support any views of a child being subject to abuses. In our views, the mandated reporter (health care professional in this example) should be entitled to raise a defence in the above situation.

19. The above proposed limb of defence is independent of and separated from the other defence on delays (see Clause 5(2)).

20. We also suggest that the word "had" in Clause 5(b) above be changed to "would", so that it is a defence for the professional to establish that the professional honestly and reasonably believed that another specific professional *would* make a report of suspected child abuse. We make this proposal, because the frontline worker should come under no obligation to investigate and/or reach a state of mind that his supervisor has made a report.

How to safeguard mandated reporters' interest?

21. The present drafting focuses on the frontline workers. Once they notice serious harms caused to a child, they are obliged to make a report to the employer. We share the concerns set out in the Legislative Council Brief that there may be cases where employers or organizations inhibit/prevent the frontline workers from fulfilling the reporting obligation. In that case, the proposed reporting mechanism would not be of much use, even if the frontline worker has made a report. We therefore support the proposal that such liability of the employer or organization should be explicitly spelt out by making express provisions to prohibit the employer or organization from inhibiting/preventing others from fulfilling the obligation. Non-compliance should render the office bearers at senior management level be liable to the criminal liability.

Supporting Measures

22. The LegCo Brief sets out various training and supportive measures (see paragraphs 18 – 22 of the Brief). We comment that those training and supportive measure should be procured and be put in place immediately, with or without this reporting mechanism regime.

Policy Consideration

23. Schedule 1 of the Bill contains a list of 25 specified professionals who are mandated to make a reporting of suspected cases of child abuses. The design of the proposal is once a person is employed or engaged in those named professions, criminal liabilities could be imposed, *by default,* for failures of these professionals to follow the regime to make the reports. It would then be up to these professionals themselves to raise defences to explain away any non-reporting. As a matter of procedures, therefore, one does not need to examine the circumstances of each individual cases before one is to consider the need to make reports.

24. The LegCo Brief explains the rationale of choosing and targeting those 25 professionals. They are the professionals "*who have frequent contacts with children and whose professions are currently subject to some form of regulation*" (§ 10, LegCo Brief).

25. This policy of targeting named professions could deliver prompt reporting, as for example a teacher (a profession named under the Proposal) does not need to explain his observations to, or argue with, the parents of a child who is suspected to be subject to child abuses, before the teacher is to make a report. The proposal would also assist law enforcement and investigation. It would give quick penalties to encourage future compliance and should have a rapid deterrent effect.

26. We however need to point out that the above approach is quite different from the more conventional policy on imposition of criminal liability in legislation on criminal conducts which the society

disapproves and by which criminal law would examine the acts (*actus reus*) and the mental elements (*mens rea*) of the offenders. The offences created under the present proposal seem to suggest that that the offences are strict liability offences[1], just like the fixed penalty parking offences. Whether the above is what the Government intends, as a matter of public policy, has not been made clear in the LegCo Brief. We suggest that, in the light of the policy issues involved (which are significant), it is desirable if the Government could clarify the above.

27. While the legislative proposal may have a rapid deterrent effect, it also has downsides. The 25 professionals listed in the Schedule are currently exhaustive and such legislative intent may not provide children with the requisite protection. The list also excludes parties who are non-professionals but who are in frequent contacts with children. Examples are child carers, clergy and religious workers generally. They can make reports on suspected child abuses cases. We are therefore of the view that parties with most likely exposure to children should also be included in the regime in order to detect any abuse in a timely manner. The question as to who are mandated to make the reports under the regime[2] should be revisited.

28. In considering whether the laying down of a definitive and exhaustive list of mandated reporters is appropriate in combating child abuses, a comparison may be made to a recommendation put forward by the Law Reform Commission ("LRC") about two years ago to introduce 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*". (See the LRC Consultation Paper on *Causing Or Allowing The Death Or Serious Harm Of A Child Or Vulnerable Adult* issued in May 2019). In that report, the LRC recommended also that the Government should review the maximum penalty for the offence of ill-treatment or neglect of a child under section 27 of the Offences against the

[1] , i.e. mens rea does not have to be proven in relation to one or more elements comprising the actus reus

[2] i.e. "*professionals who have frequent contacts with children and whose professions are currently subject to some form of regulation*". See paragraph 10 of the LegCo Brief (File Ref: LWB CR CoC/8-3/ 1 dated 31 May 2023.

Person Ordinance (Cap 212) with a view to increasing it as appropriate.

29. The offence proposed by LRC has the following main features:

    a. The offence would not be restricted to any particular group of people;

    b. The offence applies in both a domestic setting where the defendant [the mandated reporter under the Bill] was a member of the victim's household and had frequent contact with the victim, and an institutional setting where the defendant owed a duty of care to the victim.

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

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

    e. The offence carries high maximum penalties: (a) 20 years' imprisonment in cases where the victim dies; and (b) 15 years' imprisonment where the victim suffers serious harm, including being left in a permanent vegetative state.

30. The proposed offence by the LRC would send a clear and unequivocal message that a bystander of child abuses and those

who fail to take reasonable steps to protect a child under 16 years of age could not escape criminal liability[3].

31. The LegCo Brief is silent as to whether and if so how the reporting proposal is to interface with the LRC proposed offence. In our views, the policy aims of the above LRC proposal and the reporting regime set out in the Bill are similar. On the other hand, there is an overlap between the Bill and the LRC proposed offence in terms of protection offered to children, and the overlap is significant. If the Government is not to proceed with the LRC proposed offence, the stakeholders should be advised so that they could be in a better position to comment on the Bill.

32. As to the justification of those named professions in the Schedule of the Bill, we believe that the respective professions would themselves make representation to the Government on they being included in the list. As a passing remark, from our consideration of the policy propounded, it is not too readily apparent to us as to why the following medical professions are included

- registered pharmacists,
- enrolled dental hygienists,
- medical laboratory technologists,
- registered optometrists and
- registered radiographers.

33. We raise the above query because we believe that the child who is suspected to be subject to abuses should have already received the attention of the medical doctors or other medical professions, who in turn should have themselves made the reports under the Bill. Including the professions listed in the preceding paragraph above may duplicate the efforts unnecessarily and invite “double-reporting”.

[3] A report and the executive summary can be accessed on the website of the LRC at www.hkreform.gov.hk.

Conclusion

34. There must be an efficient mechanism to be put in place to stop child abuses. We therefore support the policy objectives of the Bill. However for the Bill itself and the reporting regime as set out in the Bill, we express reservation on the drafting and various other matters that we have highlighted in the above. In our views, training and supportive measures that are proposed alongside the reporting regime should be put in place immediately, with or without the reporting regime (see paragraph 22 above). Furthermore, in place of or in addition to the draft Bill, we urge the Administration to revisit the LRC's proposed offence of s. 25A, as set out in the LRC report on "*Causing Or Allowing The Death Or Serious Harm Of A Child Or Vulnerable Adult*" published in September 2021. The LRC's proposed offence removes (a) the limitation on the scope of the legislation to only those named professionals, and (b) any needs to review and update the schedule of named professionals, periodically or otherwise.

    We are prepared to discuss our above views with the Department of Justice.

The Law Society of Hong Kong
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