

LRC releases consultation paper on causing or allowing death or serious harm of a child or vulnerable adult (with photo)

The following is issued on behalf of the Law Reform Commission:

A sub-committee of the Law Reform Commission (LRC) released a consultation paper today (May 16) making preliminary proposals for reform of the law relating to the criminal liability of parents, carers and others when children or vulnerable adults die or are seriously harmed as a result of abuse or neglect while in their care. The consultation will last for three months and end on August 16.

The Sub-committee recommends the introduction of a new offence of "failure to protect a child or vulnerable person where the child's or vulnerable person's death or serious harm results from an unlawful act or neglect". The Sub-committee further recommends that the Government should undertake a review of the current maximum penalty applicable under section 27 of the Offences against the Person Ordinance (Cap. 212) (OAPO), with a view to increasing it as appropriate. Some more general observations on matters concerning the protection of children and vulnerable adults which it wishes to bring to the attention of the Government were also set out in the paper.

Speaking at the press conference, the Chairman of the Causing or Allowing the Death of a Child or Vulnerable Adult Sub-committee, Ms Amanda Whitfort, said that, "In family violence and other cases where the victims are children or vulnerable adults, a particular evidential problem can arise for the prosecution in trying to prove beyond reasonable doubt which of the victim's carers or members of the victim's household committed 'the unlawful act' which was the immediate cause of the victim's death or serious harm. The situation is often further complicated by the suspects' silence, or by their mutual accusations, and by the silence of other family members in their attempts to protect the suspects."

Ms Whitfort said that in determining the content of the reforms recommended in the consultation paper, the Sub-committee carefully considered the law and practice in many other common law jurisdictions. In particular, the Sub-committee has reviewed in detail the significant legislative and judicial developments that have taken place in three jurisdictions – the United Kingdom, South Australia and New Zealand – which each introduced a unique type of criminal offence to deal with these "which of you did it?" cases.

In line with these developments, the Sub-committee recommends 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". This offence would impose criminal liability on those who fail to take steps to protect a child (under 16 years of age) or a vulnerable person (over 16 years of age) from death or serious harm in circumstances where:

- * the defendant owed a duty of care to the victim, or was a member of the victim's household and had frequent contact with the victim;
- * the defendant was, or ought to have been, aware of the risk of serious harm to the victim;
- * the defendant's failure to take steps to protect the victim from harm was, in the circumstances, so serious that a criminal penalty is warranted.

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

The proposed offence carries high maximum penalties for both fatal and non-fatal cases, i.e.:

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

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

Ms Whitfort added, "At the heart of this reference has been the dilemma of how to achieve a proper balance between protecting the fundamental human rights of vulnerable victims on the one hand, and on the other, protecting the right to a fair trial of those allegedly involved in their death or serious harm. We trust that the offence we propose, which we must emphasise is not targeted at accidents, achieves that balance by targeting the wrongdoers in failing to offer sufficient protection to the victim, rather than resting on the fiction that because both carers were present and it is unclear who committed an offence of murder or manslaughter, for example, that both are therefore guilty of that offence."

Furthermore, the Sub-committee notes that although the maximum sentence for contravention of section 27 of the OAPO (the existing child ill-treatment and neglect offence) was increased from two to 10 years' imprisonment in 1995, this reform appears to have been insufficient for the courts to deal with the severest cases of child abuse. The Sub-committee therefore

recommends that the Government should undertake a review on increasing the current maximum penalty applicable under section 27 of the OAPD.

On the Sub-committee's reform proposals overall, Ms Whitfort said, "Those caring for children or vulnerable persons should be held responsible for harm suffered by them if they knew or should have known the victim was suffering abuse and could have taken steps to prevent it, for example, by removing the victim or reporting the abuse to the authorities. It is therefore our hope that the reforms we propose will provide a strong incentive to those living with and/or caring for children and vulnerable adults to ensure that they are adequately protected if they are at risk of harm."

The Sub-committee welcomes views, comments and suggestions on any issues discussed in the consultation paper. All views should be submitted on or before August 16, 2019 to: The Secretary, Causing or Allowing the Death of a Child or Vulnerable Adult Sub-committee, LRC (4/F, Justice Place, East Wing, 18 Lower Albert Road, Central, Hong Kong) by mail, by fax (3918 4096) or by email (hklrc@hkreform.gov.hk).

The consultation paper and the executive summary can be accessed on the website of the LRC at www.hkreform.gov.hk. Hard copies are also available on request from the Secretariat of the LRC at the above address.

