
**FAILING TO BREAK THE SILENCE:
A CRITICAL ANALYSIS OF PART 8 OF THE CRIMES
ACT 1961**

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CHAPTER ONE: INTRODUCTION

I The Emergence of Child Protection Law

“Never again”, the public claimed in 2000 in light of the horrific abuse that caused four-year-old James Whakaruru’s death.¹ “Excuses don’t count”, agreed the courts just one year later.² “We’ve got to learn to nark”, despaired child advocacy groups seven years on.³ But the “wall of silence” has stood strong.⁴ Every year, about seven children die as a result of maltreatment or neglect.⁵ Every hour, two children are physically, sexually or emotionally abused.⁶ In the year ending June 2012, Child, Youth and Family (CYF) recorded 21,525 substantiated cases of child abuse and neglect.⁷ It is therefore of no surprise that the United Nation remains alarmed at the high prevalence of child abuse and neglect in New Zealand.⁸

A key issue under the former law was its inability to provide recourse against those who failed to intervene "no matter how outrageous or how obvious the ill-treatment or neglect of the child may be."⁹ Following public outcry over tragic child abuse fatalities such as the Kahui twins and Nia Glassie, the government fast-tracked the Law Commission’s review of Part 8 of the Crimes Act 1961 (*Crimes Act*).¹⁰ This move aimed to appease public outrage that families who closed ranks against the

¹ Simon Collins "Never again: how we all failed James Whakaruru" *New Zealand Herald* (New Zealand, 1 July 2000). James’ injuries dated back to when he was just 16 months old and culminated in his death at the age of four, during which time his mother and stepfather subjected him to beatings with implements like a hammer and a vacuum cleaner pipe.

² Shenagh Gleeson "Lillybing counts - excuses don't" *New Zealand Herald* (New Zealand, 16 June 2001). In the days before her death Lillybing was subject to violent shaking and toilet-training methods that resulted in vaginal injuries and fatal brain injuries.

³ Yvonne Tahana and Beck Vass "Nia Glassie case: 'We've got to learn to nark'" *New Zealand Herald* (New Zealand, 19 November 2008). Nia Glassie was subjected to months of cruel abuse by her mother’s partner and his brother before her death at just three years old.

⁴ This phrase was coined by the media following the murder of the Kahui twins in 2006, which was left unresolved in part because family members initially refused to cooperate with police. Since then, several families accused of child abuse have been compared to the Kahui “tight 12.” See also Elizabeth Binning and Andrew Koubaridis "Baby boy left in agony but wall of silence frustrates police" *New Zealand Herald* (New Zealand, 17 February 2009); Alice Hudson "Parallels with Kahuis" *New Zealand Herald* (New Zealand, 16 November 2008).

⁵ Between 2002 and 2006, 7.6 children died from child abuse and neglect per year: Jennifer Martin and Rhonda Pritchard *Learning from Tragedy: Homicide within Families in New Zealand 2002-2006* (Ministry of Social Development, Working Paper, April 2010) at 55.

⁶ Ministry of Social Development *Green Paper for Vulnerable Children: Every Child Thrives, Belongs, Achieves* (July 2011) at (iii).

⁷ Some children may have two or more notifications or substantiated abuse findings within this statistic: Child Youth and Family "Notifications requiring further action and substantiated abuse" <<http://www.cyf.govt.nz/about-us/who-we-are-what-we-do/notifications-requiring-further-action.html>>.

⁸ United Nations Committee on the Rights of the Child *Consideration of Reports Submitted by State Parties under Article 44 of the Convention - Concluding Observations: New Zealand* LVI (2011) at [34].

⁹ Law Commission *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person* (NZLC R111, 2009) at [38].

¹⁰ At iv.

police could not be held responsible for their inaction.¹¹ Section 195A of the Crimes Act was created to arm the authorities with the legislative weapon required to surmount the shield of secrecy these families put around them.¹² As a result, household members can no longer stand by whilst a child in their home is abused. In passing the legislation, then Minister of Justice the Hon Simon Power declared:

“[S]ignificantly and importantly, those members of households who witness those incidents and turn a blind eye to the abuse or fail to take measures to stop ongoing incidents will be held accountable.”¹³

A further issue in such cases under the prior law was the inability to successfully bring charges where there was insufficient evidence that one carer or the other had caused the injuries.¹⁴ As well as introducing an entirely new offence for failure to protect, amendments were made to offences concerning protection of children and vulnerable adults from ill-treatment and neglect. This included the duties imposed by ss 151 and 152, and the offence of ill-treatment or neglect under s 195.¹⁵ The maximum penalty for offences under s 195 was increased from five years to 10 years imprisonment. Section 195A also imposes a maximum sanction of 10 years imprisonment.

This legislation is the latest governmental measure intended to help combat New Zealand’s high rates of child abuse and neglect by targeting those most likely to inflict fatal injuries onto a child.¹⁶ But will the amendments actually be effective? On the same day the new provisions came into force, Chris Kahui’s former lawyer Lorraine Smith questioned the ability of legislation to reduce New Zealand’s child

¹¹ For an example of how the media presented the changes initiated by government as a way to combat the “helplessness and frustration” felt by the public see Claire Trevett “Blind eye to child abuse to be an offence” *New Zealand Herald* (New Zealand, 19 December 2009).

¹² The crux of s 195A is contained in subs (1):

Every one is liable to imprisonment for a term not exceeding 10 years who, being a person described in subsection (2), has frequent contact with a child or vulnerable adult (the victim) and—

(a) knows that the victim is at risk of death, grievous bodily harm, or sexual assault as the result of—

(i) an unlawful act by another person; or

(ii) an omission by another person to discharge or perform a legal duty if, in the circumstances, that omission is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies; and

(b) fails to take reasonable steps to protect the victim from that risk. See Appendix One for the section in its entirety.

¹³ (15 September 2011) 675 NZPD 21393.

¹⁴ For example in the Kahui case no conviction was successfully secured against either parent after the Crown failed to prove beyond reasonable doubt that Chris Kahui had inflicted the fatal injuries on his sons: “Chris Kahui not guilty” *The Press* (New Zealand, 22 May 2008).

¹⁵ See Appendix One.

¹⁶ A recent review of selected family violence deaths between 2004-2011 revealed 91% of child victims (or 16 of the 19 child victims) lived in the same house as the suspect. The three remaining victims were killed by their grandmother, babysitter, and flatmate’s ex-boyfriend: Melina Curtis *Statistical Analysis and Summary of Themes: Family Violence Death Reviews of Deaths between 2004-2011* (New Zealand Police, June 2012) at 11.

abuse statistics.¹⁷ Concerns that these provisions do not provide the panacea to the darker side of New Zealand society are certainly valid, and have been echoed even by supporters of the latest government intervention. In fact there have been reservations about the government's "piecemeal approach" since the Crimes Amendment Bill 2011 (*Crimes Amendment Bill*) was first introduced.¹⁸

Overseas experience with similar legislation does little to quell these concerns. Ambiguity and broader policy issues plague the United Kingdom (*UK*) and Australian counterparts.¹⁹ For example, the UK's s 5 Domestic Violence, Crime and Victims Act 2004, upon which our s 195A is modeled, has brought forth criticism for its potential to be unduly punitive towards mothers subject to abuse themselves.²⁰

Whilst New Zealand had the chance to learn from these overseas jurisdictions, the resulting legislation is disappointing and deficient in a number of ways. The concern that New Zealand's s 195A will have similar implications to the UK's s 5 is discussed in Chapter Four below. Furthermore, the drafting of the legislation itself is problematic. Proposals made by the Law Commission were only taken up in part, despite their recommendation to redraft the entirety of Part 8. Consequently, the amendments are lacking in coherency.²¹ Some of the wording is ambiguous and inconsistent. This is likely to undermine the ability of authorities to secure prosecutions where such charges are appropriate.

II *Outline of the Dissertation*

This dissertation undertakes a critical analysis of the amendments to Part 8 of the Crimes Act brought into force on 19 March 2012 by the Crimes Amendment Act (No 3) 2011.

¹⁷ Paul Harper "Criticism of new abuse law rejected" *New Zealand Herald* (New Zealand, 19 March 2012) where Smith stated "[t]he very people to whom [the legislation] is directed are often too damaged to have the capacity to report the abuse themselves... How is it going to encourage people who are in a situation where they are living in a dysfunctional household and who themselves are often fractured and damaged and paralysed with fear about the consequences of reporting abuse?"

¹⁸ (3 May 2011) 672 NZPD 18316 per Charles Chavel MP (Labour). Similar concerns permeated Parliamentary debate over the Bill. In its second reading Rajen Prasad MP (Labour) stated that whilst he supported the provisions, "they do not go far enough": (13 September 2011) 675 NZPD 21231. And in the third reading Dr Prasad reiterated that the provisions "must be complemented with an investment in preventive and other responsive services for those children and families who find themselves in vulnerable positions": (15 September 2011) 675 NZPD 21393.

¹⁹ Jonathan Herring "Mum's Not the Word: An Analysis of Section 5, Domestic Violence, Crime and Victims Act 2004" in C. M. V. Clarkson and Sally Cunningham (eds) *Criminal Liability for Non-Aggressive Death* (Ashgate, Hampshire, 2008) 125 at 129; Stanley Yeo "Manslaughter Versus Special Homicide Offences: An Australian Perspective" in C. M. V. Clarkson and Sally Cunningham (eds) *Criminal Liability for Non-Aggressive Death* (Ashgate, Hampshire, 2008) 199 at 214.

²⁰ Herring, above n 19; Jonathan Herring "Familial homicide, failure to protect and domestic violence: who's the victim?" [2007] Crim L R 923. See also Appendix Two for s 5 in its entirety.

²¹ As noted by the Law Commission itself in its submission to the Select Committee: Law Commission "Submission to the Social Services Committee on the Crimes Amendment Bill (No. 2) 2011" at 1.

Chapter Two will set the scene with a brief overview of the background in which the legislation arose. It will look at what legal interventions have been made in the past in New Zealand, and why it is only now that legislation has successfully passed through Parliament.

Chapter Three will then look at each of the provisions in turn. It will briefly outline the scope of each before addressing some of the key ambiguities. The focus of this section will be on ss 195 and 195A. The issues raised by the provisions include the difficulty in defining a “household member” for the purposes of s 195A, the problematic distinction between an act and an omission, and the scope of harm required to successfully bring a charge for failure to protect.

Chapter Four will take a slightly different focus by examining policy issues that arise with the legislation’s implementation. Whilst the rationale for legal intervention is sound, the legislation itself does not discharge the government’s obligations in the battle against New Zealand’s high rates of child abuse and neglect. This dissertation will argue that the punitive nature of the legislation requires the government to put the public on notice of their new legal obligations, something that has not yet been done. Broader social investment is required to reduce child abuse and neglect.

Failure to protect laws can be unfairly punitive on women who are victims of domestic violence themselves. Child abusers are not necessarily always male.²² However, s 195A in particular fails to adequately consider the situation of a woman who is unable to take steps to protect her child, and who might not act as a “reasonable person.” Chapter Four will look at this issue in more detail, and conclude these risks should be minimised through statutory interpretation and wider police measures.

Finally, Chapter Five will question whether the legislation is actually effective in practice. Key themes from the other chapters will be drawn together to shape some legislative prescriptions. Lastly, it will outline some governmental measures that are still required to achieve an adequate child protection system.

²² A recent review of 95 police family violence death reviews in New Zealand found that the most common familial relationship between suspect and child victim is mother and child. Between 2004 and 2011 mothers killed 15 (45%) of the 33 child victims: Curtis, above n 16, at 13.

CHAPTER TWO: NEW ZEALAND'S RESPONSE TO CHILD ABUSE

I Background to the Offence

A New Zealand Favours Voluntary Action

The first statutes addressing child abuse and neglect originated from the United States in the early 1960s following Dr Henry Kempe's groundbreaking article "The Battered Child."²³ The United States' legislation introducing mandatory reporting of suspected child abuse and neglect signaled to American society that "child abuse is a public concern – not a private prerogative."²⁴

In New Zealand, discussions about appropriate legislation to provide better protection to children in danger of abuse have largely revolved around proposals to also introduce mandatory reporting laws.²⁵ Whilst debate in New Zealand on this issue dates back to around the same time mandated reporting was implemented in the United States, successful legislation progression has been slow to follow.²⁶ Proposals to mandate reporting were originally rejected due to the implications of increased notifications on an already overworked Department of Social Welfare.²⁷ Public education programmes and inter-agency programmes were favoured instead.²⁸ The law addressing child neglect and ill-treatment was limited to the former s 195 of the Crimes Act and s 10A of the Summary Proceedings Act 1957.

In 1994, a provision was inserted in the proposed Children, Young Persons and Their Families Amendment Bill 1993 to impose a duty on certain professionals to report evidence of child maltreatment encountered during the course of their professional duties.²⁹ Parliament again decided against enacting this provision, continuing instead

²³ This article is often cited as the turning point in recognising child abuse. See Ben Mathews "Protecting Children from Abuse and Neglect" in Geoff Monahan and Lisa Young (eds) *Children and the law in Australia* (LexisNexis Butterworths, Chatswood, Australia, 2008) 204 at 208.

²⁴ Jessica Yelas "Mandatory Reporting of Child Abuse and the Public/Private Distinction" (1992-1995) 7 Auckland U L Rev 781 at 788.

²⁵ 'Mandatory reporting' in this dissertation refers to "legislation that specifies who is required by law to report suspected cases of child abuse and neglect": Isla Wallace and Lisa Bunting *An examination of local, national and international arrangements for the mandatory reporting of child abuse: the implications for Northern Ireland* (Northern Ireland Policy and Research Unit, August 2007) at 4.

²⁶ Michael J. A. Brown *Care and Protection is about adult behaviour: The Ministerial Review of the Department of Child Youth and Family Services* (Report to the Minister of Social Services and Employment Hon Steve Maharey, December 2000) at 65.

²⁷ Deborah Lawson "Is mandatory reporting of child abuse an appropriate child protection tool for adolescents?" (PhD Thesis, University of Otago, Faculty of Law, 2009) at 85.

²⁸ At 85.

²⁹ The provision proposed to mandate reporting of suspected cases of child abuse and neglect for police, social workers, doctors, nurses, school dental nurses, psychologists, early childhood centre staff, teachers, probation officers and lawyers: Yelas, above n 24, at 787.

with a targeted education campaign.³⁰ Voluntary reporting protocols were developed to encourage reporting of child abuse. Following their implementation however, they were neither effectively promoted nor evaluated at a national level.³¹ Moreover, the Department of Social Welfare (now amalgamated with the Ministry of Social Development) struggled to keep up with demands of the voluntary reporting protocols due to financial constraints.³²

B Background to the New Legislation

In 2008, the National Government highlighted child abuse as being a priority in criminal justice reform.³³ Accordingly, the Law Commission in its review of Part 8 of the Crimes Act, set out recommendations with a particular focus on the adequate protection of children.³⁴ The Law Commission proposed significant substantive changes in the area of child ill-treatment and neglect.³⁵ Formerly, the common law placed a duty on a parent or a person in position of a parent to take reasonable steps to protect their child from foreseeable or reasonably foreseeable illegal violence.³⁶ The Law Commission recommended codifying this duty under ss 151 and 152. They also considered the duty should be extended to cover an omission to perform a statutory duty which could give rise to the same type of risk.³⁷

The courts' interpretation that the duty to provide the necessities of life under ss 151 and 152 did not equate to a duty to protect was identified as another deficiency in the law.³⁸ As a result, household members who were neither perpetrators nor parties to ill-treatment or neglect could not be held liable for their failure to intervene. In line with the Law Commission's recommendation, ss 151 and 152 now impose a broadly drafted duty on carers (in s 151) or parents and guardians (in s 152) to provide the "necessaries" and protect from injury.

An issue under the former law was that some people, though living in close proximity to the child, were not able to be charged with a duty of care. However, if they were not parents nor have charge of the child (and thus automatically under a duty), and had not been perpetrators of, nor parties to, the offending, they could not be held culpable under the law.³⁹ The Law Commission proposed creating a new statutory offence of failing to protect a child or vulnerable adult from the risk of death, serious

³⁰ Laurie O'Reilly "Look back - step forward: everyone an advocate for children" (1998) 2(9) B F L J 213 at 225.

³¹ Brown, above n 26, at 67.

³² O'Reilly, above n 30, at 219.

³³ New Zealand Government "Govt fast-tracks moves to further protect children" (press release, 12 April 2011).

³⁴ Law Commission, above n 9, at [5.1].

³⁵ At [5.3].

³⁶ *R v Lunt* [2004] 1 NZLR 498 (CA) at [22].

³⁷ Law Commission, above n 9, at [5.35].

³⁸ *R v Lunt*, above n 36, at [23].

³⁹ Law Commission, above n 9, at [5.26].

injury or sexual assault, where the perpetrator is a “member of the same household”, knows of the risk, and fails to take reasonable steps to prevent it.⁴⁰ This recommendation is now encapsulated by s 195A.

The government proclaimed that the resulting Bill would effectively respond to the perpetrators of violence against, and the ill-treatment and abuse of, children.⁴¹ This matched recommendations made to the government that such legal frameworks “should impact positively on risk factors for child maltreatment.”⁴² The Select Committee received 39 written submissions. The majority of these supported the Bill, albeit with some qualifications.⁴³ The Bill was read for the third time on September 15 2011, and came into force on March 19 2012.

C A Renewed Vigour for Child Protection Legislation

In 1993, the Attorney-General was concerned that the mandatory reporting clause proposed in the Children, Young Persons and Their Families Amendment Bill was a prima facie breach of right to the freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990.⁴⁴ The Attorney-General felt that such intrusion on the decision of whether to speak was a “hallmark of a police state” and thus repugnant to a democratic society such as New Zealand.⁴⁵ He reported to Parliament that the provision could not reasonably be justified as required by s 5 of the Bill of Rights Act. Another reason for dropping the mandatory reporting proposals was the lack of evidence that it would in fact reduce abuse against children.⁴⁶ This is an issue still relevant today.⁴⁷

⁴⁰ Law Commission, above n 9, at [5.24].

⁴¹ (3 May 2011) 672 NZPD 18316 per Acting Minister of Justice, the Hon Christopher Finlayson MP.

⁴² Janineardini *Preventing child neglect in New Zealand: A public health assessment of the evidence, current approach, and best practice guidance* (Office of the Children's Commissioner, December 2010) at 16.

⁴³ Crimes Amendment Bill (No 2) (284-2) (select committee report) at 4.

⁴⁴ (10 August 1993) 537 NZPD 17313 per Hon Douglas Graham MP on behalf of the Attorney-General who stated “[B]y requiring a person to report child abuse the State is requiring a person to express himself or herself when that person otherwise would have a choice... [I]n my view the public interest cannot of itself justify a regime, in whatever shape or form.”

⁴⁵ Yelas, above n 24, at 794.

⁴⁶ This was one of the reasons the Labour government in 1989 had decided against mandatory reporting: (27 April 1989) 497 NZPD 10255. Similar concerns prompted the National government in 1994 to again omit the proposed mandatory reporting provision from the Children, Young People and their Families Act: (27 September 1994) 543 NZPD 3765 per Roger McClay MP (National).

⁴⁷ Empirical research in Australia showed that in New South Wales (a state with mandatory reporting) 21.3% of notifications led to substantiation compared to in Western Australia (a state without mandatory reporting) where 44.5% of notifications led to substantiation. This indicates more resources are expended on not-substantiated cases in NSW than WA: Frank Ainsworth "Mandatory reporting of child abuse and neglect: does it really make a difference?" (2002) 7 *Child and Family Social Work* 57 at 59; for a follow-up with similar results four years on see also Frank Ainsworth and Patricia Hansen "Five tumultuous years in Australian child protection: little progress" (2006) 11 *Child and Family Social Work* 33.

This background explains why Parliament chose to enact legislation of a slightly different nature. Unlike the previous proposals, the Crimes Amendment Bill did not entail specific courses of action like reporting onto the public. The Attorney-General considered the Bill consistent with the New Zealand Bill of Rights Act.⁴⁸ The current legislation shares the aim of mandatory reporting legislation to reduce child abuse and neglect. However, it does not invoke such strong concerns of over-reporting and unmanageable pressure to the child protection system.

The amendments thus signal a change in the perception of appropriate responses to child abuse and neglect. Reports of concern relating to care and protection have been increasing over time.⁴⁹ The media has also played a role in bringing cases of horrific child abuse into the public arena. High profile cases such as James Whakarurus,⁵⁰ Lillybing,⁵¹ the Kahui twins⁵² and Nia Glassie⁵³ are all instances where no reports were made to authorities prior to the child's death. They have arguably helped highlight to the public the need for more rigorous child protection laws. In fact, the recent amendments have been dubbed the "Kahui law" by the media.⁵⁴ Although enactment of mandatory reporting law might have failed in the past, the public now clearly expects some intervention at government level to address New Zealand's shameful history of child abuse. The government "hopes" the amendments to the Crimes Act will do just that, a rather insubstantial premise given the importance of the issue.⁵⁵

II *The Resulting Legislation*

The amendments acknowledge what the history has shown - that the safety of children cannot be achieved without statutory intervention. It also ensures greater protection for vulnerable adults, who under the former law lacked legislative attention. But parent and child share a "complex and fragile bond."⁵⁶ The legal system's task of securing the safety of the child is thus a difficult one. Sections 151 and 152 impose a duty upon parents and carers to provide the necessaries and take reasonable steps to protect the child or vulnerable adult from injury. Sections 195 and 195A aim to overcome the issue of *who* caused the injuries. This is often difficult due to timing as

⁴⁸ Crown Law Office *Legal Advice: Consistency with New Zealand Bill of Rights Act 1990: Crimes Amendment Bill (PCO13543/29.0)* (24 March 2011) The only possible issue noted related to the right to freedom from discrimination on the basis of age and family status.

⁴⁹ Total number of reports increased from 62,739 in 2005/2006 to 124,921 in 2009/2010: Ministry of Social Development *Statistical Report for the year ending June 2010* (Wellington, 2011) at 265.

⁵⁰ Collins, above n 1.

⁵¹ Gleeson, above n 2.

⁵² Edward Gay "End right to silence, Kahui inquest told" *New Zealand Herald* (New Zealand, 29 June 2011).

⁵³ Tahana and Vass, above n 3.

⁵⁴ Rachael Tiffen "'Kahui Law' stops silence around child abuse cases" *3 News* (New Zealand, 2011).

⁵⁵ New Zealand Government "Parliament passes bill to protect children from abuse" (press release, 15 September 2011).

⁵⁶ Yelas, above n 24, at 791.

multiple persons care for the child.⁵⁷ Despite the long process of development leading up to legal intervention in New Zealand, the resulting legislation is not without its difficulties. Chapter Three will now look at the issues it causes.

⁵⁷ This is illustrated by a study focusing on prosecutions for deaths caused by shaken baby syndrome undertaken in the UK. It found that from a cohort of over 50 cases, 17 resulted in both carers being arrested. Of that, only in four cases were both carers charged, and just one defendant was ultimately convicted of manslaughter: Cathy Cobley, Tom Sanders and Philip Wheeler "Prosecuting cases of suspected "shaken baby syndrome" - a review of current issues" (2003) Crim L R 93 at 98.

CHAPTER THREE: STATUTORY ANALYSIS

I Introduction

The latest amendments to the Crimes Act dealing with protection of children and vulnerable adults encompass a complex set of provisions. Some comparisons will be made to similar legislation from other jurisdictions. For example, s 195A is loosely modeled on s 5 of United Kingdom's Domestic Violence, Crime and Victims Act 2004. And in Australia, all states have similar provisions providing legislating protection to children.⁵⁸

II The Provisions

A Section 150A

1 Background to the provision

Section 150A is a crucial component of Part 8's protection provisions for children and vulnerable adults.⁵⁹ It restricts criminal liability for unlawful acts based on negligence or strict or absolute liability to situations where there has been a "major departure" from the standard of care. The major departure test replaced the ordinary negligence threshold in 1997. This followed a lobbying campaign led by the medical profession against a string of prosecutions for manslaughter by negligent health professionals.⁶⁰ The major departure test now applies to ss 195(1) and 195A(1)(a)(ii) by virtue of s 150A(2).

2 The meaning of "major departure"

The courts have taken "major departure" to amount to the English equivalent of "gross negligence."⁶¹ The English courts have declared any attempt at further

⁵⁸ Children and Young People Act 1999 (ACT), s 156; Children and Young Persons (Care and Protection) Act 1998 (NSW), Criminal Code Act (NT), s 149; Criminal Code Act 1899 (Qld), s 286; Children's Protection Act 1993 (SA), s 6(2) and Criminal Law Consolidation Act 1935 (SA), s 14; Children, Young Persons and Their Families Act 1997 (Tas), ss 4 and 13; Children, Youth and Families Act 2005 (Vic), s 493; Children and Community Services Act 2004 (WA), s 101.

⁵⁹ See Appendix One.

⁶⁰ Most notably *R v Yugasakaran* [1990] 1 NZLR 399, where Y, an anaesthetist, was convicted for manslaughter after injecting the patient with the wrong drug due to his failure to check it had been stored in the correct drawer. See generally Peter Skegg "Criminal Prosecutions of Negligent Health Professionals: The New Zealand Experience" (1998) 6 Med L Rev 220. See also Sir Duncan McMullin *Report to the Minister of Justice on Sections 155 and 156 of the Crimes Act 1961* (Ministry of Justice, Wellington, 1995) which provided the turning point for legislative change in the law; and see Kevin Dawkins "Medical Manslaughter" (1998) NZLJ 422 for a critical review of this reform.

⁶¹ This was confirmed in *R v McKie* 3/8/00, Young J, HC Dunedin T13/00 at [30]. Young J considered gross negligence under s 150A does not require recklessness but does require more than simple negligence. Neither is gross misconduct such as alcohol consumption and deliberate risk-taking required.

definition will only give “spurious precision.”⁶² Rather, the courts have favoured leaving it as a value judgment for the jury, preceded by a summing up tailored to the particular circumstances.⁶³ An important ruling in light of the widespread occurrence of abuse in New Zealand is that gross negligence cannot excuse ignorance of the need to take particular steps to avoid danger to life.⁶⁴

3 “Major departure” and s 195A(1)(a)

The wording used in each of ss 195(1) and 195A(1)(a)(ii) specifically incorporates the ‘major departure’ test. By contrast, s 195A(1)(a)(i) does not. A potential interpretation is that the legislature deliberately did this to lower the threshold for unlawful acts under s 195A(1)(a)(ii).⁶⁵ It is likely that the courts will prefer to use s 150A(2) to read the major departure test into s 195A(1)(a)(ii). Nevertheless, it seems inconsistent that the legislature added the qualifications into some provisions but not into s 195A(1)(a)(ii).

B Sections 151 and 152

Sections 151 and 152 impose a legal duty to provide a child or vulnerable adult with the necessaries and to take reasonable steps to protect that person from injury.⁶⁶

1 Who is protected?

The victim must be a child or vulnerable adult. A “child” is a person under 18 years.⁶⁷ This is consistent with most Australian jurisdictions.⁶⁸ By contrast, a “child” in the UK must be under 16 years.⁶⁹ The New Zealand definition is preferable as it meets the obligations of the United Nations Convention on the Rights of a Child.⁷⁰ A vulnerable adult is defined as “a person unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person.”⁷¹

⁶² *R v Adomako* [1995] 1 AC 171 at 187, per Lord Mackay.

⁶³ *R v Spencer* 5/4/01, CA353/00 at [19].

⁶⁴ *R v Burney* [1958] NZLR 745 (CA) at [35].

⁶⁵ See Julia Tolmie “Criminalising failure to protect” (2011) NZLJ 375 at 377 where she states s 150A does not apply to s 195A. Unfortunately, no explanation is offered for this interpretation. In lieu of further clarification why the legislature would desire such a move, it appears to be more of an oversight than a deliberate omission.

⁶⁶ See Appendix One.

⁶⁷ Crimes Act 1961, s 152.

⁶⁸ The exceptions are New South Wales, where a ‘child’ is a person of 15 years and under: Children and Young Persons (Care and Protection) Act 1998 (NSW) s 3; and Victoria, where a ‘child’ is a person of 16 years and under: Children, Youth and Families Act 2005 (Vic), s 3.

⁶⁹ Domestic Violence, Crime and Victims Act 2004 (UK), s 5(6).

⁷⁰ United Nations Convention on the Rights of the Child, 1577 U.N.T.S. 3 (opened for signature 20 November 1989, entered into force 6 April 1993), art 1. However, the Children, Young Persons and Their Families Act 1989 in s 2(1) still defines a child as under 14 years and a young person as under 17 years.

⁷¹ Crimes Act 1961, s 2.

2 *Who may be charged?*

Sections 151 and 152 require the defendant to have “actual care or charge” of the victim.⁷² The former s 151 stated the duty applied “whether such charge is undertaken by him under any contract or is imposed upon him by law or by reason of his unlawful act or otherwise howsoever.”⁷³ The absence of such qualification in the current provision suggests it should be interpreted in the broadest sense.⁷⁴ The requirement that the defendant has “actual care or charge” ensures the provision will rarely catch people who do not have responsibility for the victim.⁷⁵

A parent will be unlikely to have the requisite “care or charge” under s 152 where a child aged 16 – 18 years of age marries, enters into a civil union, or lives with another person as a de facto partner, since s 28 of the Care of Children Act 2004 states these actions will end a parent or guardian’s responsibilities towards that child.

3 *Requirements of the provisions*

The former s 151 required any person with care or charge of another to provide the “necessaries of life.” This entailed provision of goods and services necessary to sustain life, namely food, clothing, housing and medical care.⁷⁶ It did not encompass a duty to protect from violence.⁷⁷ The amendments enact the Law Commission’s recommendation to simply provide the “necessaries.”⁷⁸ The Law Commission intended to broaden the legislative duty in ss 151 and 152 to cover “everything arguably necessary to the reasonable raising of a child.”⁷⁹

⁷² “Charge” depends on the fact of control, not how that fact came to be: *R v Proude* HC Auckland CRI-2008-092-1926, 25 November 2009 at [33].

⁷³ Crimes Act 1961, s 151 prior to 18 March 2012.

⁷⁴ This conclusion is supported by comments made during the Select Committee debate of the Bill that its purpose should be to ensure it is broad enough to apply to “anyone who might be implicit in the abuse or neglect of a child or vulnerable person”: (14 September 2011) 675 NZPD 21324 per Jacinda Ardern MP (Labour).

⁷⁵ An concern raised by Age Concern New Zealand Inc "Submission to the Social Services Committee on the Crimes Amendment Bill (No. 2) 2011" at 2 that an elderly mother of a 60-year-old man with mental health and alcohol issues will be liable if he dies of exposure in her garden is likely to be unfounded as the court will be able to look at the particular circumstances of the case to determine whether she had ‘actual care or charge’ of the son.

⁷⁶ *R v Lunt*, above n 36, at [23].

⁷⁷ At [24]. Although the court was reluctant to extend the well-established meaning of “necessaries of life”, they did consider a duty existed at common law for parents to protect their child from illegal violence from any other person where it was foreseeable or reasonably foreseeable.

⁷⁸ Law Commission, above n 9, at [5.46].

⁷⁹ At [5.33]. Comments from such sources as Law Commission reports, Hansard and explanatory notes to bills may of assistance to the court in “supporting a provisional interpretation of the words of the Act, or as helping to identify the mischief aimed at or to clarify some ambiguity in the Act.” However, where Parliamentary material is in plain conflict with a statute it can not be used to alter its meaning: *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 at 701 per Cooke J. See also Ian McKay "Interpreting Statutes - A Judge's View" (1997-2000) 9 Otago L Rev at 753 who considers “[i]t is now settled that the Court can look at such material, but it is rare that any help is obtained from it.” Compare *Jennings v Buchanan* [2002] 3 NZLR 145 (CA) at [41] where the Court of

However, the Law Commission failed to elaborate on what else might be necessary in raising a child. Is it necessary for a teenager to be given an allowance or to own an iPhone? This seems improbable. It is more likely the Law Commission intended to extend the scope of “necessaries” to encompass a duty to protect from injury, since it commented “[t]he duty we recommend builds on *Lunt* but is expressed in more general terms, as a duty on a parent or person in place of a parent to take reasonable steps to protect his or her child from injury.”⁸⁰ The only other guidance is a footnote to a paragraph recommending the repeal of s 153.⁸¹ It states the more extensive scope of the duty proposed in s 151 may include “access to medical care and treatment, appropriate sleeping arrangements and so on.”⁸² Again, this indicates “necessaries” refers to a more conservative interpretation than one encompassing allowances and iPhones.

Section 152 is comparable to Queensland’s s 286 of the Criminal Code Act 1899.⁸³ It Queensland provision goes further than New Zealand’s s 152 by deeming the carer to have caused *any* consequences to the child’s life and health once a failure to take reasonable precautions or actions to avoid danger to the child’s life and health has been established. It has the advantage of making it easier for the prosecution to prove causation against the accused. In New Zealand, situations where the perpetrator cannot be clearly identified may now be dealt with by s 195A.

“Injury” in subs (b) of each provision is undefined, but “to injure” means “to cause actual bodily harm.”⁸⁴ Injury may be caused by humans, human activities and non-human sources.⁸⁵ Thus daily activities unrelated to the occurrence of violence like incorrect handling of a pair of scissors could potentially invoke liability.⁸⁶ However, provided the defendant takes reasonable steps to avoid risk of injury, they will not be liable. This ensures that parents are not held to an unrealistic standard of parenting.

Appeal affirmed that proceedings in Parliament may be used to assist in finding the meaning of legislation.

⁸⁰ Law Commission, above n 9, at [5.35].

⁸¹ Section 153 relates to the duty on employers to provide the necessaries to any servant or apprentice under the age of 16 years. Despite the Law Commission’s recommendation, it currently remains in the Crimes Act.

⁸² Law Commission, above n 9, at fn 89.

⁸³ This is noted by the Law Commission, above n 9 at 36. Interestingly, whilst QLD’s s 286 refers to the “necessaries of life”, it also puts a duty upon persons with care of a child to take reasonable action to avoid danger to the child’s life, health or safety. This supports the inference that the Law Commission’s intention broaden the scope of “necessaries” was to extend its meaning to protection from injury, rather than imposing a duty on every parent to buy their child an iPhone. See Appendix Three for QLD’s s 286.

⁸⁴ Crimes Act 1961, s 2.

⁸⁵ See *Hopwood v R* [2011] NZCA 352 where the co-accused was convicted of willful neglect of a child under the former s 195 of the Crimes Act 1961 (a charge which would be now brought under s 152 of the Crimes Act 1961) for exposing her daughter to the serious health risks posed by the operation of methamphetamine manufacture in the home.

⁸⁶ Tolmie, above n 65, at 375.

4 *Criminal liability*

Section 151 no longer has a provision imposing criminal liability for failing to fulfill the duties under subs (a) and (b) so that the child's life is endangered or health is permanently injured. Likewise, s 152 no longer has an equivalent provision to the former s 152(2) criminalising liability for neglecting the duties imposed by s 152(1). The Law Commission considered the provision referring to criminal responsibility was misleading because it appeared to require the consequences of the relevant breach of duty to fall just short of death, thus unduly limiting its scope.⁸⁷ Furthermore, the reference to criminal responsibility was "redundant" since the source of criminal liability can be found in the offence provisions.⁸⁸

Currently however, the provisions do not adequately cover the former s 152(2).⁸⁹ The Law Commission commented that "[i]f the reference to criminal responsibility legally adds nothing, it should not appear in the drafting at all."⁹⁰ Yet the provision had legal value by holding liable a person who inadvertently endangers or permanently injures a child's health. This lacuna in the law could possibly have been ameliorated had the legislature enacted the Law Commission's proposed ss 157A and 157B relating to unlawful acts or omissions.⁹¹ As it is, the courts may be forced to give an expansive interpretation to s 195 in order to hold a person criminally responsible.

C *Section 195*

1 *Who is protected?*

The same persons fall under s 195 as in ss 151 and 152, outlined above.⁹² A "child" is a person under 18 years old.⁹³ The scope of harm covers all sources of "non-trifling" injury.⁹⁴ This includes bruising, grazing and cuts even if they are not the result of another person's violence. Actual harm is not required; it is sufficient if it "likely" to arise. For example, the former s 195 has been laid against parents or caregivers whose

⁸⁷ Law Commission, above n 9, at [5.40].

⁸⁸ At [5.41].

⁸⁹ For example, a young child just learning to walk is taken into the garden by her babysitter. The child falls over on the steep gravel path and hits her head on a rock whilst the babysitter is on her cellphone. The child suffers a serious head injury as a result. Even though injury was foreseeable and the babysitter did not take reasonable steps to provide adequate supervision of the child, s 195A is not available because no third party was involved. Section 141 will not apply, as criminal nuisance requires proof of knowledge the omission would endanger the child's life or health. Neither is s 195 applicable, as it requires an intentional omission to discharge or perform a legal duty.

⁹⁰ Law Commission, above n 9, at [5.41].

⁹¹ The proposed provisions did however require an additional element by stating the act or omission in question must be "likely" to injure another person: Law Commission, above n 9, at 71.

⁹² See Appendix One.

⁹³ Crimes Act 1961, s 195(3).

⁹⁴ "Injury" includes any degree of harm that is not "transitory or trifling": *R v McArthur* [1975] 1 NZLR 486 (SC) at 487.

methamphetamine-related activities in or adjacent to the home have exposed the child to the risks associated with exposure to noxious chemicals.⁹⁵

2 *Who may be charged?*

A defendant must have “actual care or charge” of the victim or be a staff member at the hospital, institution or residence of the victim.⁹⁶ They must intentionally perform an act or omit to discharge a legal duty, the effect of which is “likely to cause suffering, injury, adverse effects to health, or any mental disorder or disability to a child or vulnerable adult.”⁹⁷ Importantly, it must be a “major departure from the standard of care to be expected of a reasonable person.”⁹⁸

3 *Requirements of the provision*

Section 195 requires the defendant “intentionally” do an act or make an omission that carries a risk of “suffering, injury or adverse effects to health” to the victim.⁹⁹ The question arises whether the defendant simply has to intentionally engage in such conduct, or whether they must intentionally engage in conduct likely to cause suffering, injury or adverse effects to health. If the requirement is the latter, the defendant will have to be conscious of the fact his/her conduct carries that risk.

Prior to the amendments the defendant must have “willfully” ill-treated or neglected the child so to cause unnecessary suffering.¹⁰⁰ The Law Commission recommended deleting reference to willfulness so to remove the defence of ignorance or thoughtlessness.¹⁰¹ This suggests the requirement the defendant “intentionally” engages in conduct or omits to discharge or perform a legal duty only relates to whether such behaviour was more than accidental. Of course, liability is limited by

⁹⁵ *R v Korewha* HC Auckland CRI-2007-092-7651, 8 September 2008; *R v Murphy* HC Hamilton CRI-2009-039-796, 30 June 2010; *Hopwood v R*, above n 85. A successful case will require scientific proof of risk of exposure rather than the mere presence of a lab in or adjacent to the house. In *R v Korewha*, the levels of contamination found in the children’s hair and inside the house were too low to confirm actual risk beyond reasonable doubt. By contrast, the Family Court made a declaration to remove children from their parents’ care where positive swab tests for methamphetamine were found in the children’s rooms and in their hair: *Chief Executive of the Ministry of Social Development v VW* [2012] NZFC 2966. In these situations a charge could be laid under s 195A provided it meets the higher standard of risk of death or grievous bodily harm.

⁹⁶ Crimes Act 1961, s 195(2).

⁹⁷ Section 195(1).

⁹⁸ Section 195(1).

⁹⁹ Section 195(1).

¹⁰⁰ In other words, ill-treatment must have “been inflicted deliberately with a conscious appreciation that it was likely to cause unnecessary suffering: *R v Hende* [1996] 1 NZLR 153 (CA) at 6. The same interpretation was later applied to neglect: *R v R* [2009] NZCA 356.

¹⁰¹ Law Commission, above n 9, at [5.17]. That Parliament approved of this recommendation is clear by Mr Power’s statement that the amendments would hold those with responsibility for children more accountable by ensuring they “can no longer use ignorance or thoughtlessness as a defence”: (15 September 2011) 675 NZPD 21393 per Mr Power.

the test of gross negligence, whereby the act or omission must be a major departure from the standard of care expected of a reasonable person.¹⁰²

Section 195 requires the defendant to know that the victim is a child or vulnerable adult. This could give rise to a defence of ignorance of fact if the victim was aged 17 years 11 months, and the defendant thought s/he was in fact an adult. If however the defendant was reckless as to the age of the victim it is unlikely this defence would be available.

D Section 195A

1 Who is protected?

Like s 195, protected persons are the same as in ss 151 and 152, outlined above.¹⁰³ As in s 195, a “child” under s 195A is a person under 18 years.¹⁰⁴

2 Who may be charged?

A defendant must have “frequent contact” with the victim, although this term is left undefined.¹⁰⁵ Secondly, they must either belong to the same household as the victim, or be a staff member at the hospital, institution or residence of the victim.¹⁰⁶ They must know the victim is at risk of death, grievous bodily harm, or sexual assault.

Importantly, the risk must arise either as a result of another person’s unlawful act, or from another person’s omission to discharge or perform a legal duty (if such an omission is a major departure from the standard of care expected of a reasonable person).¹⁰⁷ Finally, the defendant must fail to take reasonable steps to protect the victim from that risk of harm.¹⁰⁸ At first blush, this offence goes against the legal maxim “Thou shalt not kill, but needst not strive officiously to keep alive.”¹⁰⁹ This hints at some of the difficulties that may arise in prosecuting a failure to protect.

¹⁰² For example, a parent who is a smoker may unintentionally cause risk of adverse effects to the baby’s health by smoking in the home. It is debatable however whether this would satisfy the gross negligence test given the high prevalence of smoking in New Zealand (the 2009 national tobacco use survey found that in 10.1% of households with one or more children, one resident had smoked inside the house in the week preceding the survey: Ministry of Health *Tobacco Use in New Zealand: Key findings from the 2009 New Zealand Tobacco Use Survey* (2010) at 94).

¹⁰³ See Appendix One.

¹⁰⁴ Crimes Act 1961, s 195(3).

¹⁰⁵ However, the defendant need not reside with the victim if they visit often enough and for such periods of time that it is reasonable to consider them a ‘household member’: Crimes Act 1961, s 195A(4). This is analogous to Domestic Violence, Crime and Victims Act 2004 (UK), s 5(4).

¹⁰⁶ Crimes Act 1961, s 195A(2).

¹⁰⁷ Section 195A(1)(a).

¹⁰⁸ Section 195A(1)(b).

¹⁰⁹ Arthur Hugh Clough *The Last Decalogue* (1848).

A person cannot be charged if they are under 18 years old.¹¹⁰ Teenage parents under 17 years are likely to be dealt with in the Youth Court and thereafter be referred to various mentoring and parenting programmes.¹¹¹

3 Requirements of the provision

The defendant must know that the victim is at risk of death, grievous bodily harm, or sexual assault by the unlawful act or omission of another person.¹¹² This prospective approach is desirable as it encourages disclosure of abusive situations before serious injury occurs.¹¹³ It also gives the police the potential to use it as a levy to break through the 'wall of silence' families may present upon questioning. However, it gives rise to two (related) questions: the degree of risk required and what knowledge the defendant must actually possess.

The Law Society expressed concern that the degree of risk required to attract liability lacks clarity.¹¹⁴ However, it is unlikely further statutory qualification would be helpful.¹¹⁵ According to the learned author of *Adam's on Criminal*, a "real" or "serious" risk of harm is needed.¹¹⁶ Where the defendant does see the risk but then fails to take precautions s/he will be liable. A situation could arise where the defendant is not aware of the risk because s/he is unaware of the relevant act or omission's possible consequences. In this case, if a reasonable person aware of the same circumstances would have appreciated the risk, then the defendant's knowledge is likely to be inferred.¹¹⁷ The nature and remoteness of the known risk will also be relevant to the reasonableness of the steps (if any) taken to avert it.

The defendant need only know of this risk of harm; s 195A does not require the harm to actually eventuate. Knowledge of the precise nature of the act or omission is not required, nor that it would incur criminal liability.¹¹⁸ It is suffice that the defendant knows of the unlawful act or omission. However, the standard for securing a successful charge under s 195A is higher than s 195 by requiring the risk of harm

¹¹⁰ Crimes Act 1961, s 195A(3).

¹¹¹ Ministry of Justice *Regulatory Impact Statement: Agency Disclosure Statement: Crimes Amendment Bill* (14 March 2011) at [18].

¹¹² Crimes Act 1961, s 195A(1).

¹¹³ Ben Mathews and Maureen Kenny "Mandatory Reporting Legislation in the United States, Canada, and Australia: A Cross-Jurisdictional Review of Key Features, Differences, and Issues" (2008) 13(1) *Child Maltreat* 50 at 60.

¹¹⁴ New Zealand Law Society "Submission to the Social Services Committee on the Crimes Amendment Bill (No. 2) 2011" at [11].

¹¹⁵ See s 8 of the Bail Act 2000, which considers cause for continued detention. When the Act was amended to delete the requirement that bail risks be "real and significant", the courts did not consider this caused any substantive change to the test. As stated in *Wallace v Police* HC Auckland CRI 2008-404-369, 23 December 2008 by Harrison J at [4] "risk alone is sufficient."

¹¹⁶ Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at CA195A.03.

¹¹⁷ *R v Parker* [1977] 2 All ER 37.

¹¹⁸ The defendant need not know the specifics of location, time and degree of violence; it is the knowledge of the likelihood of the particular kind of particular harm that is important: *R v Khan* [2009] EWCA Crim 2 at [39].

arise from a third party's act or omission.¹¹⁹ But if the defendant did not know another person was involved it is certainly arguable the provision will not apply, since s 195A(1)(a) clearly requires the involvement of another person.

Julia Tolmie has expressed concern the section takes an unprecedented step towards criminalisation for simple possession of mens rea.¹²⁰ Whilst this could indicate s 195A creates an overly broad platform for criminal liability, surely legislation whose function is to actually stop harm before the fact is more desirable than legislation capable only of picking up the pieces.¹²¹ Moreover, s 195A requires a failure on the defendant's behalf to take reasonable steps to protect the victim from the risk of harm. Finally, whilst it was Parliament's intention that the section's "biggest impact" would be to encourage people to come forward about endangered children, it is more likely an s 195A charge will be brought when the risk has already manifested itself.¹²²

II Remaining Ambiguities Within the Provisions

A "Household Member"

Section 195A requires "frequent contact" between the victim and household member.¹²³ According to the Law Commission, the victim-offender relationship encompasses "close proximity" and "co-habitation."¹²⁴ The Law Commission also emphasised the need for the extent of liability to be "clear and circumstanced."¹²⁵ Yet determining who actually falls within the bounds of s 195A is far from clear since the statute classifies some people as household members even if they do not live with the victim. Thus a person may be "so closely connected" that it is reasonable to regard

¹¹⁹ That the third party need not be a household member recognises the victim may face risk of abuse outside the familial sphere. By contrast, the UK provision takes a narrow approach by requiring the perpetrator be a member of the same household as the child: Domestic Violence, Crime and Victims Act 2004 (UK), s 5(1)(a)(i).

¹²⁰ Tolmie's concern is that the Crimes Amendment Bill "pushes at the boundaries" of traditional cautions, and in particular through the way "s 195A potentially criminalises knowledge of a slight risk that never eventuates, so long as the accused did not take "reasonable steps" to protect the victim in response to that knowledge": Tolmie, above n 65, at 377.

¹²¹ An example can be made of Michael Jackson's infamous "baby-dangling" from the window of his room on the fifth floor of a hotel in Berlin in 2002. Section 195A would require household members intervene to protect the child from that risk of death had Jackson made a habit of precariously holding his child out from high-storeyed buildings when on tour.

¹²² (15 September 2011) 675 NZPD 21393 per Mr Power. He implicitly acknowledged this by outlining the merits of the Bill in terms of its ability to hold perpetrators and witnesses of abuse *that has already occurred* accountable. Thus a mother who has been physically abused by her partner on several occasions, laid a complaint with the police, later dropped the charges, and then leaves the children in her partner's care exposing her children to the risk of harm is unlikely to face an s 195A charge in absence of abuse actually taking place.

¹²³ Crimes Act 1961, s 195A(1).

¹²⁴ Law Commission, above n 9, at [5.26]; [5.27]. This indicates that "frequent contact", whilst undefined, probably requires physical contact rather than non-physical mediums of contact such as phone or skype conversations.

¹²⁵ At [5.27].

them as a household member.¹²⁶ Determining factors are the frequency and duration of visits, whether there is a familial connection and any other relevant matter.¹²⁷ The presence of a “familial connection” points towards the defendant being a household member. How close that connection need be should have been specified in the statute given that in New Zealand wider family or whanau often play a pivotal role in bringing up a child.¹²⁸

In practice the distinction between household members and visitors of frequent visiting habits will at times be difficult. A generous interpretation could encompass an unpaid carer, such as a friend or relative, who habitually visits the child or vulnerable adult. However, the imposition of a legal duty seems unfair as they are unlikely to see themselves as a household member and will therefore not attempt to meet the s 195A duty even where they are aware of its existence.¹²⁹ The inconsistency of which visitors will meet the definition illustrates the poor drafting style of the provision.¹³⁰

Where a victim moves between households, the defendant must be in the same household as the victim when the act or omission giving rise to the risk of harm occurred.¹³¹ The learned author in *Adam’s on Criminal* notes this provision, taken directly from s 5(4)(b) of the UK Act, is inconsistent with the rest of the section by requiring an actual occurrence of harm.¹³² In absence of any explanation offered by the legislature or the Law Commission, it is likely this inconsistency is simply an oversight in drafting.

Whilst a familial connection is not expressly required, it appears that some physical connection is. A father under a parenting order who regularly visits the child but never enters the child’s home does not appear to fit the criteria for a household member. Indeed if the father has a protection order against him then by law he is not allowed to enter the house. John Herring in analysing the equivalent UK provisions suggests a “household member” should be those with a special responsibility towards

¹²⁶ Crimes Act 1961, s 195A(4)(a).

¹²⁷ Section 195A(5).

¹²⁸ See *Morgan v R* HC Hamilton CRI-2008-419-32, 13 June 2008; Community Welfare Act 1983 (NT) where the victim subjected to willful neglect was not the appellants’ child but a child of a relative in their care through their whanau. In the Kahui case, the victims lived in the same home as their aunt and uncle. In fact, it was the aunt who upon checking on the victims first alerted members other than Chris Kahui to the twins’ abnormal state of health: *Inquest into the deaths of Christopher and Cru Kahui (Infants)* Coroners Court Auckland 89/12, 2 July 2012 at 22.

¹²⁹ John Herring recommends caution in imposing criminal duties for carers in the UK context due to the uncertainties surrounding the scope of the duty, the importance of state responsibilities towards vulnerable adults, and the unreasonableness of imposition given the lack of support given to carers: Jonathan Herring “The Legal Duties of Carers” (2010) 18 *Medical L Rev* 248.

¹³⁰ For example, whilst it seems a stretch to hold a child who goes to the child-minder’s home is a household member when in reality they are simply visiting, a child-minder who comes to the child’s house often enough could more easily be considered a visitor of frequent enough habit to become a household member for the purposes of s 195A.

¹³¹ Crimes Act 1961, s 195A(4)(b).

¹³² Robertson, above n 116, at CA195A.02(1).

the child rather than those who fit a description of physical location.¹³³ Whilst this could ensure greater focus on persons with responsibility towards the child, the provision clearly relates to people who live in the same house as the child, regardless of their level of responsibility to the child.¹³⁴

The South Australian provision is more desirable in its express reference to a duty of care.¹³⁵ This recognises that merely sharing a household and having frequent contact with the victim should not automatically create a duty of care.¹³⁶ It would also encompass the father subject to a parenting or protection order and thus is more attractive than New Zealand's current provision.

B "Staff Member"

Sections 195 and 195A extend liability beyond household members to staff members of certain institutions with "actual care or charge" of the victim.¹³⁷ What the defendant saw, knew or inferred will be crucial.¹³⁸

The applicability of the section to medical practitioners who come into contact with vulnerable adults at places such as night shelters or halfway houses is also problematic. The first issue is whether the victim "resides" there; they are more likely to be transient than a permanent resident. If patients staying overnight or for a number of days at a hospital come within the section, then for purposes of consistency the same approach should be taken for adults at a night shelter.

The second issue is whether the term "staff member" includes a visiting medical practitioner such as a psychiatric nurse. Section 195A(4) provides an extended definition of who qualifies as a "household member." The absence of a similar definition for staff members could indicate a narrow interpretation is appropriate. Thus a visiting nurse checking on the 20 adults at a halfway house may not have

¹³³ Herring, above n 19, at 130.

¹³⁴ Of course, the father could be still caught under s 152. Nevertheless it seems unreasonable that a lodger could fall under s 195A where a father could not.

¹³⁵ Criminal Law Consolidation Act 1935 (SA), s 14(3): Appendix Four.

¹³⁶ Yeo, above n 19, at 215.

¹³⁷ This was done upon the recommendation of the Law Commission, who considered such a provision appropriate in light of s 18A of the Summary Offences Act 1981 which had placed obligations on staff members of Child, Youth and Family residences. Whilst the Law Commission had simultaneously recommended the repeal of s 18A, they considered the policy reasons for such a provision were still relevant, and further, should apply equally to staff members of any hospital, institution or residential care facility in which a vulnerable victim resides: Law Commission, above n 9, at [5.19].

¹³⁸ For example, a cleaner of a residential home finds the child at home alone from school with suspicious bruising on multiple occasions. Whilst the requisite level of risk of harm under s 195A is probably too high to apply, the cleaner could be caught under s 195 if their failure to ascertain the child's safety is a major departure from the standard of care expected of a reasonable person. By contrast the child's schoolteacher, who arguably has a much greater role in the child's development, has no legal duty to report any suspicions or take any steps at all.

“actual care” of any one of them for the purposes of ss 195 and 195A, although this does not seem quite in keeping with the spirit of the provisions.

C A Young Parent

A person may not be charged under s 195A if under the age of 18 at the time of the act or omission.¹³⁹ Parliament initially decided to extend the offence to all parents regardless of age to “reflect the responsibilities that come with parenthood.”¹⁴⁰ The Select Committee’s subsequent recommendation that an offender must be over 18 years was instead favoured.¹⁴¹ The result is an anomaly in the law whereby parents aged 17 years may be charged for manslaughter of their child, but cannot be charged in the alternative under s 195A.¹⁴²

The UK provision overcomes this by specifically holding all parents to be liable regardless of age.¹⁴³ This is a more effective approach as it achieves consistency as well as ensuring liability is restricted so that young household members such as siblings (who could be subject to similar abuse) are not held to unreasonable expectations. Whilst the issue of age is important, it is unlikely to affect a high number of potential defendants.¹⁴⁴

D “Child” or “Vulnerable Adult”

The classification of “child” changes throughout the Crimes Act.¹⁴⁵ For the purposes of these amendments, a “child” is a person under 18 years of age. Some Australian states go further by protecting unborn children where there is a possibility they will be exposed to risk after being born.¹⁴⁶ Without similar statutory guidance it is unlikely such an approach will be taken in New Zealand.¹⁴⁷

¹³⁹ Crimes Act 1961, s 195A(3).

¹⁴⁰ (3 May 2011) 672 NZPD 18316 per Mr Finlayson.

¹⁴¹ Their reasoning was that s 152 provides adequately for the liability of a younger parent who fails to protect their child: Crimes Amendment Bill (No. 2) 2011 (284-2) (select committee report) at 3.

¹⁴² See *R v Haddock* HC Rotorua CRI-2005-077-461, 6 Dec 2007, where the 17 year old mother who knew her child was being physically abused by her partner failed to seek medical assistance. Following the death of the child she was sentenced to two years six months imprisonment. Although these facts fit the exact situation for which s 195A was drafted she could not be charged under it due to her age.

¹⁴³ Domestic Violence, Crime and Victims Act 2004 (UK), s 3.

¹⁴⁴ The Ministry of Justice is aware of only one case in the last 30 years where a teenage parent has been convicted for failing to provide the necessities of life (which includes the common law duty to protect a child from reasonably foreseeable violence): Ministry of Justice, above n 111, at [20].

¹⁴⁵ See Crimes Act 1961, s 181, which appears to treat “child” as a newly born infant.

¹⁴⁶ Children and Young Persons (Care and Protection) Act 1998 (NSW), s 25; Child Protection Act 1999 (Qld), ss 21A, 22(1)(a)(ii); Children, Youth and Families Act 2005 (Vic), ss 29, 30.

¹⁴⁷ The High Court in *Re an Unborn Child* [2003] 1 NZLR 115 considered an unborn child is a child for purposes of the Guardianship Act 1968. Whilst applying this to ss 195 and 195A could have a valuable preventative role by providing assistance to pregnant women it raises the controversial issue of what should be reasonably expected of mothers before intrusive action by the state is justifiable: Mathews, above n 23, at 229.

The inclusion of “vulnerable adults” reflects Parliament’s stance that some persons are just as deserving of protection as children.¹⁴⁸ Elder abuse and neglect prevention services work with approximately 500 – 600 abused or neglected elders each year.¹⁴⁹ The placement of “child” (a person under 18 years) against “vulnerable adult” in ss 195(1) and 195A indicates vulnerable adults are 18 years or older.¹⁵⁰ In the UK case of *R v Khan* the court applied an extremely broad interpretation to “vulnerable adult.” Whilst the victim was neither elderly nor ill, she could not speak English, had no friends or family and was unable to leave the house.¹⁵¹ It is likely the New Zealand courts will adopt a similar interpretation of vulnerability.¹⁵²

Section 151 extends beyond parents to include anyone who assumes control over the vulnerable adult.¹⁵³ More than one person may have care or charge of a vulnerable adult at a given time.¹⁵⁴ A person may cause an adult to become vulnerable through administering or supplying a prohibited substance or causes the victim to become unconscious.¹⁵⁵ This could lead to questions of applicability in cases where the victim willingly accepted drugs but was mistaken about what type of drug it was.¹⁵⁶

E The Defendant’s Knowledge in s 195A

The defendant must know there is a risk of harm. This is a more stringent requirement than the English provision where it is sufficient that the person “ought” to have been aware of a risk.¹⁵⁷ Consequently, it may be hard to judge whether the defendant

¹⁴⁸ (3 May 2011) 672 NZPD 18316 per Mr Finlayson.

¹⁴⁹ Age Concern New Zealand Inc *Towards a Positive Future: Policies and Aims of Age Concern New Zealand* (Age Concern New Zealand Inc, August 2007) at 25.

¹⁵⁰ This is consistent with s 28(1)(a) of the Care of Children Act 2004 which states guardianship of a child ends when they reach the age of 18 years.

¹⁵¹ The court also considered vulnerability may be temporary, the result of an accident and further, that the anticipation of a full recovery may not diminish that person’s temporary vulnerability: *R v Khan*, above n 118, at [27].

¹⁵² This can be predicted by the way in which courts have treated vulnerability in the sentencing context. See *R v S* HC Tauranga CRI-2010-070-4081, 23 April 2012 where Keane J considered an Indian woman in an arranged marriage was “vulnerable” in the context of s 9(1)(g) of the Sentencing Act 2002 to her abusive husband and mother-in-law in “almost every way.” She had no freedom of movement, no finances and no cellphone. It is likely an s 195A charge could be brought against other household members like the mother-in-law in this situation.

¹⁵³ *R v Proude*, above n 72, at [50].

¹⁵⁴ At [69].

¹⁵⁵ See *Burns v R* [2011] NSWCCA 56 at 114 where the supplier of methadone was held to a duty of care because the drug was known to the appellant to be dangerous, and the deceased could be considered vulnerable because of his naivety as a user of methadone and his physical condition at the time.

¹⁵⁶ See *R v Isherwood* CA182/04, 14 March 2005, where an 18 year old female injected with methadone had actually expected to be smoking P. The issue was whether she truly consented to sexual acts. The defendants were subsequently convicted of sexual violation by rape, indicating her state was such that she was indeed ‘vulnerable’.

¹⁵⁷ Domestic Violence, Crime and Victims Act 2004 (UK), s5(1)(d)(i).

actually has that knowledge.¹⁵⁸ The risk must be caused either by another person's unlawful act, or by their omission to discharge or perform a legal duty, which in the circumstances constitutes a major departure from the standard of care expected of a reasonable person.

Difficulties arise with the degree of knowledge required. Take a mother who knows that her young child is inquisitive and mobile. She leaves him in the care of her husband whom she knows is watching television in a room that opens onto a balcony. Whilst she may know of the slight risk the child could crawl outside and slip through the railings, it seems unduly harsh to apply s 195A. Although she is unlikely to be charged if the harm never eventuates, the possibility nevertheless exists. A sensible proposal is to restrict the duty to situations where the accused has a relationship with the harm itself, to prevent the courts from becoming overly officious in judging parental or caregiver skill.¹⁵⁹

F The Scope of Harm

1 Sections 151 and 152

Prior to the amendments, the parent's duty to protect related to human-induced violence.¹⁶⁰ Courts in other jurisdictions have suggested parents and caregivers are under a broader duty to protect. Thus a father who sees his toddler walk out in front of a bolting horse should take steps to remove the child from harm's way.¹⁶¹ The revised wording of the provisions indicates injury from non-human sources will incur liability. It is questionable whether it should be left to the criminal law to decide the standards of reasonable risk management. The decision to allow a young child to ski despite the risk of significant injury seems more a debate of parental preferences rather than a question of criminal liability.

2 Section 195A

(a) Death

A concern raised by Age Concern was whether "death" in s 195A includes death by suicide.¹⁶² Whilst suicide is not in itself an offence, it is unlawful to aid or abet

¹⁵⁸ For example whilst Lisa Kuka, mother of Nia Glassi, claimed she just had "suspicions" and "doubts" about the occurrence of abuse, the Court considered it could "reasonably be inferred" from the available evidence that she did know of the violence: *R v Kuka* [2009] NZCA 572 at [59]; [75].

¹⁵⁹ Julia Tolmie "The "Duty to Protect" in New Zealand Criminal Law: Making it up as we go along?" (2010) (4) NZ L Rev 725 160 at 734.

¹⁶⁰ *R v Lunt*, above n 36.

¹⁶¹ This is an example given by the Supreme Court in Victoria, Australia: *R v Russell* [1933] VLR 59 (SC) at 81.

¹⁶² Age Concern New Zealand Inc "Submission to the Social Services Committee on the Crimes Amendment Bill (No. 2) 2011" at 3.

suicide.¹⁶³ Failing to protect someone from the risk of harm, even if it is self-inflicted, seems consistent with the spirit of s 195A. Ultimately, the act of suicide results in fatality. Thus it is possible “death” includes death by suicide.

(b) Grievous bodily harm

Section 195A goes further than the UK provision by covering death *and* serious harm.¹⁶⁴ “Grievous bodily harm” requires “really serious” harm.¹⁶⁵ The Law Commission recommended the inclusion of “serious injury” alongside “death” and “sexual assault” in s 195A.¹⁶⁶ Similarly, Child Matters suggested replacing “grievous bodily harm” with “serious harm” to extend the provision’s applicability beyond extreme cases.¹⁶⁷ A child may on several occasions receive non-accidental bruising that falls short of “really serious” harm. Yet an intention to seriously interfere with the health and comfort of a person is insufficient to satisfy “grievous bodily harm.”¹⁶⁸ Thus in practice the section fails to fulfill its preventative function since it may only be invoked where it can be shown there is a risk the bruising could escalate to grievous bodily harm.

(c) Sexual assault

The scope of “sexual assault” is unclear. “Sexual assault” could refer to the unlawful sexual acts contained in ss 128 – 142A of the Crimes Act. Conversely it could encompass all assaults that have a sexual element. The learned author in *Adams on Criminal* believes the New Zealand provision refers to an unlawful sexual act, provided it encompasses the element of assault.¹⁶⁹ Consequently, a household member who knows a relative is entering the child’s room every night and suspects an act of sexual nature is occurring will likely come under s 195A.

3 *Exposure to violence*

Another issue is whether the relevant harm under ss 151, 152, 195 and 195A encompasses exposure to inter-parental violence. Research has found consequences

¹⁶³ Crimes Act 1961, s 179.

¹⁶⁴ Domestic Violence, Crime and Victims Act 2004 (UK), s 1(a). It thus bears more similarity to Criminal Law Consolidation Act 1935 (SA), s 14(4).

¹⁶⁵ *DPP v Smith* [1961] AC 290 at 334.

¹⁶⁶ Law Commission, above n 9, at [5.29].

¹⁶⁷ Child Matters “Submission to the Social Services Select Committee on the Crimes Amendment Bill (No. 2) 2011” at [3.3.iv].

¹⁶⁸ *R v Metharam* [1961] 3 All ER 200.

¹⁶⁹ Robertson, above n 116, at CA195A.04. Therefore some acts which may at first blush seem sexually abusive will not fall within the scope of s 195A. See *Trower v R* [2011] NZCA 653 where the defendant masturbated in front of a passive child. The court considered it was not an “indecent act” for the purposes of s 129A of the Crimes Act. Accordingly, it would not fall within the bounds of s 195A either.

include aggression, depression, anxiety and impediments in cognitive development.¹⁷⁰ These consequences can be similar to or more distressing than the direct experience of abuse.¹⁷¹ In New Zealand, psychiatric injury can come within the meaning of “actual bodily harm” (the threshold for ss 151 and 152) if it involves a recognised clinical condition.¹⁷² This requires proof of expert evidence.¹⁷³ The Law Commission explicitly sought to extend liability under s 195 from physical injury to “long term psychological trauma, and/or developmental issues”, two potential consequences of exposure to domestic violence.¹⁷⁴ S 195A sets an even higher standard of “grievous bodily harm.”¹⁷⁵

A number of overseas jurisdictions have incorporated exposure to violence into their child protection schemes.¹⁷⁶ This is despite concerns it can discourage women from seeking help for fear of their children being apprehended, and cause them additional stress, thus compromising their parenting abilities.¹⁷⁷ Furthermore, it may ignore the wide variability in children’s experiences and responses to exposure, and unnecessarily overload child protection systems.¹⁷⁸ Thus whilst exposure to domestic violence could possibly meet the threshold of ss 151 or 152, a cautious approach is desirable.

G Omission

The law has traditionally had a “general aversion” to the criminalisation of omissions.¹⁷⁹ It is seen as a greater encroachment on individuals’ autonomy of freedom because a doing can be completed in fewer ways than a not-doing.¹⁸⁰

¹⁷⁰ Justine Dunlop "Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect" (2004) 50 Loy L Rev 565 at 571.

¹⁷¹ Denise Lievore and Pat Mayhew *The scale and nature of family violence in New Zealand: A review and evaluation of knowledge* (Ministry of Social Development, April 2007) at 42; Kendra Nixon and others "Do good intentions beget good policy? A review of child protection policies to address intimate partner violence" (2007) 29 Children and Youth Services Review 1469 at 1471.

¹⁷² *R v Mwai* [1995] 3 NZLR 149 at 154. This requires proof of expert evidence: *R v Kneale* [1998] 2 NZLR 169 at 9.

¹⁷³ *R v Kneale* at 9.

¹⁷⁴ Law Commission, above n 9, at [5.17].

¹⁷⁵ Crimes Act 1961, s 195A(1)(a).

¹⁷⁶ These include seven provinces in Canada, and three states in Australia: Nixon and others, above n 171, at 1475. For a more in-depth discussion of why English law should take greater account of emotional harm see John Stannard "Sticks, Stones and Words: Emotional Harm and the English Criminal Law" (2010) 74 J C L 533.

¹⁷⁷ Nixon and others, above n 171, at 1473. Six of the seven Canadian provinces require actual harm, a likelihood of harm, or a significant risk of harm stemming from exposure whilst Washington expressly specifies exposure to domestic violence does not constitute maltreatment in itself: Mathews and Kenny, above n 113, at 58.

¹⁷⁸ Stephanie Holt, Helen Buckley and Sadhbh Whelan "The impact of exposure to domestic violence on children and young people: A review of the literature" (2008) 32 Child Abuse & Neglect 797 at 807.

¹⁷⁹ *R v Chilton* [2006] 2 NZLR 341 (CA) at [42].

¹⁸⁰ A. P. Simester and Warren Brookbanks *Principles of Criminal Law* (3rd ed, Brookers Ltd, Wellington, 2007) at 44. See also Douglas N. Husak "Causation and Liability" (1980) 30(121) The Philosophical Quarterly 318 at 320 who identifies this as one of recurring four reasons in the literature for opposing liability for omissions.

Accordingly, criminalisation of a not-doing should only occur where there exists some expectation or reason for that thing to be done.¹⁸¹ Furthermore, the greater restraint on a person's autonomy of freedom makes it more important that the state alerts its citizens to the positive expectations put upon them.¹⁸² Whether the state has successfully achieved this is addressed in Chapter Four.

Section 195A in particular extends liability beyond the general law on omissions. A defendant may be held liable where s/he fails to take reasonable steps to protect the victim from risk of specified types of harm, even where the breach of duty did not directly cause that harm. A possible concern is that the maximum penalty of 10 years imprisonment is too severe a sanction for an offence of omission. After all, the defendant under s 195A has not directly intervened to make things worse, but merely failed to make the victim's position better.¹⁸³ *Ceteris paribus*, omissions may not be less culpable. But as *ceteris paribus* often requires the bulk of cases to be "fantastic examples, with which the law is not likely ever to have to deal", the more practical conclusion is that omissions are less culpable.¹⁸⁴ Nevertheless the legislation in specifying a special relationship between defendant and victim goes some way in justifying the imposition of an omission-based offence.¹⁸⁵ Liability can be justified by the need to recognise competing values like a child's right to life.¹⁸⁶

A residual concern is that parents or caregivers could be discouraged from taking steps to protect the child if they know they ought to have acted sooner, and therefore, by contacting the authorities, criminalise themselves for their past omission.¹⁸⁷ In the notorious case of Lillybing for example, her caregivers failed to provide her with medical assistance for fear of repercussions they might face in relation to the injuries already inflicted.¹⁸⁸

¹⁸¹ Tony Honoré "Are Omissions Less Culpable?" in Peter Cane and Jane Stapleton (eds) *Essays for Patrick Atiyah* (Oxford University Press, New York, 1991) 31 at 42.

¹⁸² Andrew Ashworth "Ignorance of the Criminal Law, and Duties to Avoid it" (2011) 74(1) *Modern Law Review* 1 at 20.

¹⁸³ Honoré, above n 181, at 51 who further that explains a omission is less culpable because it "threatens not security so much as the expectation of improvement, which is a different but secondary value, because it presupposes stability." And see generally A. P. Simester "Why Omissions Are Special" (1995) 1 *Legal Theory* 311, who agrees that to treat doings and non-doings indiscriminately would render the law sporadic and disruptive, though for rather different reasons to Honoré.

¹⁸⁴ Simester, above n 183, at 327.

¹⁸⁵ Both Simester and Honoré agree that omissions may be treated equally to acts where distinct duties may be owed to specific people, but in absence of such duties omissions are less culpable than unlawful actions.

¹⁸⁶ Andrew Ashworth "Public Duties and Criminal Omissions: Some Unresolved Questions" (2011) *J C C L* 1 at 5.

¹⁸⁷ Children's Commissioner "Submission to the Social Services Select Committee on the Crimes Amendment Bill (No 2) 2011" at [61].

¹⁸⁸ crime.co.nz "The tragedy of 'Lillybing'" <<http://www.crime.co.nz/c-files.aspx?ID=10661>>.

H The Relevance of Personal Circumstances

1 Section 150A

In New Zealand, whether negligence constitutes a “major departure” is an objective test. Personal characteristics cannot be engrafted onto the “reasonable person.”¹⁸⁹ The former s 150A specified that the section applied if “in the circumstances of the particular case” the omission or neglect was a major departure.¹⁹⁰ This gave the courts statutory authority to relate their directions to the context of the case at issue. At the Law Commission’s recommendation however, s 150A now omits the reference to the particular circumstances.¹⁹¹ This strengthens the objective nature of the major departure test.

2 Sections 151 and 152

Sections 151(2) and 152(2) included the qualification “without lawful excuse” prior to the amendments.¹⁹² Whilst determination of negligence was (and remains) an objective assessment, explanations for a defendant’s conduct could be based on his or her personal characteristics if they related to the “lawful excuse” element of s 151.¹⁹³ However, this phrase was deleted from both ss 151 and 152, perhaps without the full consideration it deserved. This followed the Law Commission’s recommendation that the phrase referring to criminal responsibility (within which “without lawful excuse” was couched) be deleted.¹⁹⁴ Sections 153 and 155-157 still retain the reference to criminal responsibility and lawful excuse, an inconsistency to which the Law Commission has since objected.¹⁹⁵

The deliberate deletion of the references to criminal responsibility and lawful excuse from some provisions, and not others, could be construed as a signal that the courts should adopt an abstract standard rather than relating the law back to the circumstances. This could extend liability beyond what was initially envisaged by the

¹⁸⁹ *R v Hamer* [2005] 2 NZLR 81 at [37].

¹⁹⁰ Crimes Act 1961, s 150A(2)(b) prior to 19 March 2012 (emphasis added).

¹⁹¹ Law Commission, above n 9, at 69. The Law Commission did not offer any insight into why these words were deleted beyond commenting the revised s 150A aimed to codify the decision in *R v Powell* [2002] 1 NZLR 666 (CA) to impose gross negligence as the minimum standard for unlawful acts such as those in s 160.

¹⁹² According to the Court of Appeal, criminal responsibility attached once the necessary ingredients of the offence were established unless the accused could put forward a “lawful excuse”, namely an exculpatory reason lawful in its nature and not unlawful in origin: *R v Burney* [1985] NZLR 745 at 754.

¹⁹³ *R v Hamer*, above n 189, at [54].

¹⁹⁴ Law Commission, above n 9, at [5.41]. See Chapter Three, Section II(B)(4) above for discussion on this point.

¹⁹⁵ Law Commission "Submission to the Social Services Committee on the Crimes Amendment Bill (No. 2) 2011" at 3, who stated “[h]aving some duties on the statute book in one form, and the remainder of the unamended ones in another, seems very undesirable, from a statutory interpretation perspective. Our proposals, by contrast, would have standardised the drafting of them all.”

legislature. However, it is more likely the courts will continue to tailor directions to the particular case. A fatigued mother who suffers abuse at the hands of her partner is in very different circumstances to a mother not subject to abuse, and the standard of care expected of them should be adjusted accordingly. In relation to the omission of “without lawful excuse”, s 20 of the Crimes Act preserves common law justifications or excuses such as necessity, impossibility and duress of circumstances. It seems probable the courts will use this section where appropriate to invoke common law justifications or excuses despite the deletion of “without lawful excuse” from statute.

3 *Section 195A*

Section 195A applies the standard of ordinary negligence. A test of gross negligence could have enabled importation of the defendant’s personal circumstances. Whilst the UK’s equivalent of s 195A also entails ordinary negligence, the wording used enables a more personalised (and therefore preferable) test to the New Zealand provision.¹⁹⁶ Consequently the courts in the UK have considered close analysis of the defendant’s personal position is required.¹⁹⁷ In addition, the UK’s Home Office issues circulars providing guidance on the latest policies and procedures in the criminal justice system.¹⁹⁸ Unfortunately, New Zealand does not have an equivalent body that can indicate which factors, if any, should be taken into account. Adopting the UK approach would ensure the particular circumstances are relevant where they affect the defendant’s ability to respond appropriately to the perceived risk of harm.

Currently, what is “reasonable” ultimately depends on the evidence presented and the sympathies of the jury. Judicial direction is needed to firstly ensure some consideration of personal circumstances, and secondly to reduce discrepancies in expectations of the particular defendant.¹⁹⁹

III Duties Upon Other Groups of People

The Explanatory Note to the Bill states that liability should be extended beyond parents because some people will still fall within “sufficient proximity” to have a duty to the child.²⁰⁰ Section 195 and the new s 195A therefore extend to medical

¹⁹⁶ Domestic Violence, Crime and Victims Act 2004 (UK), s 5(1)(d)(ii), which states “D failed to take such steps *as he could reasonably have been expected to take* to protect V from the risk” (emphasis added).

¹⁹⁷ *R v Khan*, above n 118, at [33].

¹⁹⁸ See Home Office “Home Office circular 9 / 2005: The Domestic Violence, Crime and Victims Act 2004” (4 March 2005) <<http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2005/009-2005/>> at [22] which specifically addresses the issue of domestic violence. It recognises the need to keep the defendant’s personal circumstances in mind when applying the section, even if this is not expressly stated in the legislation.

¹⁹⁹ The public’s judgment of Maccyna King provides a relevant example of how society can offer widely divergent views on the same issue. See Tapu Misa “Sympathy for the mother of the dead Kahui twins” *New Zealand Herald* (New Zealand, 30 July 2012).

²⁰⁰ Crimes Amendment Bill (No. 2) 2011 (284-1) (explanatory note) at 2.

practitioners who are a “staff member of any hospital, institution or residence where the victim resides.”²⁰¹ The Medical Council of New Zealand already strongly recommends medical practitioners make a report under s 15 of the Children, Young Persons and Their Families Act 1989 where they believe a child is at risk.²⁰² Doctors may also disclose information about their patients or other persons to appropriate agencies to mitigate risks of child abuse.²⁰³ However, there is not yet any legal obligation for health professionals to make a notification, should they come across a suspected case of child abuse or neglect.

The publication of Coroner Evan’s findings on the Kahui case has brought the debate of mandatory reporting for health professionals back into the limelight.²⁰⁴ Doctor Kelly, pediatrician, testified in the Coroner’s Court that health professionals should be the “front line” of child protection in New Zealand.²⁰⁵ He submitted that the high level of interaction health professionals have with families and children, and their knowledge of child health and behaviour puts them in a strong position to cope with the burden of mandatory reporting.²⁰⁶ The Coroner recommended that the government consider introducing legislation to place health professionals under such a duty.²⁰⁷ This would bring New Zealand in line with the approach taken by Australia, Canada and the United States.²⁰⁸

As pointed out by the Child’s Commissioner however, effective prevention of child abuse requires societal changes beyond legislation.²⁰⁹ The literature is clear that a duty to report abuse is only one part of the solution.²¹⁰ Before additional “do more” reforms like mandatory reporting for professionals are brought in, there needs to be a dialogue between all sectors from health to police and child protection agencies on the

²⁰¹ Crimes Act 1961, s 195(2)(b); s 195A(2)(b).

²⁰² Ian St George (ed) *Cole's Medical practice in New Zealand* (10th ed, Medical Council of New Zealand, Wellington, 2010) at 195. See also: Interview with Paul Drummond, president of the Principals' Federation and Mark Peterson, deputy chair of the Medical Association (Simon Mercet, Morning Report, National Radio, 25 July 2012) where Mr Drummond asserts current practices regarding notification already occur.

²⁰³ Health Information Privacy Code 1994, Rule 11(2)(d).

²⁰⁴ For two contrasting views within the medical community see Felicity Goodyear-Smith "Should New Zealand introduce mandatory reporting by general practitioners of suspected child abuse? NO" (2012) 4(1) *Journal of Primary Health Care* 77 and Terrance Donald "Does mandatory reporting really help child protection? The view of a mandated Australian " (March 2012) 4(1) *Journal of Primary Health Care* 80.

²⁰⁵ *Inquest into the deaths of Christopher and Cru Kahui (Infants)* above n 128, at 67.

²⁰⁶ At 75.

²⁰⁷ At 76.

²⁰⁸ These three countries have all mandatory reporting laws, whilst other countries like Argentina, Sweden, Denmark, Finland, Israel, Kyrgyzstan, the Republic of Korea, Rwanda, Spain and Sri Lanka also have some form of mandatory reporting legislation: Wallace and Bunting, above n 25, at 4.

²⁰⁹ Interview with Dr Russell Wills, Children's Commissioner (Simon Mercet, Morning Report, National Radio, 25 July 2012).

²¹⁰ Michael Heron and Amy Jordan "Health Professionals and Mandatory Reporting" (2001) May N Z L J 139 at 141.

best way to reach child protection solutions.²¹¹ As Coroner Evans concluded, for professionals to accept the role of and succeed as mandated reporters “clear requirements are needed, rather than a maze of discretion.”²¹²

²¹¹ James Mansell and others "Reframing child protection: A response to a constant crisis of confidence in child protection" (2011) 33 Children and Youth Services Review 2076 at 2086.

²¹² *Inquest into the deaths of Christopher and Cru Kahui (Infants)*, above n 128 at 75.

CHAPTER FOUR: POLICY CONCERNS

I Introduction

There is no doubt that the rationale behind the amendments is sound. As emphasised by the former Commissioner for Children Dr John Angus, “care and protection begins with families and communities.”²¹³ But will the provisions actually be effective? Notifications from family sources in New Zealand have been decreasing since 2005.²¹⁴ This indicates household members are reluctant to engage in child protection measures. As this chapter will explain, failure to protect laws tend to be used against females, and often in cases where there has been a history of domestic violence. The state must therefore provide adequate support to ensure the provisions actually have a deterrent effect. This chapter examines how the state has failed in this respect.

II The Role of Domestic Violence in a Failure to Protect

A The Expectations Upon Mothers

Domestic violence plays a significant role in families where a failure to protect occurs. Women are more vulnerable to difficult circumstances, and suffer violent behaviour at the hands of their partners more often than men.²¹⁵ In fact, a mother charged with a failure to protect her child from an abusive partner may well herself be the subject of domestic violence.²¹⁶ If so, the court could possibly hold her all the more liable, because her partner’s violent tendencies should have warned her that he could turn on her child.²¹⁷ This could be treated as an aggravating factor by the sentencing judge, since the partner’s propensity towards violence should have indicated the *risk* of harm posed to the child.

This reasoning fails to acknowledge the stress domestic violence can put upon the woman’s capability as a mother.²¹⁸ In reality, the mother’s needs are often inseparable

²¹³ *Inquest into the deaths of Christopher and Cru Kahui (Infants)*, above n 128, at 72.

²¹⁴ Notifications derived from the category “family, whanau, self or friend” decreased from 20.1% of total notifications in 2005 to 12.0% in 2009: *Mardini*, above n 42, at 33.

²¹⁵ The 2001 National Survey of Crime Victims found 26.4% of women experienced one type of the specified violent behaviour at the hands of their heterosexual partner, compared to 18.2% of men. These findings were similar to those in the 1996 British Crime Survey and the 2000 American National Violence Against Women Survey: Allison Morris and James Reilly *New Zealand National Survey of Crimes Victims 2001* (Ministry of Justice, 2003) at 139.

²¹⁶ A case study undertaken in England and Wales of 26 fatal child abuse cases perpetrated by fathers found that violence against the mother was simultaneously occurring in 71% of the intimate relationships: Kate Cavanagh, R. Emerson Dobas and Russell Dobash “The murder of children by fathers in the context of child abuse” (2007) 31 *Child Abuse & Neglect* 731 at 739.

²¹⁷ Whilst no cases have been found to expressly support this statement in the New Zealand context, there is evidence of this occurring in the American context: Jeanne Fugate “Who’s Failing Whom? A Critical Look at Failure-To-Protect Laws” (2001) 76 *N Y U L Rev* 272 226, at 292.

²¹⁸ Exposure to violent conflict has been identified as a factor common to women committing filicide as evidenced by an American study of filicidal mothers that found one in three participants had severe

from her child's.²¹⁹ Framing legislation with the mother as the defendant detracts from the pressures the mother herself may be subject to. It also fails to recognise that in protecting herself, the mother is often protecting her child.

Importantly, domestic violence between partners can come hand-in-hand with child abuse. Partners who are violent towards each other are between three and nine times more likely to abuse their own children.²²⁰ Moreover, parental partner violence can play a critical role in teaching children that violence is a normative part of family relationships.²²¹ A positive difference s 195A may have here is in changing the culture that intimate violence is an effective way to control others without being punished.

B Rationalising a Mother's Failure to Protect

A defendant may fail to undertake her duty to protect for fear of physical retaliation. This was recognised during the Bill's progression through Parliament.²²² Ultimately however the legislation failed to take proper account of this issue. Instead, s 195A focuses on what the defendant did not do: a failure to take "reasonable steps" may lead to prosecution and imprisonment. Yet an attempt to undertake the duty could, in extreme cases, spur the abuser into a rage and murder the mother. In both cases, the child suffers deprivation of a mother.

Allowing domestic violence to provide a defence to failure to protect would undermine Parliament's intention that endangered children and vulnerable adults should no longer pay the "price for silence" of their parents and caregivers.²²³ On the other hand, allowing the fact of domestic violence to provide mitigation (rather than a finding of guilt) appears more appropriate to the intention and implications of provisions imposing a duty to protect.²²⁴

conflict with the father within days of the fatality: Catherine Lewis and Scott Bunce "Filicidal Mothers and the Impact of Psychosis on Maternal Filicide" (2003) 31 J Am Acad Psychiatry Law 459 at 465.

²¹⁹ This has brought forth calls for increased co-ordination between domestic violence and child protection sectors in how they protect mothers from domestic violence and their children so to enhance the quality of child protection decision-making: Christine Potito and others "Domestic Violence and Child Protection: Partnerships and Collaboration" (2009) 62(3) Australian Social Work 369.

²²⁰ The findings of two studies, an American survey of more than 2000 American families and a study from New Zealand involving a 1977 birth cohort of 1265 children, were collaborated with the result of a strong link between partner abuse and child abuse: Terrie Moffitt and Avshalom Caspi "Preventing the intergenerational continuity of antisocial behaviour: Implications of partner violence" in David Farrington and Jeremy Coid (eds) *Early Prevention of Adult Antisocial Behaviour* (Cambridge University Press, Cambridge, 2003) 109 at 115.

²²¹ At 113.

²²² (13 September 2011) 675 NZPD 21231 per Metiria Turei MP (Green Party) who was concerned about the "difficulty in providing protection for vulnerable family members who may well be aware of things that are going on but who are not in any position to report that."

²²³ (3 May 2011) 672 NZPD 18316 per Mr Finlayson.

²²⁴ Mary Hayes "Criminal trials where a child is the "victim": Extra protection for children or a missed opportunity?" (2005) 307 Child & Fam L Q 317 at 321.

III *The question of gender disparity*

The preceding paragraphs have canvassed the influence domestic violence can have on a woman struggling to avoid the requirements of failure to protect legislation. It is expected that women will most often be the ones charged with failure to protect their children from their abusive partners.²²⁵ In a family break-down women are more often granted contact orders, thus increasing their likelihood of being in a situation where they breach their duty to protect.²²⁶ Further frustrating social justice is society's onerous expectations of mothers, where "the slightest fall from grace is regarded in the harshest light."²²⁷ Julia Tolmie agrees it is arguable that less is expected from fathers in their parental role.²²⁸ Coverage of the Kahui case provides some evidence of the media's preference to focus on the mother. The portrayal of the twins' mother Macsyna King as a "monster" could almost make one forget it was the father, Chris Kahui, who was on trial for the murder of their twin sons.²²⁹

A *The "Glorification of Motherhood"*²³⁰

John Herring suggests a woman in the criminal justice system is often subject to the "glorification of motherhood", where she is expected to be an "all-knowing, all-sacrificing protector."²³¹ Where she fails to comply with this, the criminal justice system's reaction is to treat her more harshly.²³² A feminist explanation for this differential treatment is that traditional gender-role expectations link crime with masculinity, and therefore females who do offend are doubly deviant and deserving of harsher punishment.²³³ The added element of domestic violence only augments difficulties women face in meeting society's expectations of a "glorified mother."

²²⁵ Tolmie, above n 159, at 742. See also Michelle Roberts "Requiring battered women die: murder liability for mothers under failure to protect statutes" (1998) 88(2) J Crim L & Criminology 579.

²²⁶ In 2005, 60% of day-to-day care orders were made to mothers compared to 11% to fathers, and in 2006 58% of day-to-day care orders were made to mothers compared to 12% to fathers: Ministry of Justice *Family Court Statistics in New Zealand in 2006 and 2007* (Statistical Report, April 2009) at 31; a similar trend has been identified in America: Fugate, above n 217, at 286.

²²⁷ Herring, above n 19, at 148.

²²⁸ Tolmie, above n 159, at 742.

²²⁹ Stuff Staff Reporter "Kahui twins' mother painted as 'monster'" *Stuff* (New Zealand, 25 July 2012). For a scathing article on King following the Coroner's finding that the twins died whilst under Kahui's sole care see also Michael Laws "Why Macsyna King Doesn't Deserve a Sorry" *Stuff* (New Zealand, 29 July 2012). Other significant factors explaining the focus on King include her strong personality and confessions of bad parenting, the effective transferral of suspicion onto her by Kahui's legal team and her willingness to speak to the media about the case. See Ian Wishart *Breaking Silence* (Howling at the Moon, New Zealand, 2011); Interview with Macsyna King (John Campbell, Campbell Live, 3 News, 25 July 2012). By contrast Kahui was quiet, photogenic and generally "lacked the heft the occasion [in court] seemed to require": Tim Hume "In the shadow of Macsyna King" *Stuff* (New Zealand, 20 April 2008).

²³⁰ Herring, above n 19, at 148.

²³¹ At 148; 153.

²³² Julia Tolmie "Women and the criminal justice system" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (Lexis Nexis, Wellington, 2007) at 305.

²³³ Rob White, Fiona Haines and Nicole Asquith *Crime & Criminology* (5th ed, Oxford University Press, South Melbourne, 2012) at 154; See also Dorothy Roberts "Motherhood and crime" (1993-1994)

B Cases Involving “Glorified” Mothers

R v Witika & Smith was “a case of wicked child abuse.”²³⁴ Witika undoubtedly failed her duty as a mother. Nevertheless, a factor given little (if any) weight by the court was the violence directed at Witika herself. A doctor testified Witika’s partner subjected her to beatings that on a scale of 1 – 10 factored close to 10.²³⁵ Witika also gave evidence she had been dominated by her partner physically, mentally and sexually in the last month of her daughter’s life.²³⁶ Whilst the Court of Appeal considered “the position of battered women calls for sympathy”, both Witika and her partner were given identical sentences of 16 years imprisonment.

In 2009, Lisa Kuka was sentenced to nine years imprisonment for failing to protect her three-year-old daughter Nia Glassie from the violence of her flatmates and partner.²³⁷ Nia had wrestling moves practiced on her, was put in an operating spin dryer for up to 30 minutes and spun around on a clothesline.²³⁸ Kuka admitted she had “turned a blind eye” to some of the abuse, and that her loyalties lay with her partner.²³⁹ The Court of Appeal considered Kuka was an otherwise “conscientious mother.”²⁴⁰ She had never participated in the attacks and believed her partner would “never hurt my girls.”²⁴¹ She was the only working adult in the household and reliant on other family members to mind Nia in her absence.²⁴² Unlike Witika however, Kuka had never herself been subject to any abuse. Ultimately, Kuka received six months’ mitigation.²⁴³ This indicates the courts will now give some leniency to women in difficult circumstances.

The first reported conviction under the UK’s s 5 concerned Sandra Mujuru, an asylum seeker from Zimbabwe.²⁴⁴ For “allowing” her partner Stephens to kill their four-year-old baby, Mujuru was sentenced to a two year community order. Prior to sentencing whilst awaiting trial she had already served over a year in jail.²⁴⁵ The court noted

79 Iowa L Rev 95 who argues the criminal law enforces mothers to forgo all self-interest in order to protect their children.

²³⁴ *R v Witika & Smith* [1993] 2 NZLR 424 at 427. Two-year-old Delcelia was subjected to a series of brutal beatings, received hot water burns to 10 – 15% of her body surface, and was left home alone on the day of her death even though Witika knew her daughter was going to die.

²³⁵ At 428.

²³⁶ *R v Witika & Smith*, above n 234, at 433.

²³⁷ *R v Kuka*, above n 158.

²³⁸ At [5]; [6].

²³⁹ At [62].

²⁴⁰ At [97].

²⁴¹ At [62].

²⁴² At [89].

²⁴³ At [98]. Tolmie considers the sentence showed “little compassion” to this single working and working-class mother: Tolmie, above n 159, at 744. It must be remembered however that Kuka did fail to take Nia to the hospital until 36 hours after the fatal injuries were inflicted. Dr Kelly, pediatrician, testified it was “most likely” Nia would have survived had she received medical attention within the first few hours: *R v Kuka* at [41].

²⁴⁴ *R v Stephens and Mujuru* [2007] EWCA Crim 1259.

²⁴⁵ Herring, above n 19, at 150.

Stephens was a “self-centered and dangerous man with a dangerously short fuse.”²⁴⁶ Just hours before the fatal attack, Stephens had assaulted his previous girlfriend with a frying pan and a vase.²⁴⁷ How Mujuru could have alerted the authorities without becoming subject to such violence herself was a question left unaddressed by the court.

Another comparable case in the UK involved Rebecca Lewis, a mother charged with failing to protect her baby son from her violent partner Lloyd.²⁴⁸ Like Kuka, she was absent during the attacks and not present during the fatal attack itself. Also like Kuka, Lewis knew her partner was inflicting at least some degree of ill-treatment inflicted upon the baby.²⁴⁹ This “selfish young mother” received six years imprisonment.²⁵⁰ The court dismissed Lewis’ explanation that her inaction was due to the fear she felt from her partner’s threats to kill her if she left him.²⁵¹ Yet probation officers and health professionals previously in contact with Lloyd possessed information clearly demonstrating he was a threat to the public. The state had also failed in its duty of protection towards the child. The local social services had not properly followed up a notification made about the child.²⁵² This lack of interagency sharing between authorities left Lewis with little support. Yet the Court of Appeal did not take these shortcomings into account when holding her responsible.

It is true that the mother is in a better position than her child to prevent the occurrence and escalation of abuse.²⁵³ Indeed, Witika played an active role in the infliction of abuse onto her child. Kuka did not attempt stop those assaults on Nia that she did witness. But these cases indicate the courts’ reluctance to do more than acknowledge a mother’s difficult circumstances. Wider systems of state-led support are thus crucial to ensure that even marginalised mothers have the ability to meet their duty of care.

C *A Mother’s Mindset*

There is evidence to suggest the same perpetrator often abuses both the mother and the child.²⁵⁴ This leaves the mother struggling to deal with abuse directed at her children as well as herself. Domestic violence encompasses patterns of controlling

²⁴⁶ *R v Stephens and Mujuru*, above n 244, at [35].

²⁴⁷ *R v Stephens and Mujuru*, above n 244, at [5].

²⁴⁸ “Mother allowed baby son’s murder” *BBC News* (Wales, 2 November 2006).

²⁴⁹ “Mother allowed baby son’s murder” *BBC News*.

²⁵⁰ Robin Turner “Aaron’s mum and her boyfriend jailed” *Western Mail* (Wales, 16 December 2006).

²⁵¹ Lewis also stated that she did not think her partner would “seriously” hurt her son.

²⁵² “Care agencies criticised over toddler’s death” *The Guardian* (United Kingdom, 10 May 2007).

²⁵³ See Mary Becker “Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others” (1995) 2 U Chi L Sch Roundtable 13 at 21.

²⁵⁴ An American-based review of the overlap of child maltreatment and domestic violence in families found the majority of studies indicate where one is occurring the other will also be present in 30-60% of cases: Jeffrey Edleson “The Overlap Between Child Maltreatment and Woman Battering” (1999) 5 *Violence Against Women* 134 at 136. However, these findings are of limited value due to the large range of probability and the lack of similar research undertaken in the New Zealand context.

behaviour, which can further impinge efforts to meet the duty to protect.²⁵⁵ The psychological effect on the victim can significantly influence their behaviour, so that what they believe is reasonable is inexcusable from an outsider's perspective. For example, a battered woman often has a diminished motivation to respond to violence. She becomes passive and cannot perceive any likelihood of success should she attempt to stop the cycle of violence.²⁵⁶ Emotional attachment to the abuser can further blur the vision of a victim subject to power imbalances or intermittent good-bad treatment where she believes the violence has stopped or will not occur again.²⁵⁷ This certainly resonates with Lisa Kuka and Rebecca Lewis who both believed their partners would "never" hurt the child.²⁵⁸

Yet judges and juries are inclined to evaluate circumstances from the perspective of a reasonable person not affected by living with abusive partners.²⁵⁹ This does not give due weight to avoidance tactics such as minimising the time the abuser spends alone with the child that may be the only appropriate conduct when violence is involved.²⁶⁰ Herring asserts that it is naïve to expect a mother to simply leave her abuser, as a lack of financial means, inadequate housing and the deprivation of a father to the child often factor against such action.²⁶¹ Financial concerns could deter other steps such as reporting the abuse, as this could result in imprisonment of the perpetrator and consequently loss of income for the mother. Furthermore, the act of leaving will trigger the worst of the violence for a small but significant minority where these barriers are finally overcome.²⁶²

²⁵⁵ Lievore and Mayhew, above n 171, at 31.

²⁵⁶ Herring, above n 19, at 142.

²⁵⁷ Donald Dutton and Susan Painter "Emotional Attachments in Abusive Relationships: A Test of Traumatic Bonding Theory" (1993) 8(2) *Violence and Victims* 105 at 106.

²⁵⁸ *R v Kuka*, above n 158, at [62]; above n 251.

²⁵⁹ Tolmie, above n 159, at 745. See *R v Harris* HC Wellington CRI-2004-078-1816, 26 August 2005 where H failed to intervene in her partner's ultimately fatal abuse of her child. The court considered it "difficult to imagine a more blatant case of turning a blind eye", notwithstanding the fact H's relationship had created "clearly defined but very narrow parameters" in which she could live her life. See also the case of Jill Tito, where her two male flatmates subjected her son to acts of cruelty that included beatings with a roll of wallpaper and being fed dog excrement. She was also subjected to beatings, had faeces smeared in her bed, and had fallen "under the spell" of one of the men. Whilst she had attempted to reduce contact between the men and her son, the court considered her responsibility as a mother overrode any abuse or imbalances of power she may have suffered: Juliet Rowan "Failure to stop son's abuse brings jail term" *New Zealand Herald* (New Zealand, 16 March 2006) and Juliet Rowan "Face a judge wants us all to see" *New Zealand Herald* (New Zealand, 18 March 2006).

²⁶⁰ Indeed, the significance of this action should not be underestimated as attempts to 'silence' a crying young child left in the temporary sole care of the father was identified as a motivating factor in 38% of fatal child homicide cases in Kate Cavanagh, R. Emerson Dobash and R. Dobash "Men Who Murder Children Inside and Outside the Family" (2005) 35 *British Journal of Social Work* 667 at 681.

²⁶¹ Herring, above n 19, at 144.

²⁶² Lievore and Mayhew, above n 171, at 36. Research in the United Kingdom shows one third of women who saw the perpetrator of domestic violence after splitting up experienced threats or abuse to themselves or their children: Sylvia Walby and Jonathan Allen *Domestic violence, sexual assault and stalking: Findings from the British Crime Survey* (Research Development and Statistics Directorate, March 2004) at 71.

D *Taking Note of the Position of Abused Women*

Detrimental treatment of females by the criminal system in general is not being argued. In fact, women are less likely to be charged generally, and those imprisoned are more likely to be given lighter sentences in recognition of their family responsibilities.²⁶³ Rather, the concern lies with the treatment of “glorified” mothers who offend within that specific role.²⁶⁴ Witika, Kuka, Mujuru and Lewis were all living in difficult circumstances that involved some degree of abuse towards them personally. In each case little consideration was given to this fact. Instead, it appears a defendant must be more like an unimpeachable, helpless and altogether unrealistic victim to gain any sympathy from the courts.

Failure to protect legislation should not be enacted if it only aggravates the severity of circumstances for a mother and her child. A mother may be required to take steps to protect her child when she is unable to even take steps to protect herself. In this situation failure to protect legislation replicates the authoritarian behaviour of the abuser by blaming the mother for her inaction.²⁶⁵ She becomes a victim not only of her abuser, but also of the state. New Zealand needs to ensure there is very careful judge and jury instruction to ensure the provisions do not disproportionately punish already disadvantaged women.

IV *The Invisible Abuser*

Failure to protect laws have been criticised for unfairly relying on adults other than the actual perpetrator to remove the risk of abuse from children’s lives.²⁶⁶ The extensive media coverage of mothers charged under s 5 of the UK legislation demonstrates how quick the public is to condemn a person’s failure as a parent where the child suffers serious harm.²⁶⁷ The benefit is that it sends a clear message to household members they have a duty to protect children in their household from serious abuse or neglect. In doing so however, it may deflect attention away from the actual perpetrator of abuse.

²⁶³ Tolmie, above n 232, at 312.

²⁶⁴ Whilst it may be true women are often treated more leniently, those women who commit crimes as *mothers* are treated unduly harshly: Roberts, above n 233, at 107.

²⁶⁵ Dunlop, above n 170, at 574.

²⁶⁶ Jeffrey Edleson "Responsible mothers and invisible men; child protection in the case of adult domestic violence" (1998) 13(2) *Journal of Interpersonal Violence* 294 at 294.

²⁶⁷ Headlines include "Woman let boyfriend kill her baby" *BBC News* (England, 11 April 2006); "Mother allowed baby son’s murder" *BBC News* (Wales, 2 November 2006); Aidan McGurran "Mum jailed for letting lover kill her toddler" *Mirror Online* (United Kingdom, 16 January 2007). In the case of Rebecca Lewis, the media uncritically sympathised with her relatives’ vows to “never speak to my killer daughter again” for whom “the death penalty would be too good”: Mark Drakeford and Ian Butler "Familial Homicide and Social Work" (2010) 40(5) *British Journal of Social Work* 1419 at 1429, 1430. The focus of public opprobrium on the mother is also noted in Herring, above n 19, at 147.

This attitude is fostered by child protection agencies which often view females as ultimately responsible for children over and above men.²⁶⁸ Even where the abuser has been identified, intervention is channeled towards the mother.²⁶⁹ The mother is placed in a position of “triple jeopardy” as she attempts to protect her child, meet the expectations of social workers and deal with abuse from her partner.²⁷⁰ A more balanced strategy would be to assist the mother whilst also addressing the root cause of the problem.

A final concern is that the legislation will impede prosecution of the actual perpetrator by discouraging potential witnesses from coming forward for fear of criminal retribution. For example, in *R v Stephens and Mujuru* the prosecution’s case against the mother relied in part on evidence that she had initially given to the police as a witness against her partner (the perpetrator).²⁷¹ This gives little incentive to family members to cooperate with authorities if it not only breaches loyalty to the perpetrator but also places them personally in jeopardy of prosecution.

Failure to protect laws bring the passive parent to the fore, sometimes more so than the abuser. However, New Zealand’s culture of child abuse must be expunged. One way to achieve this is by punishing those responsible, from the perpetrator to the passive parent. Whilst the spotlight is no longer solely on the perpetrator, this should not cause the criminal justice system to pass them over completely.²⁷²

V *The Role of the State*

A *The State’s Shortcomings in Passing the Legislation*

Violence is an intergenerational issue as violent parents are likely to instill violent norms in their children.²⁷³ When it becomes institutionalised in day-to-day living, it can become difficult for those at the ‘coalface’ to recognise it as abuse.²⁷⁴

²⁶⁸ Linda Davies and Julia Krane "Collaborate with caution: protecting children, helping mothers" (2006) 26(2) Critical Social Policy 412 at 414; Jonathan Scourfield "The challenge of engaging fathers in the child protection process" (2006) 26 Critical Social Policy 440 at 444.

²⁶⁹ An Australian study examining the perceptions of child protection workers found women were subject to greater scrutiny than their male batterers because the mothers “[are] not being protective enough”: Heather Douglas and Tamara Walsh "Mothers, Domestic Violence, and Child Protection" (2010) 16(5) Violence Against Women 489 at 493.

²⁷⁰ Nicky Stanley "Domestic violence and child abuse: developing social work practice" (1996) 2 Child and Family Social Work 135 at 140.

²⁷¹ *R v Stephens and Mujuru*, above n 244.

²⁷² Contrast *Attorney General’s Reference (No. 35 of 2005)* [2006] EWCA Crim 378 where a father who admitted ill-treatment of a child received a conditional discharge. The mother received six months imprisonment (albeit suspended for 18 months) for her failure to protect. On appeal, the court did state the father should have received a sentence of imprisonment, however this was not possible due to procedural problems.

²⁷³ 20 to 30 percent of abused children will become grow up to become abusive themselves: Ministry of Social Development, above n 6, at 9.

²⁷⁴ A related issue is where people do not recognise their actions are abusive because they are driven by religious beliefs. Whilst s 15 of the New Zealand Bill of Rights Act 1990 affirms religious freedoms

Unfortunately in New Zealand, violence-related offences happen all too frequently. 32,675 offences were recorded by police as family-violence related in 2006, an average of almost 90 a day.²⁷⁵ Whilst this clearly illustrates the need for proactive measures to reduce the incidence of violence, it also signals the need for caution in criminalising behaviour that goes to the core of many New Zealanders' daily lives.

A longstanding doctrine of the common law is that ignorance of the law is no excuse. Ashworth suggests that it is sometimes morally unfair to convict people of crimes the existence of which they were not aware.²⁷⁶ Of the UK provision, Ashworth debates whether it is enough that protection of the victim is a duty of common humanity. He suggests that the state should be charged with providing the public with clear notification and information of the laws to which they are held.²⁷⁷

New Zealand's recent amendments were unaccompanied by campaigns notifying the public of their new obligations.²⁷⁸ This is surprising for several reasons. Firstly, s 195A as an offence of omission is a greater infringement on liberty. It is therefore more important to ensure people are put on notice of the positive expectations the criminal law has of them.²⁷⁹ Secondly, the legislation entails government intervention in the family household; an area traditionally considered one the state should not venture into.²⁸⁰ Furthermore, the culture of child abuse in New Zealand clearly calls for public education.²⁸¹ Finally, the absence of campaigns to alert citizens to their new legal obligations seems odd in light of the extensive advertisements leading up to the recent changes to the give-way rules in transport law.²⁸²

should be respected and protected, the courts have tended to decide in favour of the best interests of the child. See *R v Moorhead* HC Auckland T011974, 13 June 2002 at [3] where the court considered the defendants' refusal to seek medical attention for their child were "dogmatic self-beliefs" rather than justifiable religious beliefs. And in the context of corporal discipline the Family Court in *Ausage v Ausage* [1998] NZFLR 72 held that the degree of force reasonable to apply does not differ according to religious belief. This rightly illustrates New Zealand does not allow personal beliefs to override a child's safety.

²⁷⁵ Families Commission *Family Violence: Statistics Report* (Research Report No 4/09, Wellington, August 2009) at 48.

²⁷⁶ Ashworth, above n 182, at 4.

²⁷⁷ At 18.

²⁷⁸ "Publicity relating to Crimes Amendment Act (No 2)" OIA 41208 (30 August 2012) (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

²⁷⁹ Ashworth, above n 182, at 13.

²⁸⁰ Yelas, above n 24, at 781; and as acknowledged by the government itself: Ministry of Social Development, above n 6, at 10.

²⁸¹ For example, a survey undertaken by the Social Workers Association found 68% of respondents thought the cultural practices they encountered fit the definition of child abuse: Aotearoa New Zealand Association of Social Workers "Submission to the Social Services Committee on the Crimes Amendment Act (No. 2) 2011" at 4.

²⁸² The government launched a \$1.2 million campaign which included television, radio, and newspaper advertisements, and a leaflet drop to 1.73 million homes: NZ Transport Agency "NZTA gearing up for publicity campaign on give way rule changes" (press release, 9 February 2012).

Ashworth comments it is “perfectly possible” that citizens in the UK are unaware of the s 5 offence.²⁸³ The lack of publicity surrounding the implementation of s 195A indicates this possibility also exists in New Zealand. Section 195A takes a preventative approach, and thus (theoretically) benefits the criminal justice system by reducing actual crime rates. However, this benefit is dependent on the assumption that society knows that certain behaviour risks criminal sanction. Secondly, as discussed in Chapter Three, s 195A is couched in complex terms and thus does not attract ready interpretation. In lieu of public education, there is a higher probability defendants may suspect their behaviour is wrong, but not necessarily know they are involved in a serious criminal offence.²⁸⁴ Adequate publicity and education would have signaled to the public that conduct captured by s 195A is to be deterred and denounced. Unfortunately, the state has failed its responsibility in this respect.

B The State’s Responsibility Towards the Victim

Having established that the state has a responsibility towards potential defendants to put them on notice, it is appropriate to discuss the state’s obligation to the victim. The provisions emphasise the parent’s responsibility towards their child. The concern is that the state feels it has done enough by leaving onerous obligations of protection to the parent.²⁸⁵

During the Bill’s passage, a concern raised was that the absence of additional non-legislative measures merely reduced the Bill to “window dressing.”²⁸⁶ The capacity of CYF in dealing with notifications has been identified as recurring issue over time.²⁸⁷ Notifications have only been increasing over time.²⁸⁸ The provisions intend to further encourage people to report serious abuse or neglect. Allegations of “window dressing” can only be overcome if state agencies like CYF can prove they have the capacity to cope with the consequences of the legislation in practice.

²⁸³ Ashworth, above n 182, at 18.

²⁸⁴ Submissions to the Select Committee during the passing of the Bill showed consensus amongst frontline workers that its success depends on education for families and communities and those agencies most impacted by the changes in law. See Child Matters "Submission to the Social Services Select Committee on the Crimes Amendment Bill (No. 2) 2011" at 2; Aotearoa New Zealand Association of Social Workers "Submission to the Social Services Committee on the Crimes Amendment Act (No. 2) 2011" at 6; National Council of Women "Submission to the Social Services Select Committee on the Crimes Amendment Bill (No. 2) 2011" at 1; Shine "Submission to the Social Services Select Committee on the Crimes Amendment Bill (No. 2) 2011" at 4; Plunket "Submission to the Social Services Select Committee on the Crimes Amendment Bill (No. 2) 2011" at 2.

²⁸⁵ Herring, above n 19, at 144.

²⁸⁶ (13 September 2011) 675 NZPD 21231 per Dr Prasad.

²⁸⁷ See for example Brown, above n 26, at 65; Ministerial Review Team *Review of the Children, Young Persons and their Families Act 1989: Report of the Ministerial Review Team to the Minister of Social Welfare / The Mason Report* (1992); Lawson, above n 27, at 86.

²⁸⁸ Care and Protection reports of concern totaled 62,739 in 2005/2006 compared to the total of 124,921 in 2009/2010. However only 44% of reports required further action in 2008/2009 and 2009/2010, compared to 61% of reports in 2006/2007. This shows an overall increasing tendency to file reports of concern: Ministry of Social Development, above n 49, at 264.

If a mother who notifies a child protection agency receive insufficient assistance before the child is killed should the jury be allowed to decide the mother should have taken further steps when the state failed to provide adequate protection the first time she sought it? If the answer is ‘yes’ this echoes the isolating notion of the “good mother”, where society holds her responsible for the harms to the victim without enquiring how state inaction contributed to the continuation of the violence.²⁸⁹ In July last year the government issued a Green Paper to stimulate discussion on how to better protect New Zealand’s vulnerable children.²⁹⁰ About half the submissions suggested that government intervene in families and whanau as early as possible.²⁹¹ This affirms that the government should take an active role in preventing child abuse.

VI *The Recurring Debate of Mandatory Reporting*

A controversial, and continuing, issue in New Zealand is whether to introduce mandatory reporting to achieve greater protection for children and vulnerable adults. As noted in Chapter Three above, Australia, Canada and the United States all have mandatory reporting laws. Whilst these differ in scope, recurring themes of concern are evident in each jurisdiction.²⁹² Some of these concerns formed the basis of New Zealand’s decision to not introduce mandatory reporting in the 1990s.²⁹³ Another is that mandatory laws drive agencies into an investigative role, detracting from their function as a support service for families in need of assistance.²⁹⁴

Substantiation rates alone are not always an accurate measure of effectiveness.²⁹⁵ It is important to distinguish the value of mandatory reporting legislation from systemic response to maltreatment by child protection agencies.²⁹⁶ Nevertheless, it is

²⁸⁹ Kristian Micco "A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings" (1999) 22 Harv Women's L J 89 260, at 93. See also the state’s failure to investigate a notification in the UK case of Lewis, above n 252.

²⁹⁰ Ministry of Social Development, above n 6, at vi.

²⁹¹ Ministry of Social Development *Green Paper for Vulnerable Children - Complete summary of submissions* (August 2012) at 50.

²⁹² Some similarities exist between Australia, Canada and the United States. Each identifies which persons are mandated to report, the state of knowledge required, the types of abuse that are relevant and the degree required to mandate a report. Differences are discernable however. For example some states (the majority of Australia and the United States) require only selected professions to report, such as medical and education professionals, whereas other states (the Northern Territory in Australia, all but one province in Canada and 18 states of the United States) mandate all citizens to report: Mathews and Kenny, above n 113, at 53.

²⁹³ See Chapter Two, Section I(C) above.

²⁹⁴ Gary Melton "Mandated reporting: a policy without reason" (2005) 29 Child Abuse & Neglect 9 at 14.

²⁹⁵ States define abuse differently, thus altering the scope of the reporting laws. Victoria and Australia Capital Territory for example do not require reports of psychological abuse or neglect, whereas New South Wales, Northern Territory, Queensland, South Australia and Tasmania all do: Mathews and Kenny, above n 113, at 54. Also, an unsubstantiated report may still require and indeed receive services which can help avoid future abuse: Mathews, above n 23, at 225.

²⁹⁶ Increases in referrals from mandatory reporting laws and the subsequent overburdening of already insufficiently resourced agencies reflect policy issues of how reporters are trained and how well the system is equipped to process reports rather than issues with mandated reporting itself: Ben Mathews

unproductive to distinguish the theoretical value of mandatory reporting if in practice such a system cannot be realistically implemented.²⁹⁷ For instance, although the United States was the first country to introduce mandatory reporting laws its child abuse rates are still high by international standards.²⁹⁸ This suggests mandatory reporting systems alone are not particularly effective. Instead, family-oriented services seem preferable as a measure to supplement New Zealand's recent child protection provisions.²⁹⁹

Professionals within the health sector in particular are well positioned to prevent maltreatment of children, as they typically have contact with the child right from birth.³⁰⁰ Imposing mandatory reporting upon this group could go some way in bringing attention to at-risk children. However, a concern is that mandatory reporting will result in under-reporting as families are discouraged from seeking help from authorities for fear of being reported.³⁰¹ This could have detrimental implications if the perceived threat presented by mandatory reporting laws means the difference between obtaining health care for an injured child or not.

Adolescents also appear more reluctant to disclose abuse if their confidants (such as a school counsellor) are mandated to report this information to a statutory authority.³⁰² Household members must now take affirmative action in light of risk of certain harms

and Donald Bross "Mandated reporting is still a policy with reason: Empirical evidence and philosophical grounds" (2008) 32(5) *Child Abuse & Neglect* 511 at 513.

²⁹⁷ That New Zealanders agree with this is reflected in the submissions made to the Green Paper. A minority of submissions supported mandatory reporting (mainly from community meetings) whilst a small minority did not (mainly non-government organisations). Those who were in support considered it should only be introduced when there are adequate resources to follow up on all reports: Ministry of Social Development, above n 291, at 144.

²⁹⁸ Data collated from the World Health Organisation Mortality Database shows that on average in America 2.2 children aged under 15 per 100,000 die from maltreatment; the second highest rate of 27 OECD countries. New Zealand comes in third at 1.2 children per 100,000: UNICEF *A league table of child maltreatment deaths in rich nations* (UNICEF Innocenti Research Centre, Innocenti Report Card, September 2003) at 4. America's poor performance in this context appears to lie in its failure to supplement its expanding of mandatory reporting laws with adequate increases in resource allocation: Jeanne Giovannoni "Reports of Child Maltreatment from Mandated and Non-mandated Reporters" (1995) 17(4) *Children and Youth Services Review* 487 at 499.

²⁹⁹ This conclusion is supported by Wallace and Bunting, above n 25, at 19. They interposed 2003 Innocenti data (referred to in n 299 above) onto nine countries that operated under either child protection focused systems or family service oriented systems. The resulting data showed child protection focused systems ranked in the upper limits of child maltreatment deaths whilst family service oriented systems occupied the middle to lower end of the scale. Indeed, New Zealand's "scarce resources" was a significant factor in the decision to reject mandatory reporting in 1992: Ministerial Review Team, above n 287, at 4.

³⁰⁰ Martin and Pritchard, above n 5, at 59.

³⁰¹ For example, a study of professionals in New Zealand revealed that mental health professionals are more opposed to mandatory reporting than other professionals because it may deter self-disclosure and thus cause more harm to the child: Christina Rodriguez "Professionals' Attitudes and Accuracy on Child Abuse Reporting Decisions in New Zealand" (2002) 17(3) *J Interpers Violence* 320 at 337.

³⁰² A New Zealand study showed 76.7% of students interviewed would not disclose abuse to a teacher under current voluntary mandatory law and 80.5% would not disclose to a teacher if the teacher was mandated to report suspected abuse to CYF. Non-disclosure increased to 84.6% if teachers were mandated to report to police: Lawson, above n 27, at 235.

under s 195A. If mandatory reporting was introduced in addition to this, perpetrators could be overwhelmed by the double-barreled liability they could potentially face, and react by taking no action at all in the hope of escaping detection. Preserving New Zealand's voluntary reporting system thus seems all the more desirable.

VII Conclusion

Key policy concerns have arisen with the latest amendments to the Crimes Act. These include the state's failure to properly put its citizens on notice of their new legal obligations and inadequate consideration of how failure to protect laws may detrimentally affect abused mothers. Chapter Five will now consider how to effectively address these concerns.

CHAPTER FIVE: THE LAW IN PRACTICE

I A Multi-Faceted Issue

Controversy is inevitable where the legislation pits conflicting basic personal interests against one another.³⁰³ A parent is justified in raising a child according to his or her own beliefs. However, this right is fettered by the child's entitlement to protection from certain types of harm. Every jurisdiction faces the "wicked question" of how to best deal with child abuse, and the literature has indicated the very nature of such a wide-reaching social issue denies the possibility of a single solution.³⁰⁴ In Northern Ireland for example, research undertaken to determine the viability of mandatory reporting as an effective tool against child abuse concluded that neither legislative nor policy change would in itself provide a straight-forward solution.³⁰⁵ Similarly, the "imperfectability of prevention and intervention" has been recognised in the Australian context.³⁰⁶ It is therefore unsurprising that the amendments to Part 8 still leave a lot to be desired of New Zealand's child protection system.

II Is the Law Workable?

A parent is often a child's most powerful advocate.³⁰⁷ Accordingly, they can be expected to play a key role in promoting and protecting children's rights. This justifies the legislature's move to place a burden of active responsibility on parents and carers. Putting aside for a moment the need for a multi-faceted approach, the question arises of the legislation's value as it currently stands.

The legislation is not expected to significantly increase the number of prosecutions laid.³⁰⁸ In fact, there have been no charges laid under the new ss 195 and 195A since they were brought into force in March this year.³⁰⁹ Nevertheless the authorities, and particularly the police, have welcomed the amendments.³¹⁰

³⁰³ Mathews, above n 23, at 227.

³⁰⁴ See John Devaney and Trevor Spratt "Child abuse as a complex and wicked problem: Reflecting on policy developments in the United Kingdom in working with children and families with multiple problems" (2008) 31(6) Children and Youth Services Review 635.

³⁰⁵ Wallace and Bunting, above n 25, at 29.

³⁰⁶ Mathews, above n 23, at 236.

³⁰⁷ O'Reilly, above n 30, at 215.

³⁰⁸ In the first Regulatory Impact Statement released by the Ministry of Justice examining the proposed amendments, the estimated effect of the revised s 195 and the new s 195A on the prison population was an increase of 10-20 beds: Ministry of Justice *Regulatory Impact Statement: Review of Part 8 of the Crimes Act 1961* (accessed 20 September 2012) at 3. Similarly low additional prosecution rates were expected of the UK's s 5 offence: Home Office "Home Office circular 9 / 2005: The Domestic Violence, Crime and Victims Act 2004" (4 March 2005) <<http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2005/009-2005/>> at [11].

³⁰⁹ Interview with Senior Sergeant Amelia Steel, Southern police district prosecutions manager (Anna Watson, Dunedin, 3 October 2012).

³¹⁰ Shortly after the amendments came into force, head of the Child Protection Implementation Team Detective Inspector Jim Gallagher stated he was "gratified and delighted" by the changes: Interview

Section 195A's value lies in its ability to be invoked where the police are unable to identify the perpetrator of abuse.³¹¹ This is due to the section's focus on the carer's failure to provide sufficient protection from the risk of harm rather than the actual perpetrator.³¹² However, in surmounting one hurdle to a successful prosecution the legislation introduces a raft of others, as explored in Chapters Three and Four.

III Suggested Areas of Focus for Legislative Reform

The Law Commission's review of Part 8 of the Crimes Act was intended to pave the way for a complete overhaul of the Part.³¹³ However, the legislature failed to redraft Part 8 as an integrated whole, continuing instead with a piecemeal approach.³¹⁴ This was despite the government itself acknowledging piecemeal amendment in the past has been a causal factor in the problems associated with the scope and applicability of Part 8.³¹⁵ The legislation requires clarity, both to avoid practical difficulties in application and to ensure the public understands what is expected of them. The following section provides suggestions to achieve this.

A Definition of Key Terms

Some key terms brought in under the Crimes Amendment Bill require further definition. For instance, the "necessaries" referred to in ss 151 and 152 is not separately defined. The Law Commission failed to explain what this encompasses beyond stating it is a "broader concept" than the former "necessaries of life."³¹⁶ Whilst the former "necessaries of life" was a well-established concept, just how far the courts should extend the scope of the "necessaries" is unclear. Analogous provisions overseas are unhelpful as they commonly use the term "necessaries of life."³¹⁷ In absence of further guidance from the legislature, the established concept of "necessaries of life" should be preferred to ensure ss 151(a) and 152(a) are not given undue breadth.

with Detective Inspector Jim Gallagher and Amanda Maynell, Academic Services Manager at Child Matters (The Court Report, Channel 7, 6 April 2012). Child protection agencies such as Jigsaw and Child Matters have also welcomed the changes: Harper, above n 17.

³¹¹ Interview with Senior Sergeant Amelia Steel, above n 309.

³¹² A similar focus is taken by s 5 Domestic Violence, Crime and Victims Act 2004 (UK) and s 14 Criminal Law Consolidation Act 1935 (SA), although the UK provision requires actual death and the SA section requires death or serious harm.

³¹³ Law Commission, above n 9, at [1.4].

³¹⁴ No formal government response was issued following the submission of the Law Commission's review of Part 8. The Crimes Amendment Bill (No 3) 2011 implemented some of the Law Commission's recommendations but set aside "the bulk" of them: Law Commission "Submission to the Social Services Committee on the Crimes Amendment Bill (No. 2) 2011" at 1.

³¹⁵ Ministry of Justice, above n 308, at 1.

³¹⁶ Law Commission, above n 9, at [5.33]. Even if the Law Commission had clarified the meaning of the "necessaries" the courts would not necessarily have used the Report as an aid to statutory interpretation: see above n 79.

³¹⁷ See Criminal Code Act 1899 (Qld), s 286; Criminal Code Act (NT), s 149; Criminal Code Act (Tas), s 144; Criminal Code 1985 (Can), s 215.

Another key term lacking clarity under ss 195 and 195A is “staff member.” The Law Commission intended ss 195 and 195A to capture staff members of any hospital, institution or residence regardless of whether they have “actual care or charge” of the victim.³¹⁸ This indicates a wide interpretation is most appropriate. An expanded statutory definition would confirm “staff member” includes a health professional whose role is to monitor vulnerable adults living in residences like halfway houses, even if on an infrequent basis.

Who qualifies as a “household member” under s 195A will sometimes be uncertain. Requiring a defendant to have special responsibility towards the child *or* live in the same household could ameliorate this. The disadvantage is that this definition could widen liability to encompass persons like teachers, to whom the provision is clearly not directed.

B Criminal Responsibility and Lawful Excuse

The legislature’s piecemeal approach to reform is evident in the discrepancy between duties in ss 151 and 152, compared to ss 153, 155, 156 and 157 in relation to the phrase referring to criminal responsibility. Its inclusion (or not) should be standardised across all duties to avoid risk of confusion and thus a possibility of relitigation.³¹⁹ This could be achieved by deleting the phrase from ss 153, 155, 156 and 157.

The legislature should simultaneously consider the effect that the deletion of criminal responsibility has on the qualification “without lawful excuse.”³²⁰ A provision could be inserted to clarify the availability of lawful excuses and justifications in relation to these duties. This would allow consideration of the particular circumstances of the case where appropriate.

C The Former ss 151(2) and 152(2)

In its review of Part 8, the Law Commission clearly stated:

“Our principal concern has been to ensure that, no matter how serious or minor the outcome of the breach of a statutory duty, criminal offence provisions with appropriate maximum penalties are available to capture the whole range of cases.”³²¹

³¹⁸ Law Commission, above n 9, at [5.19].

³¹⁹ This would likely appease the Law Commission, who were “uncomfortable” with the discrepancy between the duty provisions brought in by the Crimes Amendment Bill (No 2) 2011: Law Commission "Submission to the Social Services Committee on the Crimes Amendment Bill (No. 2) 2011" at 3.

³²⁰ “Lawful excuse” could have allowed a consideration of the defendant’s personal characteristics. See Chapter Three II(H)(2) above.

³²¹ Law Commission, above n 9, at [5.37].

Sections 151(2) and 152(2) were each deleted on the basis that they were no longer necessary in light of the additional offence provisions recommended by the Law Commission.³²² However, the failure to implement these provisions means the “whole range of cases” are not captured.³²³ Some cases falling outside the scope of the available offences may still endanger the victim’s life or permanently injure their health. Accordingly, a provision of criminal responsibility for these types of cases should be reinserted into ss 151 and 152.

D Limiting Liability in the Context of Domestic Violence

The call for extra protection for abused mothers is not intended to cover mothers in general.³²⁴ However, the influence of domestic violence should not be marginalised.³²⁵ As noted above, the wording of UK’s s 5 encourages a more personalised consideration of the defendant’s circumstances than New Zealand’s s 195A.³²⁶ Even so, it has been criticised as failing to attach adequate weight to the influence of domestic violence.³²⁷ Does this indicate that a statutory defence is most appropriate to ensure domestic violence is given its due weight?³²⁸ The question of how to manage the relationship between victims of domestic violence and child protection law is undeniably a delicate one. The concerns revolving around abused mothers are certainly valid. But a statutory defence would dilute the original purpose of the provision to criminalise parents and others for failing to take steps to protect children from significant risk.

It is preferable to instead rely on the flexibility of the criminal justice system. For instance, domestic violence can be taken into account as a mitigating factor during the sentencing stage of the process. This recognises the influence of domestic violence on a defendant’s conduct without denying the defendant failed to protect the child from harm.³²⁹ Proponents of a specific defence criticise this approach on the grounds it too

³²² At [5.42]. See generally Chapter Three above.

³²³ At [5.42].

³²⁴ Women are not necessarily less culpable than men. See above n 22.

³²⁵ See Chapter Four, Section II.

³²⁶ See Chapter Three, Section II(2).

³²⁷ See Herring, above n 19, at 140, but see the recent decision by the Court of Appeal in *R v Khan*, above n 118, at [33] that the section “requires close analysis of the defendant’s personal position”; see also Micco, above n 289, at 119 who criticises failure to protect legislation in New York and Illinois and proposes a ‘reasonable battered mother test’ to ensure “the social circumstances of battering and of mothering within a violent environment shape judicial inquiry.”

³²⁸ Herring considers a specific defence is warranted for the UK’s s 5 offence: Herring, above n 20, at 298. Some states in the United States have an affirmative defence, although the onus is on the battered woman to show her failure to protect was in the best interests of the child. See Minn Stat Ann § 609.378 subd 2.

³²⁹ Hayes, above n 224, at 313 who states “[s]hielding parents who harm their child from the criminal process, however well-intentioned the motivation, fails to recognise that children are rights-holders and that they are entitled to equal protection under the law from criminal behaviour.” Contrast Herring, above n 19, at 141.

easily overlooks objectively insignificant responses to violence.³³⁰ The state could attenuate this concern by integrating child protective and domestic violence services so abused women may be properly identified and provided with the protection they require to be able to fulfill their own obligations of protection to the child.

In the UK a spectrum of responses that may amount to “reasonable steps” have been provided by the Home Office.³³¹ In lieu of an equivalent body in New Zealand, it is particularly pertinent that the state undertakes measures to educate society of their role in keeping children and vulnerable adults safe and how this may be achieved. Of course, much of this information is already available to the public. For instance, CYF publishes a range of documents providing advice on how to keep children and the wider family safe.³³² This indicates more active promotion is needed to ensure people understand they will now be culpable for failing to protect their child from the risk of serious harm.

IV The Available Alternatives

As noted by the Children’s Commissioner Doctor John Angus, while this legislation provides tougher penalties and a broader range of offences, it is not the “panacea” to the problem.³³³ Rather, it is just one component of the child protection system. A similar conclusion is reached by Herring in considering the abused mother, who states effective protection of children requires “an effective and thorough raft of measures” aimed at both children and women at risk.³³⁴ It is therefore important that efforts to improve the law do not stop with a redraft of the current legislation.

A Government Spending

The implementation of this legislation has brought fresh calls from the executive, academics and the public for greater investment in preventative and responsive services to combat child abuse and neglect.³³⁵ The 2011 – 2012 Budget appropriated \$736,962 for some initial costs of child abuse and neglect.³³⁶ However, estimates

³³⁰ Randy Magan "In the best interests of battered women: Reconceptualizing allegations of failure to protect" (1999) 4(2) Child Maltreat 129 at 132.

³³¹ See above n 198.

³³² CYF has a number of downloadable brochures, newsletters, journals and reports available on its website: Child, Youth and Family "Publications" <<http://www.cyf.govt.nz/about-us/publications/index.html>>.

³³³ Children's Commissioner "Submission to the Social Services Select Committee on the Crimes Amendment Bill (No 2) 2011" at [4].

³³⁴ Herring, above n 19, at 153.

³³⁵ Children's Commissioner "Submission to the Social Services Select Committee on the Crimes Amendment Bill (No 2) 2011" at [14]. See also *Inquest into the deaths of Christopher and Cru Kahui (Infants)* at 62; Mansell and others, above n 212, at 2086; Ministry of Social Development, above n 291, at 48.

³³⁶ This includes care and protection services to assist and protect children and young people (\$345,765), education and advice services for prevention of abuse (\$4045), family and community services (\$35,546), youth justice services (\$132,440), Children’s Commissioner (\$2157), counseling

suggest that every year child abuse and neglect generates a long-term cost equivalent to NZ\$2 billion.³³⁷ This illustrates a deficiency between government spending and the costs incurred by child abuse and neglect.

The exact nature of the relationship between the poverty and child abuse is unclear.³³⁸ Nevertheless, it is an important consideration when reviewing government spending. New Zealand has typically framed the issue of child abuse as an individual problem with the blame on individual behaviour.³³⁹ The amendments to Part 8 illustrate this by placing a burden of active protection upon household members. The issue is that this detracts from overarching social problems like poverty, over which individuals may have little control. This signals the need for renewed government investment to improve overall living standards and thereby New Zealand's dire child abuse statistics. The recently proposed Child Poverty Bill is an indication of a positive step in this direction.³⁴⁰

B Mandatory Reporting

As discussed in Chapter Two, whether mandatory reporting should be introduced is a recurring debate. Whilst mandatory reporting proposals were dropped in the 1990s due to concerns of unjustifiable state intrusion, the demarcation between public and private life can be "more harmful than helpful."³⁴¹ State policy often regulates the underground operations of society. The more relevant question pertains to the effectiveness of mandatory reporting.

and rehabilitation for children, young people and families (\$17,829), Families Commission (\$7124), Family Wellbeing Services (\$78,476) and the "Strong Families" programme (\$104,874): Government of New Zealand *The Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2013* (B. 5, 24 May 2012) at 248. Selection of these costs was guided by a 2008 report examining economic costs of child abuse and neglect in New Zealand: Every Child Counts *The nature of economic costs from child abuse and neglect in New Zealand* (ECC Discussion Paper Number 1, June 2010) at 10.

³³⁷ This conclusion was reached in a study that adapted international cost estimates of child abuse and neglect to the New Zealand situation: Every Child Counts, above n 336, at 3.

³³⁸ Mike O'Brien "Poverty and violence, and children" in M. Claire Dale, Mike O'Brien and Susan St John (eds) *Left Further Behind: how policies fail the poorest children in New Zealand* (Child Poverty Action Group Inc., Auckland, 2011) at 104.

³³⁹ At 111. This is also evident from parliamentary debate of the Crimes Amendment Bill where Su'a William Sio MP (Labour) emphasised better outcomes will follow if government recognises and addresses the relationship between poverty and child abuse: (13 September 2011) 675 NZPD 21231.

³⁴⁰ According to Ms Ardern the Bill "sets a definition of poverty, establishes methods to measure it and ensures that government becomes a champion on behalf of our kids and puts their needs at the heart of future decision-making": New Zealand Labour Party "Bill Takes Bold Steps To Tackle Child Poverty" (press release, 19 September 2012).

³⁴¹ Frances Olsen "The Myth of State Intervention in the Family" (1985) 18 U Mich J L Reform 835 at 835, who argues that the state is deeply implicated in the formation and functioning of families, so to debate whether it should or should not intervene can be an impediment to effective regulation.

An important consideration is the impact of statutory wording on reporting tendencies.³⁴² The mixed success of other jurisdictions with mandatory reporting laws indicates it is perhaps more prudent to take non-legislative action to encourage professionals to report suspected cases of abuse and neglect.³⁴³ Improving interagency information-sharing protocols, directing notifications to a single body, and ensuring a consistent threshold of notification across the country could all improve New Zealand's voluntary system.³⁴⁴ In fact, the government has recently supported increased information-sharing between authorities.³⁴⁵ These strategies would channel focus onto known deficiencies without the risk of introducing the disadvantages of mandatory reporting laws.

C *Early Intervention and Prevention*

The primary focus of New Zealand's child protection system should not be on the formal system, but families and communities.³⁴⁶ New Zealand's child protection system has been described as the "ambulance at the bottom of the cliff."³⁴⁷ Early intervention and prevention strategies have only recently been brought to the fore.³⁴⁸ Such measures have been discussed in Chapter Four, like media campaigns to educate the public.³⁴⁹ This will create a culture of intolerance to child abuse, something the current Children's Commissioner sees as crucial to the legislation's success.³⁵⁰

Another measure could be a monitoring scheme for vulnerable children and young

³⁴² Some commentators in the American context, where mandated reporting first developed, strongly argue such legislation is not an effective method of treating child abuse. For example, narrow definitions of maltreatment may limit reporting whilst broad definitions may be too ambiguous to be of use to reporters needing guidance whether to report or not: Margaret Meriwether "Child Abuse Reporting Laws: Time for a Change" (1986) 20 Family Law Quarterly 141 at 149.

³⁴³ See also Lawson, above n 27, who concludes mandatory reporting is not an appropriate child protection tool for adolescents in New Zealand.

³⁴⁴ Interview with Paul Drummond, president of the Principals' Federation and Mark Peterson, deputy chair of the Medical Association (Simon Mercet, Morning Report, National Radio, 25 July 2012).

³⁴⁵ For example the Privacy (Information Sharing) Bill currently before Parliament aims to widen the law to ensure public services agencies can enter information sharing agreements so that vulnerable people do not "slip between the cracks": (8 February 2012) 677 NZPD 228 per Minister of Justice, the Hon Judith Collins.

³⁴⁶ *Inquest into the deaths of Christopher and Cru Kahui (Infants)* above n 128, at 72.

³⁴⁷ Even the latest legislation has been described as emulating this approach: (3 May 2011) 672 NZPD 18316 per Iain Lees-Galloway MP (Labour); (13 September 2011) 675 NZPD 21231 per Moana Mackey MP (Labour).

³⁴⁸ Interview with Paul Drummond, president of the Principals' Federation and Mark Peterson, deputy chair of the Medical Association, above n 344, per Paul Drummond, who considers society has neglected to address the social conditions that create a climate of child abuse and neglect. For further support of an early prevention scheme in New Zealand see also *Beyond the Darklands*: Nia Glassie, Series 5 Episode 6 (Nigel Latta, TV One, 8 October 2012).

³⁴⁹ Research showing that one in three people take action against domestic violence as a result of New Zealand's "Its Not OK" campaign illustrates media campaigns do make a positive difference in the community: Ministry of Social Development *It's Not Ok - Year in Review 2011* (2011) at 13.

³⁵⁰ Interview with Dr Russell Wills, Children's Commissioner (Simon Mercet, Morning Report, National Radio, 25 July 2012).

people to ensure child protection agencies are not called in too late.³⁵¹ This idea gained support from almost submitters to the government's recent Green Paper for Vulnerable Children.³⁵² Its success would depend on careful consideration of the criteria a "vulnerable" child or person must meet to come within the scheme. Support was also shown for a proposed "Action Plan" for vulnerable children.³⁵³ This could ensure the realization of adequate and well-researched measures to complement Part 8's recent amendments. A monitoring and evaluation system is also essential to achieve successful cohesion across different sectors of government.

³⁵¹ Whilst CYF may know of high risk families, this does not necessarily equate to adequate supervision: see Jamie Morton "Troubled mum's family failed to seek help, CYF tells inquest" *New Zealand Herald* (New Zealand, 31 August 2012) where a mother caused her baby's death by suffocation when sleeping drunk in the back seat of a parked car. The baby's family was well known to CYF but because no notifications had been made, no active monitoring had taken place.

³⁵² Ministry of Social Development, above n 291, at 129.

³⁵³ At 77. See also United Nations Committee on the Rights of the Child *Consideration of Reports Submitted by State Parties under Article 44 of the Convention - Concluding Observations: New Zealand* LVI (2011) at 34 who recommended New Zealand adopt a comprehensive national strategy to combat child abuse and neglect.

CONCLUSION

The issues addressed by the latest amendments to the Crimes Act are complex and controversial. There is no single answer, and indeed probably no correct answer. The criminal law has a crucial role to play in the protection of children and vulnerable adults. However, ss 151 and 152, and ss 195 and 195A are vitiated by ambiguity and inconsistency. Of particular concern is the use of s 195A in cases characterised by domestic violence. Even if this issue is overcome, the stringent requirements of s 195A limit its value in the practical sense.

New Zealand media has been quick to deplore a number of truly tragic cases of child abuse over recent years. The state responded by implementing some significant changes to New Zealand's child protection law. But children and vulnerable adults will not be adequately protected by this legislation alone. The state must actively publicise the law's renewed intolerance to child abuse and neglect. The amendments must be supplemented by careful consideration of policy strategies, increased long-term government investment and implementation of a range of measures designed to protect children, vulnerable adults and victims of domestic abuse generally.

Measures should range from early intervention and prevention through to victim-oriented protection strategies. The state must accept its role in providing a multi-faceted response to the abuse and neglect of children and vulnerable adults. Only then will New Zealand make real progress towards adequate protection and care of those who need it most.

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**APPENDIX ONE: THE RELEVANT NEW ZEALAND
PROVISIONS AMENDED BY THE CRIMES AMENDMENT
BILL (NO 3) 2011**

Section 150A: Standard of care applicable to persons under legal duties or performing unlawful acts

(1) This section applies in respect of—

(a) the legal duties specified in any of sections 151, 152, 153, 155, 156, and 157; and

(b) an unlawful act referred to in section 160 where the unlawful act relied on requires proof of negligence or is a strict or absolute liability offence.

(2) For the purposes of this Part, a person is criminally responsible for omitting to discharge or perform a legal duty, or performing an unlawful act, to which this section applies only if, in the circumstances, the omission or unlawful act is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies or who performs that unlawful act.

Section 151: Duty to provide necessaries and protect from injury

Every one who has actual care or charge of a person who is a vulnerable adult and who is unable to provide himself or herself with necessaries is under a legal duty—

(a) to provide that person with necessaries; and

(b) to take reasonable steps to protect that person from injury.

Section 152: Duty of parent or guardian to provide necessaries and protect from injury

Every one who is a parent, or is a person in place of a parent, who has actual care or charge of a child under the age of 18 years is under a legal duty—

(a) to provide that child with necessaries; and

(b) to take reasonable steps to protect that child from injury.

Section 195: Ill-treatment or neglect of child or vulnerable adult

(1) Every one is liable to imprisonment for a term not exceeding 10 years who, being a person described in subsection (2), intentionally engages in conduct that, or omits to discharge or perform any legal duty the omission of which, is likely to cause suffering, injury, adverse effects to health, or any mental disorder or disability to a child or vulnerable adult (the victim) if the conduct engaged in, or the omission to perform the legal duty, is a major departure from the standard of care to be expected of a reasonable person.

(2) The persons are—

(a) a person who has actual care or charge of the victim; or

(b) a person who is a staff member of any hospital, institution, or residence where the victim resides.

(3) For the purposes of this section and section 195A, a child is a person under the age of 18 years.

Section 195A: Failure to protect child or vulnerable adult

(1) Every one is liable to imprisonment for a term not exceeding 10 years who, being a person described in subsection (2), has frequent contact with a child or vulnerable adult (the victim) and—

(a) knows that the victim is at risk of death, grievous bodily harm, or sexual assault as the result of—

(i) an unlawful act by another person; or

(ii) an omission by another person to discharge or perform a legal duty if, in the circumstances, that omission is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies; and

(b) fails to take reasonable steps to protect the victim from that risk.

(2) The persons are—

(a) a member of the same household as the victim; or

(b) a person who is a staff member of any hospital, institution, or residence where the victim resides.

(3) A person may not be charged with an offence under this section if he or she was under the age of 18 at the time of the act or omission.

(4) For the purposes of this section,—

(a) a person is to be regarded as a member of a particular household, even if he or she does not live in that household, if that person is so closely connected with the household that it is reasonable, in the circumstances, to regard him or her as a member of the household:

(b) where the victim lives in different households at different times, the same household refers to the household in which the victim was living at the time of the act or omission giving rise to the risk of death, grievous bodily harm, or sexual assault.

(5) In determining whether a person is so closely connected with a particular household as to be regarded as a member of that household, regard must be had to the frequency and duration of visits to the household and whether the person has a familial relationship with the victim and any other matters that may be relevant in the circumstances.

APPENDIX TWO: SECTION 5 DOMESTIC VIOLENCE, CRIMES AND VICTIMS ACT 2004 (UK)

Section 5 The offence

- (1) A person (“D”) is guilty of an offence if—
- (a) a child or vulnerable adult (“V”) dies as a result of the unlawful act of a person who—
 - (i) was a member of the same household as V, and
 - (ii) had frequent contact with him,
 - (b) D was such a person at the time of that act,
 - (c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and
 - (d) either D was the person whose act caused V’s death or—
 - (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),
 - (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
 - (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.
- (2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.
- (3) If D was not the mother or father of V—
- (a) D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused V’s death;
 - (b) for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.
- (4) For the purposes of this section—
- (a) a person is to be regarded as a “member” of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it;
 - (b) where V lived in different households at different times, “the same household as V” refers to the household in which V was living at the time of the act that caused V’s death.
- (5) For the purposes of this section an “unlawful” act is one that—
- (a) constitutes an offence, or
 - (b) would constitute an offence but for being the act of—
 - (i) a person under the age of ten, or
 - (ii) a person entitled to rely on a defence of insanity. Paragraph (b) does not apply to an act of D.
- (6) In this section—
- “act” includes a course of conduct and also includes omission;
- “child” means a person under the age of 16;

“serious” harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861 (c. 100);

“vulnerable adult” means a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.

(7) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.

APPENDIX THREE: SECTION 286 CRIMINAL CODE ACT 1899 (QLD)

Section 286: Duty of person who has care of child

(1) It is the duty of every person who has care of a child under 16 years to—

- (a) provide the necessaries of life for the child; and
- (b) take the precautions that are reasonable in all the circumstances to avoid danger to the child's life, health or safety; and
- (c) take the action that is reasonable in all the circumstances to remove the child from any such danger;

and he or she is held to have caused any consequences that result to the life and health of the child because of any omission to perform that duty, whether the child is helpless or not.

(2) In this section—

person who has care of a child includes a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child.

APPENDIX FOUR: SECTION 14(3) CRIMINAL LAW CONSOLIDATION ACT 1935 (SA)

Section 14: Criminal liability for neglect where death or serious harm results from unlawful act

- (1) A person (the "defendant") is guilty of the offence of criminal neglect if—
- (a) a child or a vulnerable adult (the "victim") dies or suffers serious harm as a result of an unlawful act; and
 - (b) the defendant had, at the time of the act, a duty of care to the victim; and
 - (c) the defendant was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act; and
 - (d) the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.

Maximum penalty:

- (a) where the victim dies—imprisonment for 15 years; or
 - (b) where the victim suffers serious harm—imprisonment for 5 years.
- (2) If a jury considering a charge of criminal neglect against a defendant finds that—
- (a) there is reasonable doubt as to the identity of the person who committed the unlawful act that caused the victim's death or serious harm; but
 - (b) the unlawful act can only have been the act of the defendant or some other person who, on the evidence, may have committed the unlawful act,
- the jury may find the defendant guilty of the charge of criminal neglect even though of the opinion that the unlawful act may have been the act of the defendant.
- (3) For the purposes of this section, the defendant has a duty of care to the victim if the defendant is a parent or guardian of the victim or has assumed responsibility for the victim's care.

(4) In this section—

"act" includes—

- (a) an omission; and
- (b) a course of conduct;

"child" means a person under 16 years of age;

"serious harm" means—

- (a) harm that endangers, or is likely to endanger, a person's life; or
 - (b) harm that consists of, or is likely to result in, loss of, or serious and protracted impairment of, a part of the body or a physical or mental function;
- or
- (c) harm that consists of, or is likely to result in, serious disfigurement;

"unlawful"—an act is unlawful if it—

- (a) constitutes an offence; or
- (b) would constitute an offence if committed by an adult of full legal capacity;

"vulnerable adult" means a person aged 16 years or above whose ability to protect himself or herself from an unlawful act is significantly impaired through physical or mental disability, illness or infirmity.