

Media Release

**Rt Hon Sir Geoffrey Palmer SC
President
Law Commission**

18th December 2009

Crimes against the person: Law Commission report

Parents and caregivers will be liable if they fail to protect their children from injury or fail to intervene when a child is at risk under a package of reforms recommended by the Law Commission.

The new provisions are outlined in the Law Commission's latest report on the Crimes Act 1961 which focuses on Part 8 of the Act dealing with crimes against the person, including homicide, assault, and injury offences.

The most substantial changes recommended by the Commission relate to the provisions addressing child assault, neglect, and ill treatment.

"We share the government's view that some of the existing offences and their maximum penalties are inadequate and do not sufficiently protect our children", said Law Commission President Sir Geoffrey.

The new provisions are designed to expand the duties of care parents and guardians owe children and other vulnerable dependents such as the elderly or impaired.

Under a proposed new law adults living in the same household as a child under 18 whom they know to be at risk of death, serious injury or sexual assault, will be legally liable if they fail to take reasonable steps to protect them. The provision is modelled

on an offence in the English Domestic Violence, Crime and Victims Act 2004 (UK), and would also apply to any vulnerable adult living in the home.

Currently there is no legal duty for adults to intervene to protect a child in their home. Sir Geoffrey said that in practice this means household members who are neither perpetrators of, nor, legally speaking, parties to, ill treatment or neglect cannot be held liable for their failure to intervene, no matter how outrageous or how obvious the ill treatment or neglect of the child might be.

“In our view that is entirely unsatisfactory and needs to change.”

The Commission has also proposed expanding the current provision requiring parents and caregivers to provide children and other vulnerable dependents with “necessaries” (a broader concept than the “necessaries of life” and including food, medical care, adequate clothing etc). The Commission does not think this offers sufficient protection and wants parents and caregivers to have an additional legal duty to take reasonable steps to protect the person in their charge from injury.

Liability for offences involving “cruelty to a child” will also be strengthened under the proposed reforms. At present, a person is not guilty of this offence if their acts were done out of ignorance or thoughtlessness. The Commission proposes replacing this defence with a gross negligence test which means the jury would only need to be satisfied that the alleged conduct was a major departure from the standard of care expected of a reasonable person. It would be extended to cover those in charge of children up to 18 years of age, as well as vulnerable adults. The maximum penalty would increase from 5 years imprisonment to 10 years.

The Commission has also reviewed the “core” assault and injury offences in the Crimes Act; as well as the “specific” assault offences (such as assault on a child, and male assaults female). “We recommend that all of these offences be simplified,” said Sir Geoffrey. “Although a few specific offences need to be retained, the majority should be repealed and replaced by three new sections containing six new offences, to cover the whole range of assaults and injuries short of death.”

The Commission has also looked closely at the offences which deal with “endangering” or criminally negligent activity. The report recommends a hierarchy of offences depending on whether death, injury, or risk of injury results.

However, the scope of homicide law is not altered by the Commission’s proposed changes. “This is about clarifying and codifying the existing law dealing with homicide, not changing it,” Sir Geoffrey said.

“We have also undertaken a substantial revision of maximum penalties, to try to ensure that they are consistent,” Sir Geoffrey said. “We have recommended a number of changes. But these are less significant than they first appear. They principally result from a re-organisation of the offences, rather than any policy to alter sentencing outcomes. None of the revised penalties has decreased.”

The government will announce today its response to the Commission’s report.

“A Crimes (Offences Against the Person) Amendment Bill has been drafted, and is appended to our report. It is ready for introduction, if the government agrees,” Sir Geoffrey said.

-ENDS-

The report can be downloaded free of charge from the Law Commission website: www.lawcom.govt.nz

For comment, contact Dr Warren Young, Law Commission Deputy President: **021 55 77 83**, wyoung@lawcom.govt.nz. Dr Young was the Law Commissioner jointly responsible for this project, in collaboration with Val Sim.

SUMMARY

- 1 Part 8 of the Crimes Act 1961 deals with “offences against the person”. It contains offences including murder, manslaughter, injury and assault.
- 2 In 2007 the Law Commission received a reference from government to review Part 8 of the Crimes Act. In late 2008, the Minister of Justice invited us to expedite this work, with a particular view to ensuring that children are adequately protected by the offences contained in this Part.
- 3 In the timeframes available to us, we have not been able to comprehensively review the whole of Part 8. The principal focus of this project was on the core injury and assault offences; the definition of homicide and related offences of criminal nuisance and negligent injury; and offences addressing child ill treatment and neglect. We have substantially revised the offences in these three areas.
- 4 Many of the changes that we recommend have, as their principal objective, codification or clarification of the existing law. However, particularly in the area of child ill treatment and neglect, we are proposing significant substantive changes.
- 5 A draft Crimes (Offences Against the Person) Amendment Bill is attached as Appendix B to this paper.

Chapter 2 – The core assault and injury offences

- 6 We recommend that the core assault and injury provisions in Part 8 should be replaced by six new offences:
 - Causing serious injury with intent to injure;
 - Causing serious injury by assaulting any person, or acting with reckless disregard for safety;
 - Causing injury with intent to injure;

- Causing injury by assaulting any person, or acting with reckless disregard for safety;
 - Assault with intent to injure;
 - Common assault.
- 7 The new offences would address three problems that we identified with the current provisions in Part 8. First, the current provisions have no clear organising principle, either in the way that they are structured, or in the allocation of their maximum penalties. Secondly, they have “passed their use by date”. A lot of the language employed in their drafting is old fashioned and unduly legalistic. Furthermore, as the result of judicial interpretation over the years, their meaning and scope are not transparent, and there are substantial overlaps in the coverage of a number of the offences. Thirdly, there are a number of offences in Part 8 that arbitrarily elevate a specific set of circumstances (eg, assault with a weapon) into an element of a separate offence, when it ought to be regarded as no more than one of the whole range of aggravating factors to be dealt with on sentencing.
- 8 Our proposed new offences all address both culpability (that is, the intent or other mental state of the offender) and consequence (the results of the offender’s acts). However, because consequence may be fortuitous, we have taken the view that the culpability of the accused should be the principal consideration. Thus, while there are elements in the offences addressing both culpability and consequence, culpability has been given greater weight in allocating maximum penalties to each offence,

Maximum penalties

- 9 We recommend a substantial revision of the maximum penalties, by reference to a methodology that is set out in chapter 2. None of the maxima we are proposing has decreased, relative to current maximum penalties. While a number of the penalties look quite different, the differences are primarily a consequence of the reorganisation of the offences. There is only one core offence in chapter 2 that has an effective increase in the maximum penalty: assault with intent to injure.

Miscellaneous offences

10 Chapter 2 concludes with a discussion of four offences that we propose should be retained, and half a dozen others whose repeal is recommended. We have identified a need to retain the following offences, because they address what would otherwise be gaps on the statute book:

- Section 197 – Disabling;
- Section 201 – Transmitting disease;
- Section 202 – Setting traps;
- Section 204 – Impeding rescue.

11 We recommend the repeal of the following offences because they are adequately covered by the core offences and are therefore unnecessary:

- Section 191 – Aggravated wounding or injury;
- Section 192 – Aggravated assault;
- Section 194 – Assault on a child, or by a male on a female;
- Section 198 – Disabling firearm or doing dangerous act with intent;
- Section 199 – Acid throwing;
- Section 200 – Poisoning with intent;
- Section 202C – Assault with a weapon.

Chapter 3 – Specific assaults

12 This chapter considers when provision should be made for specific assault offences – that is, assaults on particular categories of victim, that typically carry aggravated maximum penalties.

13 We recommend:

- Repealing the offences of assault on a child and male assaults female in section 194 of the Crimes Act;
- Retaining the status quo as regards assaults on police officers;
- Further work by either the Ministry of Justice or the Law Commission to rationalise the numerous other specific assault provisions on the statute book – assaults on enforcement officers, judges, court staff, and so on.

14 We do not recommend the establishment of any new specific assault offences.

Assault on a child

- 15 Our recommendation to repeal the child-specific assault offence in section 194(a) might be considered surprising, in the context of a report that is directed to ensuring that the legal framework adequately addresses the ill treatment and neglect of children. But in our view, the indirect disadvantages of section 194(a) are such that the law will in fact be more robust without it.
- 16 The principal argument in favour of establishing a separate victim-specific offence is to signal that this particular category of conduct is so much more serious than the “normal” range of criminal conduct that it requires a separate label, and an aggravated maximum penalty. However, there are a number of reasons why section 194(a) does not adequately achieve this purpose and is tending to undermine it.
- 17 First the offence is only available to address low-level offending against children. More serious offences are dealt with by other charges. This creates a perception problem: it looks as if this category of offending is not taken seriously, contrary to the reality that sentencing judges are in fact imposing more severe sentences for offending against children across the whole range of cases.
- 18 Secondly, the availability of the separate offence invites inconsistent police charging practice. In particular, it may lead to under-charging – that is a charge of assault on a child under section 194 when the facts support the laying of a more serious charge. That contributes to the perception problem.
- 19 Thirdly, there are other victims who are just as vulnerable as children, such as the very elderly or severely mentally impaired. There is no case for elevating the undeniably important interests of children above those of equally vulnerable victims.
- 20 Finally, it is unnecessary to create a victim-specific offence to achieve appropriate sentencing outcomes. As part of our review we undertook an analysis of sentencing outcomes for offending against children. It demonstrated that sentences imposed are consistently more severe when children are victims, whether or not a child-specific charge is laid. The fact that there should be a sentencing premium where a child victim is involved

has been reinforced by recent amendments to the Sentencing Act that make it explicit that the fact that offending against a child is to be treated as an aggravating factor.

- 21 We note that our proposed changes to section 195 of the Crimes Act, which relates to child “cruelty” by way of ill treatment or neglect, would still permit that section to be used in cases involving assault. We have recommended a substantial increase in the maximum penalty attaching to it. It would therefore remain open to the prosecution, in the absence of section 194, to rely upon section 195 instead if it felt that the culpability of the conduct in any given case required an aggravated charge.

Male assaults female

- 22 The “male assaults female” offence in section 194(b) of the Crimes Act, like assault on a child, only addresses relatively minor cases – the equivalent of common assault, but for the gender of the two people involved. Where the conduct is more serious, resulting in injury to or even the death of the female, more serious generic charges ought to be, and in most cases would be, laid. We consider that, provided the maximum penalty for common assault is increased to address the culpability of this category of assault, the separate offence is not fulfilling a useful function.
- 23 The strongest argument offered for its retention is that it offers tangible evidence of a criminal history of this particular kind of highly undesirable conduct. However, ultimately everybody with whom we consulted agreed that a criminal record that relies upon the offence of male assaults female to indicate propensity is highly misleading, because the offence only captures cases at the low end of the spectrum of seriousness. Ultimately, everybody agreed that it would be preferable to develop a method of recording such propensity, covering the whole range of relevant offences. We understand that the Ministry of Justice and Police are working together to address this.

Chapter 4 – Endangering, negligent injury, and homicide

- 24 Chapter 4 recommends changes to section 160(2) of the Crimes Act, which defines culpable homicide, and to two other related provisions. The section

160(2) changes codify case law. The related offences – which appear in new sections 157A and 157B of the Bill and, broadly speaking, relate to endangering and negligent injury – are amended to align them with section 160. There have been some historical anomalies and inconsistencies of approach that in our view are not justified. The policy objective here is simply to ensure that the law is consistent. The three provisions now establish a hierarchy that addresses the whole range of possible outcomes (death, injury or risk of injury) that may rise from unlawful acts or omissions to perform statutory duties.

25 The key changes recommended in this chapter are:

- Amending section 150A of the Crimes Act, to codify the Court of Appeal decision in *R v Powell* [2002] 1 NZLR 666 (CA) that gross negligence needs to be proved by the Crown in cases where, but for section 150A, a lesser mental element would suffice.
- Substituting gross negligence for the recklessness requirement in what is currently section 145 of the Crimes Act (new section 157A in our proposed draft Bill), so that there is consistency of approach across the three provisions: sections 160, 157A, and 157B.
- Defining “unlawful act” to mean “an offence in breach of any Act, regulation, rule or bylaw”, in order to codify the Court of Appeal’s approach in *R v Myatt* [1991] 1 NZLR 674 (CA), and ensure that “unlawful act” has the same meaning across all three provisions.
- Requiring that any such breach also be one that is, in the circumstances, likely to cause injury to any person. This, too, codifies the Court of Appeal’s approach in *R v Myatt* [1991] 1 NZLR 674 (CA); although the Court in that case referred to “harm”, rather than “injury”, we do not consider the difference significant.
- Changing references to “lawful duty” to “statutory duty”, in the interests of certainty and transparency.
- Repealing section 160(2)(c) and (e).

Chapter 5 – Ill treatment or neglect of children and other vulnerable victims

26 We propose substantial reforms to the laws relating to child neglect and ill treatment. The changes we propose can be summarised as follows:

- A redrafted section 195 of the Crimes Act 1961 (formerly entitled “cruelty to a child”), addressing ill treatment and neglect by those with care or charge of a child or vulnerable adult, with a substantially increased maximum penalty of 10 years.
- A new offence for those living with a child or vulnerable adult, of failing to take reasonable steps to protect such a victim from any known risk of death, serious injury or sexual assault.
- An extension to the scope of the duties provisions under sections 151 and 152 of the Crimes Act, by introducing an additional requirement in each provision to take reasonable steps to protect a child (section 152) or vulnerable person (section 151) from injury.

Section 195

27 There are some aspects of the current function and purpose of section 195 that we explicitly do not wish to change: in particular, the notion of ill treatment being sufficiently open-ended to accommodate some instances of assault; and the ability of a jury to assess in the round, having regard to the totality of evidence, whether a course of conduct constitutes ill treatment or neglect.

28 We recommend four key changes that broaden the scope of this category of offending, and signal its very grave nature:

- **Extension of scope to vulnerable adults.** At present, section 195 applies only to child victims. We consider that other vulnerable victims are entitled to the same level of protection. Our proposed section 195 has therefore been extended to apply to both categories – vulnerable adults, as well as children.
- **Age of child raised, to under 18 years.** Section 195 currently applies to children under the age of 16 years. In our view, this should be raised to under 18 years. We have recommended this in all of our revised offences.

It is consistent with New Zealand's obligations under the United Nations Convention on the Rights of the Child.

- **An objective gross negligence test.** The Court of Appeal has held that the current requirement that the conduct be wilful requires ill treatment to have been inflicted deliberately, with a conscious appreciation that it was likely to cause unnecessary suffering. Neglect, too, will only be regarded as “wilful” where it is deliberate. These are subjective tests: they require the defendant's state of mind to be proved. In practice, this means that ignorance or thoughtlessness is a defence. We recommend that any reference to “wilfully” should be removed from section 195. Instead we are proposing a “gross negligence” test. This would require the jury only to be satisfied that the conduct alleged was a major departure from the standard of care to be expected of a reasonable person; ignorance or thoughtlessness would no longer absolve a defendant from liability
- **Maximum penalty raised from 5 to 10 years.** The current maximum penalty for ill treatment and neglect of a child under section 195 is 5 years' imprisonment. We consider that this penalty needs to be considerably higher to reflect the proper relativity between it and other offences. We propose a new maximum prison term of 10 years, since the worst class of case under section 195 will be one in which the child has nearly died. Furthermore, the section is typically invoked in response to what is often extremely unpleasant and grave offending, that may well have occurred over a considerable period. The resulting consequences may well extend beyond physical injury, to long term psychological trauma, and/or developmental issues. The penalty needs to be sufficiently high to address the culpability of such cases.

New offence of failing to protect a child or vulnerable adult

29 We propose a new offence of failing to protect a child or vulnerable adult from risk of death, serious injury or sexual assault, if the perpetrator resides in the same household or residence, has knowledge of the risk, and fails to take reasonable steps to prevent it.

30 The offence proposed has been closely modelled on section 5 of the Domestic

Violence, Crime and Victims Act 2004 (UK). There is also a similar South Australian provision.

31 No duty to intervene in such cases presently exists. It is a situation that falls beyond the scope of any of the existing statutory duties, and in the absence of such a duty, there is no criminal liability for omitting to act. In practice, this means that household members who are neither perpetrators of, nor (legally speaking) parties to, ill treatment or neglect cannot be held liable for their failure to intervene, no matter how outrageous or how obvious the ill treatment or neglect of the child may be. We take the view that those who live in close proximity to a child, and are in frequent contact with the child, have a sufficiently close nexus to make the imposition of a duty of care appropriate.

32 The offence we propose would have the following key elements:

- The victim must be either a child under the age of 18 years, or a person who is vulnerable by reason of detention, age, sickness, mental impairment, or any other reason;
- The offender must be either a member of the same household as the victim, or a staff member of a residential facility, who has frequent contact with the victim. He or she must be over the age of 18 years;
- The offender must know that the victim is at risk of death, serious injury or sexual assault, as the result of an unlawful act or an omission to perform any statutory duty;
- The offender must fail to take reasonable steps to protect the victim from harm.

Extended section 151 and 152 duties

33 Section 152 imposes a duty on parents and those in the place of parents, to provide their children under the age of 16 years with “necessaries”. As noted above (paragraph 28), we recommend raising this age to under 18 years.

34 We also recommend extending the scope of the duty. In *R v Lunt* [2004] NZLR 498 (CA), the Court of Appeal held that a parent or person in loco parentis is under a duty to take reasonable steps to protect his or her child from the illegal violence of any other person where such violence is foreseen or

reasonably foreseeable.

35 The new section 152 duty we propose 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. In other words, the scope of what we are proposing is not, in its express terms, confined to “illegal violence”. The reality is that many things likely to cause injury (ie, actual bodily harm) to a child will indeed amount to illegal violence. However, from time to time, an omission to perform a statutory duty may give rise to the same risk. Such an omission is equally culpable in our view, in the sense that the risk to the child is the same. Our proposed new duty is therefore cast in terms that do not exclude such a case.

36 We note that the additional parental duty to protect from harm that we are proposing has some similarity to an analogous duty provision in Queensland: section 286 of the Criminal Code Act 1899.

37 Section 151 of the Crimes Act applies to any person who has charge of another vulnerable person. A vulnerable person is a person who is “unable by reason of detention, age, sickness, insanity or any other course to withdraw himself from such charge and unable to provide himself with the necessaries of life”. Section 151 establishes a duty on the person in charge, to supply the vulnerable person with the necessaries of life.

38 We think that vulnerable people are entitled to the same protection as children. We therefore propose an extension of the duty in section 151, as with section 152. This will require the person in care or charge to take reasonable steps to protect a vulnerable person in their care from injury, and to provide them with “necessaries”.

Section 153 of the Crimes Act

39 We are recommending that section 153 of the Crimes Act, which imposes a duty on employers to provide food, clothing or lodging to an apprentice or servant, should be repealed. That section is outdated. It will no longer be necessary, in the light of our other proposed changes

Section 10A of the Summary Offences Act

40 Section 10A, the offence of ill-treatment or wilful neglect of a child, is extremely rarely charged: in the 10 years from 1999 to 2008, only 30 charges were laid. We have taken care to frame section 195 in a way that encompasses the present scope of section 10A, so that there is a single offence capable of addressing the whole range of conduct. We recommend that section 10A should be repealed.