



REVIEW OF PART 8 OF THE CRIMES ACT 1961: CRIMES AGAINST THE PERSON





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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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The Hon Simon Power
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

30 November 2009

Dear Minister

NZLC R111 – REVIEW OF PART 8 OF THE CRIMES ACT 1961: CRIMES
AGAINST THE PERSON

I am pleased to submit to you Law Commission Report 111, *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink, which appears to read 'Geoffrey Palmer', is written over a light blue horizontal line.

Geoffrey Palmer
President

FOREWORD

In 2007 the Law Commission received a reference from the government to review Part 8 of the Crimes Act. Part 8 contains “crimes against the person”, including homicide, assault, and injury offences. In two previous projects undertaken by the Law Commission – drafting sentencing guidelines, and the review of maximum penalties – we had encountered anomalies in the Part 8 offences that made it difficult to carry out the necessary work.

In 2008, the new National government announced that one of its priorities in the criminal justice area was developing an appropriate response to violence against children. Because some of the Part 8 provisions relate to offending against children, the government invited us to expedite our work on this project.

In undertaking this work, we have therefore pursued three objectives. First, we have addressed the problems initially identified, by ensuring that the scheme of Part 8 offences from homicide through to common assault – including the “endangering” offences (where risk of injury is incurred, although injury may not result) – is comprehensive and coherent. In particular, we have ensured that the offence structure properly reflects both the range of culpability involved in violent behaviour and the consequences arising from it, and have used this as a basis to ensure that maximum penalties for all of the offences are allocated on a principled basis.

Secondly, we have concluded that the current offences addressing child ill treatment and neglect have a number of gaps and deficiencies and do not attach sufficient weight to the importance of child protection. We propose an expansion of the legal duties in relation to children, and some significant changes to current offences (including a substantial increase in the maximum penalty for the offence that is currently termed “cruelty to a child”). We also propose the creation of a new offence of failing to protect a child or vulnerable adult from the 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.

Thirdly, we have endeavoured to eliminate a number of offences that are more appropriately covered by other generic Part 8 offences. This includes the repeal of assault on a child, and assault of a female by a male. Both of these offences result in inconsistent charging practice and sometimes inappropriate under-charging. We think it better that charges represent the culpability relating to the offence and its consequence rather than the status of the victim.

Overall, we believe that our recommended package of reforms will substantially improve the accessibility and functioning of the law in this very important area.

The Commissioners responsible for this reference were Warren Young and Val Sim. They were assisted by advisers Steve Melrose, Claire Browning, and Zoë Prebble.



Geoffrey Palmer
President

TERMS OF REFERENCE The Law Commission has been asked to review the offences of assault and injury to the person in Part 8 of the Crimes Act, particularly sections 188 to 194, 196, and 202C. In doing so, the Commission should consider:

- The overall scheme of the Crimes Act provisions, and whether a more coherent scheme can be devised;
- The elements and scope of individual offences and their relationships to each other;
- The maximum penalty levels of these, and other offences, and their respective relativities; and
- The implications of any proposed reforms for assault provisions in other legislation.



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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] 1 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 necessities of life”. Section 151 establishes a duty on the person in charge, to supply the vulnerable person with the necessities 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.

Chapter 1

Introduction

- BACKGROUND
- 1.1 Part 8 of the Crimes Act 1961 deals with “offences against the person”. It contains offences including murder, manslaughter, injury and assault.
 - 1.2 In the injury and assault category, which was a primary focus for this review, there are both generally applicable provisions (eg, common assault) and numerous offences addressing particular types of circumstances, victims or outcomes, such as male assaults female,¹ poisoning,² and acid throwing.³
 - 1.3 In 2007 the Law Commission was invited to review Part 8 of the Crimes Act. Our terms of reference, which are reproduced on page 2, directed us to determine whether a more simplified, rational and coherent scheme of assault and injury offences could be devised for Part 8.
 - 1.4 The impetus for this review initially arose from problems encountered in the course of two other Law Commission, or Law Commission-affiliated, projects: work undertaken by the Sentencing Establishment Unit to draft sentencing guidelines for Part 8; and the Law Commission’s maximum penalty review. Both projects identified anomalies in the scope and coverage of the offences and their respective maximum penalties. These issues suggested that there was a real need to review and revise the scheme of Part 8 – and, indeed, the numerous assault and obstruction provisions in other legislation, that similarly show significant variation of approach and widely differing maximum penalties.
 - 1.5 The Crimes Act 1961 was closely modelled on the Criminal Codes of 1893 and 1908. An attempt was made in 1989 to substantially reform the entire 1961 Act through the introduction of the Crimes Bill 1989,⁴ followed by the Crimes Consultative Committee (“Casey Committee”) Report on the Bill published in 1991.⁵ This work did not progress – or at least, not as a package. Substantial changes have been made in a piecemeal fashion to other Parts of the Act, implementing or updating the Crimes Bill 1989 proposals. However, to date, Part 8 remains largely unchanged.

1 Crimes Act 1961, s 194(b).

2 Crimes Act 1961, s 200.

3 Crimes Act 1961, s 199.

4 Crimes Bill 1989, no 152–1.

5 Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (Crimes Consultative Committee, Wellington, 1991).

- 1.6 In late 2008, in response to a number of high profile cases involving the worst forms of child neglect and non-accidental death, the Minister of Justice Hon Simon Power invited us to expedite the Part 8 review, and to have particular regard to the offences aimed at the protection of children from ill treatment and neglect, and the adequacy of their maximum penalties.
- 1.7 This advice to the Minister completes our work.

SCOPE OF THE REVIEW

- 1.8 Not everything in Part 8 was included within the scope of our review. In the circumstances, there were very significant time and resource constraints that made it unrealistic for us to review the entire Part.
- 1.9 For ease of reference a schedule of the offences amended, repealed, or replaced as part of the review is included in Appendix A.

In Part 8 but out of scope

- 1.10 Although we have proposed some amendments to section 160(2), we did not attempt a first principles review of the law relating to homicide. This would have been a major undertaking that was unachievable given the level of resource and period of time available to us. For similar reasons, suicide and abortion were also excluded from scope. Provocation in section 169 has already been addressed by the Law Commission; a Bill is presently before the House to repeal it.⁶
- 1.11 The provisions surrounding female genital mutilation were inserted in Part 8 in 1996.⁷ We felt that they gave rise to considerations that would be better dealt with separately (issues of cultural imperialism, international legal obligations, and so on).
- 1.12 We briefly considered whether we should attempt to deal with the vexed issue of the boundaries of consent to assault and injury, or leave it to common law development, along the lines set out by the Court of Appeal in *R v Lee*.⁸ This is a fraught area, extremely difficult as a matter of both policy and drafting, that has been controversial overseas (although less so in New Zealand). Again, we were not able to address it in the time available. We are, in any case, unconvinced that codification would be capable of providing any greater clarity or certainty than the guidance laid down by the Court of Appeal.
- 1.13 Culpability terms such as “intention” and “recklessness” that appear throughout Part 8 are not codified in the Crimes Act, although they are well understood at common law. Given that it was not defensible to define such terms solely for Part 8 purposes, tackling them would have swiftly evolved into the drafting of a General Part, which would have substantially expanded the scope of the project in a way that was not feasible in the circumstances.

⁶ Crimes (Provocation Repeal) Amendment Bill 2009, no 64–1.

⁷ Crimes Act 1961, ss 204A, 204B.

⁸ *R v Lee* [2006] 3 NZLR 42 (CA).

- 1.14 Several offences that could not sensibly be reviewed in isolation from their wider context were excluded (in particular, sections 198A, 198B, 202A, 202B, and 202BA). Broadly speaking, these address arms offending. We understand that Police are separately reviewing the Arms Act, which by extension, ought to incorporate a review of other arms-related provisions.⁹
- 1.15 The abduction and kidnapping offences, and offences relating to bigamy and feigned marriage, were also excluded from scope. For completeness, we note that we are not sure why the bigamy and feigned marriage offences appear in Part 8 at all; they would seem to be more closely aligned with Part 7 matters.

Outside Part 8 but within scope

- 1.16 We extended the scope of our review to include some provisions in the Summary Offences Act 1981, that overlapped substantially with offences being addressed in Part 8. These included section 9 – common assault, section 10 – assault on a police, prison, or traffic officer, and section 10A – ill treatment or wilful neglect of a child.
- 1.17 It was also necessary to address section 145 in Part 7 of the Crimes Act, which is closely connected with sections 160 and 190 in Part 8.
- 1.18 In the draft Bill, consequential amendments and minor changes have been made throughout the Crimes Act to maintain consistency of language.

STRUCTURE OF THIS PAPER

- 1.19 The structure of the remainder of this paper is as follows.
- 1.20 Chapter 2 deals with what we have dubbed the core assault and injury provisions: current sections 188, 189, 193 and 196. The chapter also describes our methodology for reviewing the maximum penalties attached to these provisions. As a result of our reform proposals in what are now new sections 188, 189 and 189A of the draft Bill, we are recommending the repeal of a number of existing Part 8 provisions. These are noted in the chapter, along with a brief discussion of a few additional offences that we considered it appropriate and necessary to retain: disabling, infecting with disease, setting traps, and impeding rescue.
- 1.21 Chapter 3 sets out our policy on “specific assaults” – that is, assault provisions directed to particular classes of victim. It proposes that section 194, which contains offences of assault on a child, and male assaults female, should be repealed and dealt with instead under the generally applicable assault and injury provisions discussed in chapter 2. Our reasons for reaching this view are discussed at some length in the chapter.
- 1.22 Chapter 4 discusses our proposed changes to the offences of endangering and injuring by unlawful act (formerly sections 145 and 190), and the definition of culpable homicide in section 160(2) of the Crimes Act which affects the scope of the law of manslaughter. For reasons explained in the chapter, we consider that a consistent approach to these three provisions is desirable. Our policy in this area, if agreed to, would also necessitate some changes to section 150A.

⁹ “Lethal air guns to be reviewed” (12 September 2008), <http://www.stuff.co.nz/national/624488> (last accessed 4 August 2009).

- 1.23 Chapter 5 sets out our policy relating to the offences and maximum penalties for child neglect and ill treatment. We are proposing a number of changes to make the law substantially more robust, that are discussed at some length in that chapter. It also explains why section 153 of the Crimes Act 1961 (which establishes a duty on employers who have contracted to provide certain items, such as food and lodging, to young employees) will no longer be necessary, in the light of our other proposed changes.
- 1.24 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: assault and injuring with intent

INTRODUCTION 2.1 This chapter begins with our diagnosis of the problems with the core assault and injury offences in sections 188, 189, 193 and 196 of the Act. We then outline the six new offences which we recommend should replace them. We explain the approach to maximum penalties we have taken in this review, which is best illustrated by reference to these half dozen new offences. The chapter concludes with a brief discussion of other offences, some of which we believe need to be retained, and some repealed.

PROBLEMS WITH THE CURRENT LAW 2.2 The core assault and injury offences currently in the Crimes Act 1961 are sections 188 (wounding with intent), 189 (injuring with intent), 193 (assault with intent to injure) and 196 (common assault). There is a further common assault offence in section 9 of the Summary Offences Act 1981. Collectively, they address the whole spectrum of this category of offending, from the threatened application of force, to the intentional infliction of grievous bodily harm.

2.3 Part 8 also includes a number of circumstance-specific and aggravated offences. By contrast with the core assault and injury offences, these might, for example, refer to method of causation (such as whether or not a person was assaulted with a weapon),¹⁰ or specify the gender or age of a victim (such as a woman or child),¹¹ or list other aggravating features (such as the fact the offence was committed in furtherance of some other criminal goal).¹²

2.4 Broadly speaking, we have identified three problems with the content and structure of these offences.

¹⁰ Crimes Act 1961, s 202C.

¹¹ Crimes Act 1961, s 194.

¹² Crimes Act 1961, s 191.

- 2.5 First, the core assault and injury offences address both culpability and consequences: that is, the accused's intention or other mental state at the time of committing the criminal act (culpability), and the level of harm or other outcome that has resulted from the act (consequences). But they do this incoherently. There is no clear organising principle to the structure of the offences that we were able to discern, and the approach taken to the allocation of maximum penalties is inconsistent.
- 2.6 By way of an example, sections 191(1) and 192(1) of the Crimes Act provide for the offences of aggravated wounding and injury (section 191(1)) and aggravated assault (section 192(1)). In both offences, the level of culpability of the offender is the same – intent to commit a crime or avoid arrest. However, the maximum penalties for the offences, 14 years and 3 years respectively, are clearly very different. The 14-year maximum penalty applies in the worst cases to situations where grievous bodily harm has been caused, whereas the maximum penalty of 3 years deals only with aggravated assault (where there was little or no injury).
- 2.7 It would seem that, as regards these two offences at least, the legislature has taken a consequence-focused approach. That is, it has structured two different offences solely by reference to their different outcomes, and has given them substantially different maximum penalties, notwithstanding the identical culpability. For maximum penalty purposes, a heavy weighting has clearly been given to the very serious outcome under section 191(1) (grievous bodily harm).
- 2.8 By contrast, however, the scheme of the offences in sections 188(1) and 188(2) appears to be quite different. Section 188(1) deals with wounding with intent to cause grievous bodily harm; section 188(2) with wounding with intent to injure. Their culpability therefore differs. However, both offences list identical outcomes or consequences. The maximum penalties for the two offences are 14 years and 7 years' imprisonment respectively. In this instance, therefore, the focus is evidently on culpability, not consequences. If the rationale laid out above, in relation to sections 191 and 192, had been consistently applied, two separate offences – certainly two separate offences with such disparate maximum penalties – would not have been necessary or appropriate. If there was any maximum penalty difference at all, one would expect it to be quite small. (In fact, we regard the section 188 approach as more legitimate, for reasons that will be subsequently explained; the sole point we are making here relates to the muddled scheme of the current offences.)
- 2.9 The second problem is what may be summed up as the outdated nature of the offences – both in their terminology, and their drafting style.¹³ The language is frequently archaic (such as “wounding”, “maiming” and “grievous bodily harm”). There is a lack of transparency as to the actual scope of the provisions, arising from the fact that many of the terms are not defined or have, over the years, been substantially qualified by the courts. Some of the offences have scope for considerable overlap. For example, the breadth of the concept of wounding, which has been held to mean “a breaking in the continuity of the

13 This sentiment was shared by members of the Casey Committee who, in relation to the core injury and assault offences, wrote that these are “unnecessarily detailed and allow too much scope for argument as to the precise category into which particular conduct should appropriately fall”: Crimes Consultative Committee, above n 5, 60.

skin” could easily be regarded as either “grievous bodily harm” or an “injury” depending on the severity of the wound.¹⁴ There are arbitrary or irrelevant distinctions (eg, the concepts of wounding, maiming, and disfiguring arbitrarily distinguish between the different ways in which the injury was inflicted, rather than its extent).

- 2.10 Thirdly, the circumstance-specific offences previously noted, such as acid throwing and assault with a weapon, arbitrarily identify a specific type of conduct or set of circumstances and elevate that factor into an element of an offence, to the exclusion of numerous other aggravating factors that are equally worthy of recognition, but can only be taken into account at sentencing. In approaching the reform of the Part, we have tried to minimise the extent to which this occurs. All relevant aggravating and mitigating factors should of course be able to be taken into account by the courts, but to do so by establishing separate offence provisions to recognise each of them is simply not practicable. Certainly the apparently ad hoc approach that is presently evident in Part 8 is not desirable.

THE NEW OFFENCES

- 2.11 The proposed new offences discussed in this chapter appear in clause 22 of the Bill. They have been reproduced below for ease of reference:

188 Causing serious injury with intent

- (1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to injure any person, causes serious injury to any person.
- (2) Every one is liable to imprisonment for a term not exceeding 4 years who causes serious injury to any person by assaulting any person or otherwise acting with reckless disregard for the safety of others.

189 Injuring with intent

- (1) Every one is liable to imprisonment for a term not exceeding 10 years who, with intent to injure any person, injures any person.
- (2) Every one is liable to imprisonment for a term not exceeding 3 years who injures another person by assaulting any person or otherwise acting with reckless disregard for the safety of others.

189A Assault with intent to injure or common assault

- (1) Every one is liable to imprisonment for a term not exceeding 5 years who, with intent to injure any person, assaults any person.
- (2) Every one is liable to imprisonment for a term not exceeding 2 years who assaults any person.

- 2.12 We are proposing that this “matrix” of six offences should form the core of Part 8. It is not a major departure from the current approach, in the sense that the new offences will continue to address both culpability and consequences.¹⁵ The key difference is that the new offences are comprehensive, coherent, and plainly drafted.

¹⁴ *R v Waters* [1979] 1 NZLR 375, 378 (CA) McMullin J for the Court.

¹⁵ This is in contrast to other recommendations that have been made from time to time, for example, in the Crimes Bill 1989 and the 1976 Report of the Criminal Law Reform Committee on Culpable Homicide, in which a pure culpability focus was preferred.

- 2.13 Of these elements, we consider the culpability of the accused to be the paramount consideration. Consequence may be fortuitous, and is beyond the control and foresight of the person accused. In other words, it is to some extent a lottery. Thus, while there are elements in the offences addressing both culpability and consequence, in allocating maximum penalties to them, culpability has been given greater weight.¹⁶
- 2.14 However, that is not to say that consequence should be given no weight, and the offences we are proposing recognise three different degrees of outcome. Covering all degrees of injury within a single offence would provide inadequate guidance to the courts about appropriate sentencing levels. The question is how to strike the right balance between what must be established as an element of the offence, and what can properly and preferably be left to sentencing. We have attempted to find a middle ground between overly broad and discretionary offences on the one hand and, on the other, offences that are unduly detailed and prescriptive.

Levels of culpability

- 2.15 The new offences recognise two levels of culpability:
- intent to injure – included in new sections 188(1), 189(1) and 189A(1);
 - assault or otherwise acting with reckless disregard for the safety of others – included in new sections 188(2) and 189(2).
- 2.16 In our view, there is a considerable moral distinction to be drawn between those who intentionally injure another, and those who cause injury as a result of being reckless. Including these two concepts in the same offence, as currently occurs in Part 8 – for example, in sections 188(2) and 189(2) – blurs this line, and unjustifiably exposes the substantially less culpable to the same maximum penalty as the offender who intentionally injures another.
- 2.17 At present in Part 8, there are offences such as those in sections 188(1) and 189(1) that require proof of an intent to cause grievous bodily harm. In our proposed new offences, the highest culpability element is “intent to injure”. While we considered the option of a further “tier” of aggravation, namely intent to seriously injure (which is, essentially, what “grievous bodily harm” means), we received some judicial feedback that often, in practice, it may be difficult on the evidence to draw a clear dividing line between “intent to seriously injure” and “intent to injure”. We therefore think that it is preferable for the level of intended injury to be a sentencing factor, rather than a substantive element of the new offences.
- 2.18 Where there is no intent to injure, the “matrix” we are proposing establishes lower level offences for assault or otherwise acting with reckless disregard for safety, that results in injury or serious injury. Both concepts of assault and recklessness are well understood in the current scheme of offences, and no further legislative definition of them is necessary. Both have been treated as signalling roughly equivalent degrees of culpability. Clearly, many instances of assault will constitute reckless disregard for safety. However, while similar in culpability terms, they are not identical; in particular, there will be occasions in which reckless disregard for safety does not require an assault.

¹⁶ See further para 2.39.

Levels of consequence

- 2.19 Currently there is a distinction in the Part 8 offences between situations involving an assault,¹⁷ those in which a victim suffers injury,¹⁸ and those in which a victim suffers grievous bodily harm or is wounded, maimed or disfigured.¹⁹ Our proposed new “matrix” does not differ significantly in this respect, although it is better organised, and we have not retained the concepts of wounding, maiming, or disfiguring.²⁰
- 2.20 The three degrees of consequence proposed are:
- assault;
 - injury;
 - serious injury.

Assault

- 2.21 “Assault” is defined in section 2 of the Crimes Act. It covers both the intentional application of force to the person of another, and threats of force by act or gesture. Rather than being a “consequence” per se, assault clearly describes conduct; however, it addresses the category of cases where no injury has ensued, or only relatively minor injury, such that it is not considered appropriate by prosecutors to charge with the more aggravated offence.

Injury

- 2.22 As already defined in section 2 of the Crimes Act, “to injure” means to cause actual bodily harm. While we did not consider that this existing aspect of the definition required reform, our draft Bill refines the definition to make clear that it excludes psychological and emotional harm.²¹
- 2.23 This addresses the dicta of the Court of Appeal in the case of *R v Mwai*,²² in which the Court indicated that “actual bodily harm” might well include recognised psychiatric injury, if supported by expert evidence of “a discernible intrusion upon or interference with the normal functioning of the physical or mental process”. The Court considered that “mind and body are inseparable” and noted “the artificiality of separating the mind from the physical body, and treating them as distinct entities.”²³
- 2.24 While we are not aware of any case in which purely psychological or emotional harm has been recognised as an “injury”, it was not desirable to leave this important question unresolved.

17 Crimes Act 1961, ss 193 and 196.

18 Crimes Act 1961, ss 189(1) and 189(2).

19 Crimes Act 1961, ss 188(1) and 188(2).

20 See further para 2.09.

21 Crimes (Offences Against the Person) Amendment Bill, cl 4.

22 *R v Mwai* [1995] 3 NZLR 149, 155 (CA) Hardie Boys J for the Court.

23 *R v Mwai*, above n 22, 154.

- 2.25 If psychological or emotional harm was regarded as an “injury”, it would have two consequences. First, psychological or emotional harm *alone* could provide a foundation for the laying of an injury charge. Secondly, where it coincided with physical injury, it could be a basis for laying an aggravated (eg, a serious injury) charge.
- 2.26 In our view, in almost all cases, the level of psychological or emotional harm incurred will coincide with the degree of injury (which will in turn tend to coincide with the nature of the attack). To the extent that this does not hold true, it is likely to be attributable to the greater psychological or emotional vulnerability of a particular victim. That is clearly a factor that may be taken into account on sentence, but it should not be a factor that, in the absence of any other physical injury, elevates what would otherwise be a mere assault to a substantially more serious offence. We have therefore excluded it from the injury definition “for the purposes of this Act” (ie, the Crimes Act). There is nothing to prevent it being taken into account, as it always has been, for sentencing purposes under the Sentencing Act 2002.

Serious injury

- 2.27 Our draft Bill substitutes “serious injury” for the current concept of “grievous bodily harm”, both in the matrix of core assault and injury offences, and in a small number of consequential amendments elsewhere in the Crimes Act. This is not intended to change the existing scope of the law. Grievous bodily harm already means “really serious harm”.²⁴
- 2.28 We are proposing this change simply so that the offences are cast in more user-friendly and generally understood terms. Our draft Bill states that “serious” has the same meaning as “grievous” currently has, to signify that the status quo is intended to be preserved. We hope this will ensure that “grievous” is interpreted by reference to the existing legal position, as meaning “really serious harm”. While this may be regarded as somewhat circular, if references to “serious injury” were left unclarified, the intended scope of the new language would be open to question, and the boundary between injury and serious injury would be unclear. We were concerned to minimise any prospect of so-called “creep”, whereby offences that historically would properly have been regarded as mere injuries are able to be charged under the more serious offence – giving rise to potential inconsistency, and unfairly exposing some defendants to the aggravated 14-year maximum penalty.

SECTION 9 OF THE SUMMARY OFFENCES ACT

- 2.29 Section 9 of the Summary Offences Act 1981 (common assault) provides that every person is liable to imprisonment for a term not exceeding 6 months who assaults another person. It duplicates the Crimes Act common assault offence, with a lower maximum penalty.
- 2.30 We do not consider that there is any proper justification for this; there should be a single offence of “common assault”, and it is a matter for the sentencing judge in the circumstances of the individual case to assess what penalty is appropriate. We therefore recommend the repeal of section 9.

²⁴ *R v Waters*, above n 14, 379.

- 2.31 However, there is a difficulty in proceeding with immediate repeal. Under section 9, by virtue of its 6-month maximum penalty, a defendant would normally be entitled to elect jury trial.²⁵ However, this generally applicable right is overridden in relation to section 9 by section 43 of the Summary Offences Act, which provides that charges under sections 9 and 10 can only be tried summarily before a judge sitting alone.
- 2.32 If section 9 was repealed, all common assault charges would necessarily be laid under the Crimes Act. Because of the Crimes Act common assault penalty, such charges would be eligible for election for jury trial. We consider this undesirable. Common assault is a high volume offence that is generally relatively minor in nature. It does not, in our view, justify the time, expense and inconvenience to the community that a jury trial necessarily entails.
- 2.33 We briefly considered the option of whether, if section 9 was repealed, section 43 of the Summary Offences Act might be amended to include a reference to Crimes Act common assault; or whether a provision analogous to section 43 should be enacted in the Crimes Act. However, we do not support the section 43 approach. We consider it arbitrary and unprincipled. There may well be other offences that, along with common assault, similarly do not justify the investment of a jury trial. Trying to cherry-pick such offences for inclusion in a section 43-type provision is unlikely to be robust.
- 2.34 Overall, this leads us to the view that the repeal of section 9 should be deferred. We note that, as part of the criminal procedure simplification project being undertaken jointly by the Law Commission and the Ministry of Justice, there is a proposal to raise the threshold for the election of a jury trial from 3 months' imprisonment to 3 years. If that proposal is adopted, it would address the problems outlined above. We therefore recommend reconsideration of the repeal of section 9 as part of that other project.

MAXIMUM PENALTIES

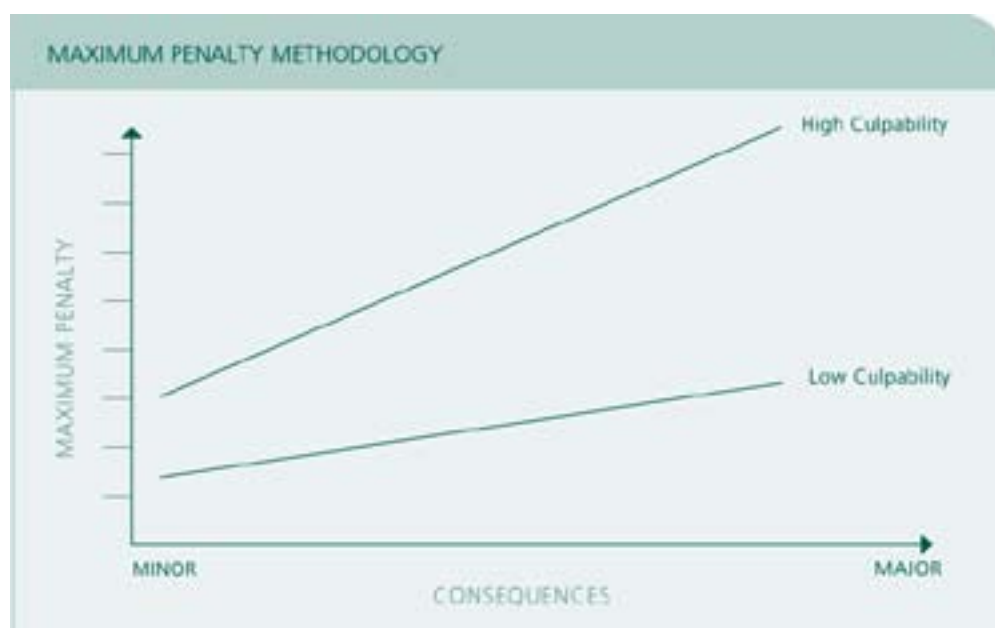
- 2.35 Maximum penalties indicate the relative seriousness of offences. As a matter of sentencing theory, they are supposed to be set by reference to the worst class of case of the particular category of offending – in other words, to reflect the term of imprisonment that society considers justified in the worst class of case.
- 2.36 As noted earlier in the chapter, the current maximum penalties included in Part 8 vary widely, without reference to any apparent governing principle. We are, therefore, proposing a number of revisions.

The approach to penalties generally

- 2.37 While taking the view that a considerable overhaul of maximum penalties was required, we did not consider that it was open to us to start completely afresh. Clearly, while it is important for Part 8 maximum penalties to be internally coherent, and an appropriate reflection of modern views of culpability, it is just as important to preserve relativities between Part 8 maximum penalties and maximum penalty levels elsewhere on the statute book.

25 New Zealand Bill of Rights Act 1990, s 24(e); Summary Proceedings Act 1957, s 66.

- 2.38 The approximate approach we have taken to the Part 8 maximum penalty review can be illustrated as follows:



- 2.39 This reflects our view that more weight needs to be attributed to culpability in setting the maximum penalty, than to consequence. The culpability of a person who causes harm to another is best assessed by reference to his or her state of mind at the time of the offending. Whereas the public intuitively would expect the outcome of the defendant's acts to be taken into account, consequence may well be a matter of chance, particularly in the context of an assault. When culpability is low, the penalty should not be aggravated as much, even when the consequences – primarily attributable to bad luck – turn out to be very serious. When culpability is high – when an offender has intent to seriously injure, for example – the likelihood that they will achieve that objective, or that the consequences will in any event be very serious, will tend to increase. The penalty they receive on account of that consequence should therefore be proportionately greater.

Application to the new core offences

- 2.40 The proposed maximum penalties for the new offences discussed in this chapter are:²⁶

INTENT TO INJURE	ASSAULT / RECKLESS DISREGARD FOR SAFETY
Section 188(1) causing serious injury with intent to injure – 14 years	Section 188(2) causing serious injury by assault or reckless disregard for safety – 4 years
Section 189(1) causing injury with intent to injure – 10 years	Section 189(2) causing injury by assault or reckless disregard for safety – 3 years
Section 189A(1) assault with intent to injure – 5 years	Section 189A(2) common assault – 2 years

²⁶ The section numbers referred to in the table are the new section numbers that appear in our draft Bill in clause 22: see further Appendix B.

- 2.41 None of the proposed maxima have decreased, relative to current maximum penalties. While a number of them look quite different, the differences are more apparent than real. They are a necessary consequence of the reorganisation of the offences. Only one of the proposed changes represents a real increase in maximum penalty, for reasons that are explained below.

Effect of the reorganisation of offences

New sections 188(1) and 189(1)

- 2.42 There are currently different offences depending on whether the offender's intent is to cause "grievous bodily harm" or "to injure". However, if our recommendation above (paragraph 2.17) was adopted, this distinction would be removed. Offences with the highest culpability would require only proof of an intent to injure.
- 2.43 We propose that the highest offence in the new hierarchy (causing serious injury with intent to injure – new section 188(1)), should carry a maximum penalty of 14 years' imprisonment, with a 10-year maximum penalty for the next most serious offence (injuring with intent to injure – new section 189(1)).
- 2.44 These penalties are higher than their apparent equivalent under the current law: the maximum penalties for wounding with intent to injure and injuring with intent to injure are only 7 years and 5 years respectively. However, this is not the correct comparison. The worst class of case for our proposed new offences in section 188(1) and 189(1) will be those in which there is an intent to cause *serious* injury. The analogous current offences are wounding with intent to cause grievous bodily harm and injury with intent to cause grievous bodily harm, which have maxima of 14 years and 10 years respectively. In other words, the penalties applying to the worst case of care would not change.

New section 188(2) – no current maximum penalty

- 2.45 The offence in new section 188(2) (causing serious injury by assault, or acting with reckless disregard for safety) carries a proposed maximum penalty of 4 years. There is currently no equivalent maximum penalty for cases of reckless injury. Although section 189(2), as it is currently drafted, includes reference to injuring with reckless disregard for safety, the 7-year maximum must be taken to relate to the worst class of case – those who intend to injure.

New section 189A(2) – common assault

- 2.46 Finally, the penalty for common assault has been raised from 1 year (in the current section 196 offence) to 2 years. However, this is to accommodate aggravating factors that were previously subject to their own specific offences – chiefly the proposed repeal of the specific offences of assault on a child and male assaults female that are currently in section 194.²⁷ Again, while the penalty thus appears to have doubled, in practice it has not changed.

27 See further chapter 3.

The increased maximum penalty – new section 189A(1)

- 2.47 For the offence of assault with intent to injure, in new section 189A(1), we have proposed a maximum penalty of 5 years' imprisonment, which is 2 years higher than the current maximum penalty in the analogous section 193 offence. There are two reasons for this recommendation.
- 2.48 First, in our view, the current maximum penalty under section 193 (the analogous provision) is a little low, given that it potentially also applies to cases in which there is intent to seriously injure.
- 2.49 Secondly and more importantly, given our view that the culpability level of an offender should be regarded as paramount, the 5-year proposed maximum was set with an eye on relativity with the penalties proposed for the lower culpability offences – where injury is not intended, but is the unfortunate byproduct of an assault or acting with reckless disregard for safety. The proposed penalties for these offences range from 2 to 4 years. Where culpability is higher – in other words, where intent to injure can be proved, even though injury did not result – it needs to be reflected in the maximum penalty.

*Penalty relativities**New sections 188(2), 189(2) and 189A(2) – the “low culpability” category of offences*

- 2.50 The differentiation between the offences in the “low culpability” assault/reckless disregard for safety column is small, ranging from 2 to 4 years, reflecting our view that culpability carries more weight than consequences.

New section 188(1) and 188(2) relativities

- 2.51 We began this discussion by summarising our thinking on a possible methodology for coherently approaching the allocation of maximum penalties within the “matrix”. Consistent with that line of thinking, the proposed 14-year maximum penalty under new section 188(1) differs a great deal from the proposed 4-year maximum penalty under new section 188(2). Although both offences address cases in which serious injury has been caused, the offender's culpability is very different. Under section 188(1), in the worst class of cases, there will have been intent to seriously injure. Under section 188(2), the worst class of case is acting with reckless disregard for the safety of any person – in other words, unreasonably running a risk.
- 2.52 A similar pattern is evident in the other proposed maximum penalties when “high culpability” and “low culpability” equivalents are compared, for identical reasons.

**OTHER
OFFENCES**

- 2.53 As well as the new core assault and injury offences, we recommend that the following offences should be retained. The discussion below sets out, in relation to each, first why we recommend their retention, and secondly, a brief explanation of the key changes we are proposing. Broadly speaking, the changes do two things: modernise the drafting language (without significantly altering scope), and alter the maximum penalties (in three instances by reducing them substantially).

Disabling – new section 197

- 2.54 We consider that it is necessary to retain the “disabling” offence, which applies when another person is “stupefied” or rendered unconscious. There will be cases of disabling that do not amount to assault, do not cause any injury, fall short of an attempt to commit some other crime, and do not constitute endangering (because without this offence provision, stupefying would not be an unlawful act). The offence therefore addresses a real gap in the law.
- 2.55 We recommend some minor drafting changes to the provision, to ensure that its language is consistent with other changes proposed elsewhere. However the principal change, and the one that we envisage would give rise to the most concern, is the reduction of the maximum penalty from 5 years’ imprisonment to 2 years.
- 2.56 Where stupefying facilitates more serious offending – sexual violation, for example – the more serious offending would be charged, and stupefying would, in all likelihood, be a very serious aggravating factor. Where it constitutes an attempt, an attempt could similarly be charged; or where it causes injury, an injury charge might be laid under new section 189. As such, we consider that the proper scope of this offence is where stupefying, without more, occurs. In terms of culpability, we consider that it is akin to the endangering offence discussed in chapter 4, for which we have likewise proposed a 2-year maximum penalty.

Infecting with disease – new section 201

- 2.57 We recommend retention of the infecting with disease offence in section 201 of the Crimes Act. Such an offence is necessary because disease is not necessarily synonymous with “injury”, even though transmitting disease has similarities to causing injury, in terms of its level of culpability. The redrafted offence in section 201(1) of our proposed Bill is the same as the offence already in section 201, with the same maximum penalty of 14 years. The minor drafting changes that have been made to it do not alter its scope. The term “wilful” has been changed to “intentional”, which codifies case law.²⁸ We also recommend deleting the references to “sickness” and “without lawful justification or excuse”, both of which are superfluous.
- 2.58 Subsections (2) to (7) of our proposed draft would be new additions to the Crimes Act. However, they very largely reproduce the provisions in clauses 126 and 127 of the Public Health Bill, currently awaiting its second reading in Parliament. We recommend that those offences be relocated in the Crimes Act, so that like offences are consolidated in one place in the statute book. The Ministry of Health (the agency responsible for the Public Health Bill) agrees that it would be appropriate to relocate the offences.
- 2.59 Draft section 201(2) is an offence of recklessly transmitting a notifiable disease or condition, as defined in Schedule 1 of the Public Health Bill. A maximum penalty of 3 years’ imprisonment is imposed, in line with the penalties proposed in our new sections 157B (grossly negligent injury by unlawful act or omission

28 *R v Mwai*, above n 22, 152.

to perform a statutory duty) and 189(2) (causing injury with reckless disregard for safety). Draft section 201(3) is an offence of recklessly putting any person at risk of contracting a notifiable disease or condition, again defined by reference to Schedule 1 of the Public Health Bill. The 2-year penalty proposed is analogous to the 2-year penalty suggested under section 157A (unlawful act or omission to perform a statutory duty that is likely to injure another).

- 2.60 Section 201A of our draft reproduces a further feature of the Public Health Bill provisions. We were advised that the select committee was concerned to ensure that the offences did not extend to people who consent to the risk of transmission of a notifiable disease, such as where one partner in a long-term relationship is HIV-positive. However, neither we nor the Ministry of Health consider that a defence of this kind should apply to the offence of intentional transmission (formerly in the Crimes Act, not the Public Health Bill, and thus not considered by the select committee).

Setting traps – new section 202

- 2.61 We recommend the retention of this provision to address what, in its absence, would be gaps in the law. There is an offence of setting traps on the land of another under the Trespass Act,²⁹ and where a trap is laid with intent to injure and injury in fact results, an injury with intent charge would be available. However, our proposed redraft of section 202 addresses two gaps: the otherwise lawful laying of traps with intent to injure or with reckless disregard for safety where, perhaps fortuitously, injury has not resulted; and allowing traps placed by somebody else to remain on one's own land with intent to injure or a reckless disregard for safety.
- 2.62 We recommend omitting the current requirement for the conduct to be "likely to injure". This does add an extra element to the offence that would not feature in our draft, because there may be circumstances in which it is unreasonable to run a known risk (as expressed in the reckless disregard for safety element), even when the chance of the risk is low. However, we think that overall this extra element unnecessarily complicates the offence, because it is difficult to think of situations where a person whose risk taking was unreasonable should not be held criminally liable.
- 2.63 Section 202 currently contains two offences, with different maximum penalties of 3 years (setting traps while in occupation or possession of any place) and 5 years (setting traps with intent to injure or with reckless disregard for safety). Our proposed draft likewise has two offences, although expressed in different terms. However, we recommend the same maximum 2-year penalty for both, consistent with the penalty proposed for all of the endangering-type offences. Where an injury or death results from the deliberate setting of a trap, higher penalties will be available under other provisions.

29 Trespass Act 1980, s 7.

Impeding rescue – new section 204

- 2.64 The offence of impeding rescue is extremely rarely charged. However, it is possible to conceive of a set of facts in which no other criminal offence would be applicable to a person who has impeded rescue and thereby endangered the life of another because they may be acting lawfully (eg, obstructing access but parked legally).
- 2.65 Our proposed redraft makes two things clear, that are not entirely clear on the face of the current provision:
- The offence could not be committed by omission; our redraft refers only to an “act”. To extend liability in such situations to omissions would have bordered upon the establishment of what is sometimes called “a Samaritan duty”, which currently does not exist, in New Zealand criminal law. There is extensive philosophical debate in the literature about whether such a duty is workable or appropriate. We are inclined to the view that it is neither, and that it is not appropriate to extend the law in this way.
 - We have expressed the mens rea element of the offence as recklessness. The current offence is silent as to the culpability level required for a successful charge.
- 2.66 We are also proposing to reduce the maximum penalty for this offence from 10 years to 2 years. This is a very substantial reduction. However, in our view, the current maximum penalty, must have been based upon a misconception as to the scope of the offence. Presumably, the thinking in setting such a penalty was that in the worst class of case of impeding rescue, the defendant would act with malicious intent, and the victim would die. However, in such a case, a homicide charge would be appropriate. Similarly, if injury resulted in such circumstances, a charge of injury with intent would properly reflect the culpability involved. The essence of the offence is, therefore, endangering, and its penalty needs to be aligned with the other offences of similar character already discussed, above.

RECOMMENDED REPEALS

- 2.67 We recommend repeal of the following offences, which we consider unnecessary:
- **Aggravated wounding and injury (section 191).** Section 191 deals with aggravated wounding and injury. It sets out a list of aggravating factors, such as intent to commit any crime, or avoid arrest, or facilitate the flight of any other person. While on the face of the section it may appear that it has a different focus from the core assault and injury offences, because it does not require proof of intent to injure, the Court of Appeal in *R v Tihi* held that before an accused can be found guilty of an offence under this section, it must be shown the offender either meant to cause the specified harm, or foresaw that there was a likelihood of such risk.³⁰ More fundamentally, we take the view that the better approach in principle is to recognise aggravating factors, such as those listed in section 191, as relevant to sentencing under the core assault and injury offences, rather than as elements that justify a separate offence.
 - **Aggravated assault (section 192(1)).** Section 192(1) is an offence of aggravated assault. The aggravating factors are the same as the section 191 factors, described above. We recommend repeal of this offence for the same reasons as section 191.

³⁰ *R v Tihi* [1989] 2 NZLR 29 (CA).

- **Discharging a firearm or doing a dangerous act with intent (section 198).** Section 198 provides that everyone is liable to imprisonment for a term not exceeding 14 years, who with intent to do grievous bodily harm, discharges any firearm or similar weapon at any person, sends any person an explosive substance or device, or sets fire to any property. There is a parallel offence where there is intent to injure, with a maximum penalty is 7 years. The reference to setting fire to any property is superfluous; arson is a separate offence, with a maximum penalty of 14 years, that does not require proof of intent to cause grievous bodily harm or injury. All of the other offences set out in section 198 can, in our view, be adequately, and indeed more appropriately, dealt with by utilising other charges of either injury or attempt. In the circumstances addressed by section 198(1), if serious injury was caused, our proposed new sections 188(1) or 189(1) would apply, with a maximum penalty of either 14 years, or 10 years if any lesser injury resulted. Where no injury occurred, such behaviour would clearly constitute an attempt under section 188(1), with a maximum penalty of 7 years. Because of the lesser maximum penalty that would apply in the latter situation, the police do not support the repeal of section 198. However, in our view, the proper focus is not the reduction in the available maximum penalty, but rather the extent to which it will affect sentences actually imposed when a firearm or similar weapon is discharged but no injury occurs. On the approach currently taken by the courts, there is little or no prospect that such a sentence would exceed or even approach a prison term of 7 years. Reliance on an attempt charge is therefore unlikely to effect any reduction in the severity of punishment.
- **Acid throwing (section 199).** Under section 199 it is an offence to throw a corrosive substance at any person, or apply such a substance, with intent to injure or disfigure them. The maximum prison term is 14 years. For similar reasons to those outlined above, in relation to section 198, we consider that our proposed new sections 188 and 189 offer a more principled method of addressing such conduct. The 14-year term in section 199 has clearly been set to address the worst class of case in which serious injury has resulted; under section 188(1), our proposed maximum is likewise 14 years. Where there is no injury, the conduct can properly be addressed by a charge of attempt under section 188 or section 189.
- **Poisoning with intent (section 200).** Section 200 contains two poisoning offences: poisoning with intent to cause grievous bodily harm, and poisoning with intent to cause inconvenience or annoyance. The first of these would constitute either attempted murder or, if actual bodily harm resulted, either an injury or serious injury charge. The second addresses situations where the intention of administering a noxious substance is solely to cause inconvenience or annoyance, no injury results, and there has been no reckless disregard for safety sufficient to warrant an attempt charge under new section 189(2). We doubt that this is a proper subject for criminal liability at all – certainly not one that could justify a maximum prison term of 3 years.

- **Assault with a weapon (section 202C).** Under section 202C, everyone is liable to a prison term not exceeding 5 years who in assaulting any person uses any thing as a weapon, or is in possession of any thing in circumstances that show an intention to use it as a weapon. This offence singles out a weapon as an aggravating factor that justifies increasing the maximum penalty for assault five-fold, in cases where there is no intent to injure, and no injury is caused. In cases in which there is intent to injure, or injury is caused, there is no need for section 202C; an injury or attempt charge could, and should, be laid. We can find no basis in principle on which to justify such a heavily inflated penalty, or a separate offence for cases involving an assault with a weapon, based solely on this one aggravating factor. We note that our recommended maximum penalty for common assault will be 2 years (double the current maximum), which will allow aggravating factors including the use of a weapon to be properly taken into account.

Chapter 3

Specific assaults

INTRODUCTION 3.1 This chapter considers whether the victim-specific assault offences that currently exist in Part 8 and in numerous other pieces of legislation should be retained, and whether or not it is necessary or appropriate to enact any new victim-specific assault provisions.

3.2 The nub of our recommendations is that the offences of assault on a child and male assaults female in section 194 of the Crimes Act should be repealed. We recommend retaining the status quo as regards assaults on police officers, and further work in relation to the numerous other specific assault provisions on the statute book – assaults on enforcement officers, judges, court staff, and so on. We have not recommended the establishment of any new specific assault offences.

THE ADVANTAGES AND DISADVANTAGES OF SPECIFIC ASSAULT PROVISIONS

3.3 The main argument in favour of the creation or retention of victim specific offences is one of “fair labelling” or symbolism. It is based on the belief that offending against particular categories of victims is so substantially different in character and culpability that it is appropriate to distinguish it from generic conduct of the same kind by way of a specific offence category. Without that distinction, it is argued that the aggravated nature of victim-specific conduct will not be adequately signalled, and that public messages of disapproval will not be properly expressed. By the same token, it is argued that the generic conduct, by being grouped together with the aggravated conduct, will be labelled (by association and through the level of the maximum penalty) as more serious than it actually is.

3.4 We acknowledge the merits of these arguments. However, they must be set against the disadvantages that to a greater or lesser extent are always associated with victim-specific provisions, whatever their nature and purpose. The disadvantages are:

- **Implications for charging discretion.** Victim-specific assault or injury offences inevitably overlap with the generally applicable assault and injury offences that would otherwise be available. They therefore enlarge police discretion at the charging stage. Police do not automatically charge under victim-specific offences in all cases in which they are available; sometimes they will consider that the circumstances of the offending warrant a generally applicable charge. For example, they may not regard every assault of a female by a male as warranting exposure to the aggravated section 194(b)



penalty; and if an assault on a child has resulted in injury, they are likely to take the view that an injuring offence would be a more appropriate charge. This may produce inconsistency in charging practice.

- **Arbitrary disparity arising from singling out some aggravating factors as more important than others.** Victim-specific assault offences single out one aggravating factor, among the many possible aggravating factors that may be present in any given case, as the defining factor. In the case of male assaults female, for instance, the aggravating factor that the offender is a male and the victim is a female is singled out. In some instances, that may indeed turn out to be the most serious aggravating factor present. However, sometimes there will be other aggravating factors that are equally serious or indeed more serious, such as use of a weapon, a prior history of serious convictions, or the advanced age and vulnerability of the victim. We have suggested in chapter 2 that other aggravating factors of this kind should not be elements of the offence. They should instead be taken into account on sentence. Logically, it would seem to follow that the status of the victim should be dealt with in the same way.
- **The risk of ad hoc specific offences being randomly inserted on to the statute book, every time an issue arises that causes political or public concern.** Having identified a class of victims that arguably deserves to be singled out by its own specific offence, it can be hard to argue that another, arguably equally deserving class of victims, should not be given the same treatment. Indeed, there are already a plethora of assaults against specific victims scattered throughout the statute book, with widely varying maximum penalties. Proposals for the creation of other such offences (eg, to protect emergency doctors and taxi drivers) continue to emerge from time to time, as perceived need arises. Use of victim-specific offences thus gives rise to a “slippery slope” effect: if we create victim-specific offences in some areas, we will probably find it hard to resist doing so in others. The result will be a patchwork of offences without any logical or coherent structure.

3.5 Overall, then, the question is whether the case for establishing a specific assault provisions is sufficiently strong to overcome their manifest disadvantages.

3.6 Law reform proposals in New Zealand and other jurisdictions generally reflect a shift away from victim specific provisions.

New Zealand – Crimes Bill 1989

3.7 In 1989, a Bill was drafted to substantially revise and rewrite the 1961 Act.³¹ The Bill moved away from the use of victim-specific offences. It excluded a number of the child-specific provisions included in the 1961 Act, leaving only a small number that dealt with child sexual offences and abduction.

31 Crimes Bill 1989, above n 4.

Notably, the victim-specific assault provisions covering women and children were omitted. No issue was taken with this approach in the Casey Committee Report on the Bill.³²

Other jurisdictions' use of specific offences

- 3.8 The majority of jurisdictions we looked at have moved away from the use of victim-specific offences and law reform bodies have tended to take the same view.³³ Most jurisdictions have instead dealt with victim-specific factors as aggravating factors, which can either elevate the available maximum penalty or be taken into account at sentencing.³⁴ Some jurisdictions are silent, preferring to leave the matter to the Courts.³⁵ This approach has allowed these jurisdictions to avoid the proliferation of similar offences distinguishable only by one or two elements. Those jurisdictions that have retained any victim-specific offences have tended to confine them to offences of assaulting police or assault with intent to resist lawful arrest.

ASSAULT ON A CHILD

- 3.9 Under section 194(a) of the Crimes Act 1961, it is an offence for an adult to assault a child. The offence reads:

Every one is liable to imprisonment for a term not exceeding 2 years who—

(a) Assaults any child under the age of 14 years;

...

- 3.10 This part of this chapter explains our recommendation to repeal the child-specific assault offence in section 194(a), which 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 disadvantages of section 194(a) are such that the law will in fact be more robust without it. Our other proposals relating to ill treatment and neglect offences are discussed in chapter 5.

Problems with the current law

- 3.11 It is generally acknowledged that there is a substantial difference in culpability between assaults on children and other instances of assault. Clearly, in some individual cases, a minor assault on a child such as a smack will be less severe than some other instances of common assault on an adult. However, our work tends to indicate that the judiciary, at least, regards such conduct as more culpable;³⁶ so does current government policy, and it is probably

32 Crimes Consultative Committee, above n 5.

33 See for example United Kingdom Law Commission *Legislating the Criminal Code Offences – Offences Against the Person and General Principles* (Law Com No 218, London, 1993); Law Reform Commission of Ireland *Report on Non-fatal Offences Against the Person* (LRC 45, Dublin, 1994); Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General *Model Criminal Code – Chapter 5 – Non Fatal Offences Against the Person* (Standing Committee of Attorneys' General, Canberra, 1998).

34 See for example Criminal Code Act 2007 (WA), s 221; Criminal Code Act 1899 (Qld), s 340; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 33, 111;

35 Non-Fatal Offences Against the Person Act 1997 (Ire); Law Reform Commission of Ireland, above n 33, para 9.129.

36 See further para 3.18 below.

a fair assumption that the proposition would be generally accepted by the community. Certainly this was indicated by some recent research conducted by Colmar Brunton for the Law Commission's maximum penalty review.³⁷

- 3.12 The principal argument in favour of retaining section 194(a) is to signal that this particular category of conduct (assaults on children) is so much more serious than a “normal” assault that it requires a separate label, and an aggravated maximum penalty. However section 194(a) does not adequately achieve this purpose because it is only available to address low-level offending against children which creates an erroneous perception that offending against children is not taken seriously. Moreover, a child specific offence is not necessary to ensure that offending against children attracts a sentencing premium and that sentence levels for those who offend against children are appropriate. We discuss the issues further below.

Offence available only at the bottom end

- 3.13 Section 194(a) is the child-specific equivalent of the Crimes Act common assault offence. Its 2-year maximum penalty is double that of the penalty for common assault. If conduct is alleged to have caused the death of a child, murder or manslaughter is likely to be charged. Similarly, in a child abuse case that has resulted in significant injury, charges are much more likely to be laid under one of the generally applicable aggravated assault provisions in the Crimes Act, such as wounding or injuring with intent. These provisions have substantially higher maximum penalties (up to 14 years' imprisonment in some cases).
- 3.14 Logically, one would expect that, if allowance is to be made in the substantive offence structure for the greater culpability attaching to violence against children, this should be done across the whole spectrum of offending against children, from “common” assault to manslaughter. In fact, the current offence structure does not do this; it creates an aggravated offence only for the common assault category, at the bottom end of the spectrum of seriousness.

A perception problem

- 3.15 As a result, as one might expect, section 194(a) charges tend to be laid in response to relatively low-level offending against children. But when members of the public hear about sentences imposed for assault on a child, they may infer that the conduct that prompted the charge was much more serious than was in fact the case (because, if it had been more serious, the likelihood is that an aggravated charge would have been laid). That is, we suspect, the reason for the commonly expressed view that sentences for assaults against children are more lenient than comparable assaults on adults. In fact, our analysis has found that the reverse is true.³⁸

37 Presented with 28 different scenarios, the “cruelty to a child” scenario was ranked on average 3rd, between bulk methamphetamine importation (4th) and gang rape (2nd). While there are certainly some very significant caveats that need to be applied – the scenario was in some respects quite extreme (including forcing the child to drink urine), and the response to it cannot necessarily be extended to the context of child assault – the discussions that occurred between participants tended to be driven simply by the status of the child, not particular aspects of the scenario.

38 See further para 3.18 below.

Inconsistent police charging practice

- 3.16 As noted above, police charging practice may well be inconsistent, particularly in the absence of any prosecutorial charging guidelines (police have advised that there are currently no such guidelines). If a prosecutor puts more emphasis on the status of the victim than the nature of the conduct, it will sometimes invite under-charging – that is, reliance on section 194 when the facts support the laying of a more serious charge. That contributes to the perception problem outlined above, but equally importantly, it raises issues of natural justice, by failing to treat like offenders alike.

No reason to distinguish children from other vulnerable groups

- 3.17 Even if there was a desire to establish a whole hierarchy of child-specific offences, there is a further difficulty. There are other victims just as vulnerable as children, such as the very elderly, or severely mentally impaired. There is no case, in our view, for elevating the undeniably important interests of children above those of other equally vulnerable victims. Unless separate specific offences are also to be created for each vulnerable category of victim (which is impracticable), generally applicable maximum penalties will need to be the same as any child-specific maximum penalty. That is because maximum penalties have to be set by reference to the worst class of case, which would be an assault on a vulnerable victim. That makes the separate offence redundant at best.

Sentencing premium in the absence of a specific offence

- 3.18 In terms of whether offending against children will be accorded adequate gravity and weight in the absence of a specific assault offence, our analysis of sentencing outcomes suggests that this will indeed occur, regardless of the nature of the charge. We undertook an analysis of sentencing outcomes for offending against children. It demonstrated that sentences imposed are consistently more severe when children are the victims. In other words, there is a sentencing “premium” for this kind of conduct. For example, when sentences for assaults on children were compared with sentences for male assaults female (the two offences that can be charged under section 194, which are identical except for the identity of the victim), the average term of imprisonment for male assaults female was 8.1 months whereas for assault on a child it was 10.1 months. A similar pattern is evident across the spectrum, from relatively minor assaults to more serious ones.
- 3.19 This sentencing premium is not dependent upon the existence of a child-specific offence. The difference in penalty applied regardless of the nature of the offence charged. In other words, it was circumstance-based rather than offence-based.
- 3.20 The sentences considered were imposed prior to the enactment of new section 9A which was inserted into the Sentencing Act 2002 in December 2008.³⁹ It explicitly provides that offending against children, defined as less than 14 years of age, is an aggravating factor. Early decisions under 9A indicate that the courts have recognised its purpose and significance.⁴⁰

39 Sentencing (Offences Against Children) Amendment Act 2008, s 4.

40 *R v Anthony Mervyn Richards* (1 May 2009) HC WN CRI-2008-078-001067, para 17 Gendall J.

Our recommendation for repeal

- 3.21 We therefore consider that the weight of argument leans in favour of repealing section 194(a). In the light of this recommendation, we are making a parallel recommendation that the maximum penalty for common assault (new section 189A(2)) should be increased to 2 years. This will ensure that assaults against children are still punishable by an appropriate maximum penalty – that is, the same penalty that currently exists. Of course, assaults against children that cause injury, or where there is an aggravated intent, will be chargeable under other offences with higher maxima: see further chapter 2.
- 3.22 We consider that the current 2-year penalty for child-specific assault that does not cause injury is appropriate, relative to other penalties. Pending a first principles review of maximum penalties – which we support – it has been necessary given the limited scope of this project to preserve the existing relativities. While comparisons have from time to time been made with the maximum penalty, for example, for the wilful ill treatment of animals under section 28 of the Animal Welfare Act 1999, the example is not analogous. The analogous offence in the context of offending against children is wilful ill treatment in section 195 of the Crimes Act, with a current maximum penalty of 5 years imprisonment, which we are recommending should be increased to 10 years.

MALE ASSAULTS FEMALE

- 3.23 Under section 194(b) of the Crimes Act 1961, it is a specific offence for a male to assault a female. Like section 194(a) (assault on a child), it is subject to a maximum term of 2 years' imprisonment, as opposed to the 1-year maximum for common assault. Section 194(b) provides:

Every one is liable to imprisonment for a term not exceeding 2 years who—

...

(b) Being a male, assaults any female.

- 3.24 While an assault by a male on a female is generally a relatively culpable form of assault, we have reservations about whether it is universally sufficiently more culpable to warrant a separate offence. While as a general rule, the average male will very often have a physical advantage over the average female, the circumstances will differ in each case.
- 3.25 Police charging practice suggests that section 194(b) will be used for cases where the assault was more than trifling, but (we assume) short of the really serious assaults that would trigger a more serious injury charge. In other words, the application of the existing offence in practice tends to undermine any argument for its retention on the basis of symbolism: it is not the symbolism that drives its use; it has more to do with ensuring that charges are tailored so that maximum penalty adequately reflects the culpability.
- 3.26 We considered whether the offence might have been designed, or be operating, as a proxy for an offence of domestic assault. However, not all domestic assaults will be perpetrated by a male partner; a woman might be the perpetrator in some cases, or there might be an abusive same sex relationship. If a domestic assault offence is the end that is sought, section 194(b) is not doing a good job.

- 3.27 Whilst acknowledging the limited benefits of section 194(b) as a proxy for domestic assault, police and others noted a concern that, if the offence was repealed, and those currently convicted under it convicted of common assault instead, there would be nothing on the criminal record to establish a history of that category of offending. That might be relevant information to a judge for sentencing purposes, or Child, Youth and Family in considering the placement of children, for example.
- 3.28 We acknowledge that this is an important point. However, again, we note that section 194(b) is not a good means to that end. Like assault on a child, it 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 or even death of the female, generally applicable charges ought to be, and in most cases would be, laid. In other words, a criminal record that relies upon the offence of male assaults female to indicate propensity to engage in domestic assault will be highly misleading. Ultimately, everybody agreed that a method of recording such propensity, covering the whole range of relevant offences, would need to be developed. We understand that the Ministry of Justice and Police are working together to address this. We are advised that police methods of coding are capable of being modified to do the job.
- 3.29 In light of this we recommend that section 194(b) should be repealed.

Domestic assault

- 3.30 As noted above, we considered whether section 194(b) might have been designed, or be operating, as a proxy for an offence of domestic assault. The hidden nature of domestic assault is a possible rationale for a specific offence. There is currently a government-funded campaign trying to promote visibility and shift social mores, which some might think would be undermined by the omission of a specific offence. By separately labelling this offence category, it potentially has a “name and shame” effect.
- 3.31 However, the central message of that campaign is that domestic assault is just as bad as other assault. It would, in fact, be entirely consistent with that message to repeal particular provision for male assaults female, and decline to introduce new provision for domestic assault, on the basis that all are equally culpable. To provide for such incidents separately is in fact inconsistent with the primary message.
- 3.32 However, more importantly, there are likely to be very significant problems when attempting to define “domestic assault”, and it is difficult to construct a definition – whether “relationship in the nature of marriage”, cohabitation, long term relationship, and so on – that would not potentially result in some very significant anomalies.
- 3.33 We do not recommend the introduction of a new domestic assault offence.

- 3.34 The Crimes Act 1961 and Summary Proceedings Act 1981 each contain specific assault provisions in respect of police officers acting in the execution of their duty. Section 192(2) of the Crimes Act provides:

192 Aggravated assault

...

(2) Every one is liable to imprisonment for a term not exceeding 3 years who assaults any constable or any person acting in aid of any constable, or any person in the lawful execution of any process, with intent to obstruct the person so assaulted in the execution of his duty.

- 3.35 Section 10 of the Summary Offences Act 1981 (which also applies to prison officers) provides:

10 Assault on police, prison, or traffic officer

Every person is liable to imprisonment for a term not exceeding 6 months or a fine not exceeding \$4,000 who assaults any constable, or any prison officer, or any traffic officer, acting in the execution of his duty.

- 3.36 The principal argument for specifically protecting police by way of a unique assault provision (or provisions) derives from the symbolic nature of their role. Police are the front line of state enforcement – the so called “thin blue line” between lawlessness and the rest of us. Implicitly, an attack on a police officer is an attack on the authority of the state. The police are necessarily at the forefront of almost every emergency response; as was said to us (by the police), whereas others can run from danger, police must run towards it. Because of that, they are entitled to expect robust state protection. Furthermore, it is not just about protection of police; if assaults on their person and authority are in any way deterred by the existence of a specific offence, that is of general benefit to us all, not just a benefit to police officers.
- 3.37 There is thus an argument that assault on a police officer is qualitatively different in its culpability from other assaults, and that this difference should be explicitly signalled. Indeed, internationally, assault on a police officer is the one specific assault offence that consistently reappears in the precedents, and that law reformers have consistently decided to retain.⁴¹
- 3.38 The police put their case strongly, and ultimately we are persuaded that a specific offence of assault on a police officer should for the time being be retained. No change to sections 10 and 192(2) is recommended.

⁴¹ See for example United Kingdom Law Commission, above n 33, 41; and Law Reform Commission of Ireland, above n 33, paras 9.111 – 9.115.

ASSAULTS ON OTHERS IN PERFORMANCE OF THEIR DUTIES

3.39 Currently there are a myriad of statutory offences involving assaults and other related conduct (eg. obstruction) on a range of enforcement officers and officials. These include the following:

SECTION	OFFENCE – ASSAULTS	MAXIMUM PENALTY
Animal Products Act 1999, s 133(1)	Offence to assault, threaten, or intentionally obstruct or hinder an animal product officer official assessor, or recognised risk management programme verifier.	\$50,000
Biosecurity Act 1993, s 154(a)	Offence to threaten, assault or intentionally obstruct or hinder an inspector or authorised or accredited person.	12 months or \$50,000
Civil Defence Emergency Management Act 2002, s 98	Offence to threaten, assault, or wilfully obstructs person performing duty under Act.	3 months or \$5,000
Copyright Act 1994, s 221	Offence to assault, threaten, intimidate or intentionally insult member of tribunal.	\$1,000
Courts Security Act 1999, s 30	Resists/ assaults/ wilfully obstructs Court Security Officer.	3 months or \$300
Crimes Act 1961, s 401	Assault of judge, registrar, officer of the court, witness	3 months or \$1,000
Customs and Excise Act 1996, s176	Threatens/ assaults/ by force resists/ intentionally obstructs or intimidates customs officer.	12 months or \$15,000
Disputes Tribunal Act 1988, s 56(1)	Assault of referee, witness, or officer of Tribunal.	\$1,000
District Court Act 1947, s 18	Assault on officer of the Court (this does not require a charge, so is not an offence).	\$300
Employment Relations Act 2000, s 196(1)	Assault on member of authority/ judge/ registrar, etc.	3 months or \$5,000
Evidence Act 2006, s 179	Assaults witness, solicitor or Court Officer during video link proceedings to Aus Court.	3 months or \$1,000
Forests Act 1949, s 59	Assault of forestry worker, other person exercising duties under the Act.	\$2,000
International War Crimes Act 1995, s 40(1)	Assault of judge, prosecutor, registrar, barrister or solicitor.	3 months or \$1,000
Judicature Act 1908, s 56	Assault of judge, registrar, officer of court, etc of Federal Court of Aus sitting in NZ.	3 months or \$1,000
Judicature Act 1908, s 56C	Assault of judge, registrar, officer of court, juror or witness.	3 months or \$1,000
Health Act 1956, s 72	Threatens/ assaults/ intentionally obstructs/ hinders health officer or police officer acting under the Act.	6 months or \$4,000
Health Practitioners Competence Assurance Act 2003, Schedule 1, cl (13)(1)	Assault on member of tribunal, officer, barrister or solicitor or witness.	\$10,000

Human Rights Act 1993, s 114(1)	Assault of judge, officer, registrar, prosecutor.	10 days or \$1,500
Lawyers and Conveyancers Act 2006, s 251(1)	Assault of member or officer of Disciplinary Tribunal.	\$5,000
Reserves Act 1977, s 98	Assault of ranger or employee of the Crown.	3 months or \$2,500
Residential Tenancies Act 1986, s 112(1)	Assault of tenancy adjudicator or officer of tribunal or witness etc.	\$1,000
Resource Management Act 1991, s 282	Assault of member of, special adviser to or officer of Court.	10 days or \$1,500
Social Workers Registration Act 2003, Sched 2 cl (13(1)	Assault on member/ advisor/ officer of Complaints and Disciplinary Tribunal.	\$2,000
Summary Offences Act, s 10	Assault on police, prison, or traffic officer.	6 months or \$4,000
Summary Proceedings Act 1957, s 192(9)	Assault of special constable or assistant in execution of duty.	3 months or \$300
Supreme Court Act 2003, s 35(1)	Assault of Supreme Court Judge, Registrar, witness.	5 days or \$5,000
Weathertight Homes Resolution Act 2006, s 115	Assaults/ threatens/ intimidates Member of Tribunal.	\$5,000
Wildlife Act 1953, s 40(1)	Assault of ranger or assistant.	3 months or \$5,000
Wildlife Act 1953, s 51	Assault of inspector or other authorised person.	\$5,000
Wine Act 2003, s 101(1)	Assault of wine officer, assistant or authorised person.	\$50,000
SECTION	OFFENCE – OBSTRUCTION	MAXIMUM PENALTY
Antarctica (Environmental Protection) Act 1994, s 47	Offence to obstruct inspectors.	\$1,500
Auckland Harbour Act 1874, s 34	Penalty for obstructing receiver.	\$200
Biosecurity Act 1993, s 134	Enforcement of area controls.	5 years or \$100,000 or both (individual), \$200,000 (company)
Building Act 2004, s 367	Offence to obstruct execution of powers under this Act.	\$5,000
Civil Aviation Act 1990, s 55	Personation or obstruction of aviation security officer.	3 months or \$2,000
Commerce Act 1986, s 103	Offences.	\$10,000 (individual), \$30,000 (body corporate)
Companies Act 1993, s 365	Registrar's powers of inspection.	\$10,000
Driftnet Prohibition Act 1991, s 25	Offences.	\$20,000
Fisheries Act 1996, s 113W	Persons on New Zealand ships to co-operate with foreign high seas inspectors.	5 years or \$250,000 or to both
Fisheries Act 1996, s 229	Obstructing fisheries officers.	\$250,000

Gambling Act 2003, s 346	Obstructing gambling inspector.	\$2,000 (individual), \$5,000 (higher grade of licence)
Health and Safety in Employment Act 1992, s 48	Obstruction, etc.	\$250,000
Historic Places Act 1993, s 21	Rights of entry.	\$2,500
Immigration Advisors Licensing Act 2007, s 69	Offence to obstruct inspection.	\$10,000
Insurance Companies (Ratings and Inspections) Act 1994, s 26	Registrar's powers of inspection.	\$10,000
Land Transport Act 1998, s 53	Obstruction of enforcement officer or dangerous goods enforcement officer.	\$10,000
Limited Partnerships Act 2008, s 78	Registrar's powers of inspection.	\$10,000
Maritime Security Act 2004, s 74	Personation or obstruction of authorised person.	3 months or \$2,000
Mental Health (Compulsory Assessment and Treatment) Act 1992, s 117	Obstruction of inspection.	\$2,000
Misuse of Drugs Act, s 16	Obstruction of officers.	3 months or \$500 or both
Misuse of Drugs Amendment Act 2005, s 60	Offence to obstruct enforcement officer or member of police under this Part.	\$1,000
Motor Vehicle Sales Act 2003, s 109	Offence to obstruct inspection.	\$2,000
Motor Vehicle Sales Act 2003, s 110	Offence to obstruct search.	\$2,000
Real Estate Agents Act 2008, s 153	Offence to resist, obstruct, etc.	\$40,000 (individual), \$100,000 (company)
Retirement Villages Act 2003, s 97	Registrar's powers of inspection.	\$30,000 (individual), \$100,000 (body corporate)
Serious Fraud Office Act 1990, s 45	Offence to obstruct investigation, etc.	12 months or \$15,000 (individual), \$40,000 (company)
Transport Act 1962, s 80	Inspection of vehicles required to have certificates of fitness or permits.	\$1,000

- 3.40 A jumble of approaches is evident in these offences. Their maximum penalties vary widely. Some of the offences refer to assault; others to other forms of obstruction, using language such as “resist”, “impede”, “obstruct”, “use abusive or threatening language”, or “behave in a threatening manner” in addition to, or instead of, assault.
- 3.41 It is questionable what these offences add to the general provisions in the Crimes Act 1961 and Summary Offences Act 1981. They appear to have been created for symbolic reasons to recognise the special role of enforcement officers and the risks they face in carrying out their duties. However, it is doubtful that

they achieve this because the low level nature of the offences risks the same problem of perception that we discussed in relation to the child specific offence earlier in the chapter.

- 3.42 Moreover, if we are concerned with people on the “front line”, there are persons other than law enforcement officers on whom we rely in a crisis.
- 3.43 A consultation document circulated by the Scottish Executive illustrates the problem that quickly arises when one group is singled out to the exclusion of another. In 2003, the Executive circulated a consultation paper titled *Protection of Emergency Workers*.⁴² It concluded that common law and statutory protections were inadequate and that protection for emergency workers needed to be brought into line with that available for police. The paper started by making its case for police, fire service and ambulance officers. It then drew a link between these workers and general practitioners, community nurses and community midwives who attend emergencies. Added to this list were doctors, consultants, allied health professionals and nurses who work in emergency departments. Those that assisted these staff were also to be protected. And if that was not sufficient, the proposed protection was also stated to cover “workers who respond to environmental emergencies” including those who fix gas leaks or work to decontaminate water. The legislation proposed would have made it an offence to obstruct, assault, or hinder one of these categories of workers in the execution of their duty.
- 3.44 This “floodgates” problem leads us to the view that *no* specific assault offences other than assault on a police officer are justified.
- 3.45 In addition, singling out some occupational groups for special treatment not only creates a risk of anomalies. It also adds unnecessary technicality and complexity to prosecutions because of the need to prove the status of the victim. In our view, the status of the victim and the function that he or she performs at the time of the assault are matters that can be properly taken into account as part of the sentencing process.
- 3.46 In principle, we consider that the various specific assault provisions that apply to enforcement officers and other officials should be repealed.

Recommendation for further work

- 3.47 The scope of the work involved in addressing specific assault and/or obstruction offences relating to all enforcement officers is considerable. It could not be achieved within the time available to us – particularly given the likelihood that we would propose repeal of a number of the offences and perhaps indeed all of them, which would have required extensive consultation. We would have needed to consider the implications of the blurry line between offences that refer to assault (perhaps including reference to other forms of obstruction) and those solely directed to obstruction: is there any basis on which to argue that the two categories of offence are different in character?
- 3.48 We recommend that further work should be undertaken on this issue, by either the Law Commission or the Ministry of Justice.

⁴² Scottish Executive *Protection of Emergency Workers – A consultation paper* (Astron, Edinburgh, 2003).

Chapter 4

Endangering, negligent injury, and homicide

THE CURRENT LAW

- 4.1 Sections 145, 160, and 190 of the Crimes Act 1961 provide (in relevant part):

145 Criminal nuisance

- (1) Every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.

...

190 Injuring by unlawful act

Every one is liable to imprisonment for a term not exceeding 3 years who injures any other person in such circumstances that if death had been caused he would have been guilty of manslaughter.

160 Culpable homicide

...

- (2) Homicide is culpable when it consists in the killing of any person—
- (a) By an unlawful act; or
 - (b) By an omission without lawful excuse to perform or observe any legal duty; or
 - (c) By both combined; or
 - (d) By causing that person by threats or fear of violence, or by deception, to do an act which causes his death; or
 - (e) By wilfully frightening a child under the age of 16 years or a sick person.
- 4.2 Under section 190, a person is liable for injuring another in circumstances where he or she could have been guilty of manslaughter had the victim died. Accordingly, the case law relating to section 160 applies to section 190 cases, albeit modified as necessary to fit situations of injury rather than death.

OUR APPROACH 4.3 TO THESE OFFENCES

Our proposed redraft of these provisions makes some changes to section 160(2) of the Crimes Act, which defines culpable homicide. The section 160(2) changes would codify case law. We recommend that sections 145 and 190 should be re-enacted in new sections 157A and 157B of the draft, and amended to align them with section 160. There have been some historical anomalies and inconsistencies of approach between the three provisions that in our view are not justified. The policy objective here is simply to ensure that the law is consistent. If our recommendations are agreed to, the three provisions would establish a hierarchy that addresses the whole range of possible outcomes arising from a grossly negligent unlawful act or omission to perform a statutory duty, depending on whether death, injury, or risk of injury results.

4.4 The new draft clauses read:

157A Unlawful acts and omissions likely to cause injury

Every one is liable to imprisonment for a term not exceeding 2 years who does any unlawful act or omits to perform any statutory duty if, in the circumstances, that act or omission is likely to injure another.

157B Injuring by unlawful act or omission

Every one is liable to imprisonment for a term not exceeding 3 years who—

- (a) does any unlawful act or omits to perform any statutory duty if, in the circumstances, that act or omission is likely to injure another and results in injury to another; or
- (b) causes a person to do an act that results in injury to that person by threats of violence, or fear of violence, or by deception.

THE MENTAL ELEMENT

Section 150A

- 4.5 When a charge is laid under either section 160 or 190 of the Crimes Act, alleging an omission to perform a duty, section 150A of the Act applies.⁴³
- 4.6 Section 150A was inserted into the Crimes Act in 1997, to give effect to the recommendations of the McMullin report.⁴⁴ Sir Duncan McMullin recommended that the minimum level of culpability for cases of manslaughter by omission should be gross negligence – or, as eventually expressed in section 150A, a gross departure from the standard of care expected of a reasonable person. Section 150A currently reads:

⁴³ In *R v Andersen* [2005] 1 NZLR 774 (CA), the Court of Appeal preferred to leave the question of whether section 150A should also apply in section 145 cases for another day. We are proposing that section 145, currently in Part 7 of the Crimes Act, will be brought into Part 8 as new section 157A. The provision sits more logically in Part 8, because of its close connection with new section 157B and section 160(2). This means that section 150A of the Crimes Act (which applies to offences “in this Part” – ie, Part 8) will apply to it, thus clarifying the unresolved *Andersen* point.

⁴⁴ Sir Duncan McMullin, *Report of Sir Duncan McMullin to Hon Douglas Graham, Minister of Justice, on Sections 155 and 156 of the Crimes Act 1961* (Wellington, 1995).

150A Standard of care required of persons under legal duties

- (1) This section applies in respect of the legal duties specified in any of sections 151, 152, 153, 155, 156, and 157.
- (2) For the purposes of this Part, a person is criminally responsible for—
 - (a) omitting to discharge or perform a legal duty to which this section applies; or
 - (b) neglecting a legal duty to which this section applies—
 only if, in the circumstances of the particular case, the omission or neglect is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies in those circumstances.

- 4.7 As presently drafted, section 150A addresses the mens rea element only in cases where there has been an omission to perform a legal duty. But in our view, gross negligence should also be the minimum standard of criminal liability for unlawful acts charged under the proposed sections 157A, 157B and 160. This is consistent with the view taken by the Court of Appeal in *R v Powell*,⁴⁵ when the Court held that the legislature cannot have intended that different standards would apply to unlawful acts and omissions respectively, because in some cases, it may be open to the Crown to frame its charge in terms of either section 160(2)(a) or (b). It would be nonsensical for the required standard of culpability to depend upon the decision (perhaps made arbitrarily) as to the framing of the charge.
- 4.8 We therefore recommend that section 150A should be amended, to codify what we understand to have been the decision in *Powell*. Where the offence constituting the unlawful act includes a culpability element of intention or recklessness, it will remain necessary for the Crown to establish this element beyond reasonable doubt. But where the offence requires mere negligence or is a strict or absolute liability offence, we propose that under section 150A, the Crown will have to prove that the person's act was a gross departure from the standard of care expected of a reasonable person.

New section 157A – gross negligence, not recklessness

- 4.9 At present the culpability element for the endangering offence in section 145 is recklessness.⁴⁶ This is not the case under sections 160 and 190, where death or injury has resulted; by virtue of section 150A of the Act, gross negligence suffices to establish liability.⁴⁷
- 4.10 Recklessness means that an accused has knowingly run a risk to another that, in the circumstances, it was unreasonable to run. Gross negligence, on the other hand, is an objective test that, as set out in section 150A of the Act, simply measures the conduct of the accused against the standard of care expected of a reasonable person, and asks: was this a major departure from that standard?

45 *R v Powell* [2002] 1 NZLR 666 (CA).

46 *R v Andersen*, above n 43.

47 See generally Adams on Criminal Law CA160.03.

UNLAWFUL ACTS

4.11 In our view, there is no justification for perpetuating this distinction. If a major departure from the standard of care expected of a reasonable person is sufficient to establish liability in cases involving death and injury, it is difficult to see why a higher standard of culpability should be required to establish liability when the consequence of the conduct is less serious and the available penalty is lower.

4.12 The term “unlawful act” appears in sections 145 and 160. Under section 145, the unlawful act need not be criminal or one prohibited by statute; any act that is in breach of either criminal or civil law will suffice.⁴⁸ This is to be contrasted with the meaning of “unlawful act” under sections 160 (and 190) which, as confirmed by the Court of Appeal in *R v Myatt*, is limited to an offence in breach of any Act, regulation or bylaw.⁴⁹

4.13 The narrower interpretation preferred by the Court in *Myatt* is our preferred option, for two reasons.⁵⁰ First, we do not think that criminal liability should arise solely from civil wrongs. Civil liability allocates loss between two parties, where one party has allegedly suffered harm at the hands of the other, whereas the criminal law involves the state bringing an individual to justice who has done a wrong against the community. If civil laws are breached, civil remedies are available and should not give rise to criminal liability unless there is some independent justification for doing so. Secondly, we think that for serious charges that may result in a significant prison term, the scope of liability should be certain, so that a person is able to ascertain in advance the extent of his or her criminal liability.

4.14 We therefore recommend the adoption of a modified *Myatt* approach, that would cover offences in breach of rules, as well as those that breach Acts, regulations or bylaws.

CHANGING “LAWFUL” TO “STATUTORY” DUTY

4.15 Sections 145 and 160 each refer to omissions to perform a legal duty (and as noted above, although section 190 does not contain this language, it imports all of the law relating to section 160). In most cases, the duty on which a charge under any one of these sections is based will be one of those set out in sections 151 to 157 of the Crimes Act. But there are also uncodified common law duties that have been relied on at least twice to establish a legal duty by the New Zealand Court of Appeal.⁵¹ In *R v Mwai* the defendant had allegedly failed to use protection during sexual intercourse when he knew he was a carrier of the HIV virus. The Court held that a general duty at common law exists

48 Adams on Criminal Law CA145.01.

49 *R v Myatt* [1991] 1 NZLR 674, 678 (CA), Bisson J for the Court. While the Court in *R v Myatt* was not required to conclusively determine whether the sole scope of “unlawful act” for manslaughter purposes is breach of an Act, regulation or bylaw, this seems to have been the view reached by the English appellate authorities and the basis on which the *Myatt* Court proceeded: see for example *R v Lamb* [1967] 2 QB 281 (CA) and *R v Kennedy (No 2)* [2008] 1 AC 269; [2007] 3 WLR 612 (HL).

50 We have noted the approach taken to endangering in the Crimes Bill 1989, followed by the Casey Committee, which based the endangering offences on “any act” that is likely to injure or endanger the safety of another. We did not support this approach because of its breadth: if the new offences were framed in terms of “any act”, it could give rise to liability for anyone who smoked in a public place, skateboarded down the street, or sold unhealthy food to a sick person. Our more cautious approach is supported by *Cagney v Director of Public Prosecutions* [2007] IESC 46, in which the Supreme Court criticised section 13 of the Non-Fatal Offences Against the Person Act 1997 (Ire).

51 See for example *R v Mwai*, above n 22; *R v Andersen*, above n 43, para 71; *R v Lunt* [2004] 1 NZLR 498 (CA).

“not to engage in conduct which one can foresee may expose others to harm”,⁵² and that this duty was sufficient to support the charge under section 145. In *R v Lunt*, the Court of Appeal held that while the duty on a parent or person in place of a parent contained in section 151 did not include a duty to protect a child from harm, a common law duty existed on a parent to “protect his or her child from the illegal violence of the other parent or of any other person where that violence is foreseen or reasonably foreseeable”.⁵³

- 4.16 If the “legal duty” language was retained, it would remain open to the courts to continue to apply common law duties. This would allow the courts to address situations beyond the scope of the codified duties, as *Mwai* and *Lunt* illustrate. Views amongst those we consulted were fairly evenly divided on the arguments for and against this; some considered the resulting flexibility to be an advantage, and that precisely the purpose of a catch-all phrase such as “legal duty” is to respond to unforeseen circumstances.
- 4.17 However, on balance we consider that, in the interests of certainty and transparency, it would be preferable to refer instead to “statutory” rather than “legal” duties. We feel uneasy with the notion that uncodified duties can form the basis for criminal offences; as one academic has noted, “it is not a matter of what duties exist, it is only possible to indicate which ones have so far been recognised.”⁵⁴ It is a cornerstone of the rule of law that people should only be held criminally liable for conduct that was criminal at the time that it occurred, so that, if they were inclined to do so, they would be able to ascertain whether it is prohibited. This is not possible in relation to the common law duties discerned by the courts from time to time; bluntly put, it invites the courts to “make it up as they go along” according to the circumstances of the individual case. We therefore consider that the basis of omissions liability in the criminal law of New Zealand needs to be comprehensively established by statutory duties, and confined to the scope of those duties. While we cannot rule out the possibility that, in future, the occasional case may fall on the wrong side of the line, that will be a matter for the legislature to address from time to time, as the occasion arises.
- 4.18 Other proposed changes are discussed in other parts of the report,⁵⁵ which will ensure that the scenarios addressed by *Mwai* and *Lunt* will remain within the scope of the criminal law, notwithstanding the change in language from “legal” to “statutory” duty. Neither we, nor others whom we consulted, were able to identify any other scenarios beyond the scope of one of the existing or proposed statutory duties that would amount to a lacuna.

52 *R v Mwai*, above n 22, 156.

53 *R v Lunt*, above n 51, 687.

54 Fran Wright “Criminal nuisance: getting back to basics” (2004) 21 NZULR 665, 679.

55 See further the discussion regarding the duty in *R v Lunt*, above n 51 in chapter 5; and the discussion regarding *R v Mwai*, above n 22 in chapter 2.

- 4.19 In *R v Myatt*, having noted that breach of any Act, regulation or bylaw constitutes an unlawful act for manslaughter purposes, the Court of Appeal held that two further matters needed to be proved to establish manslaughter liability.
- 4.20 The first was that the Act, regulation or bylaw breached should have public safety as its objective, or at least one of its objectives. There are myriad offences in Acts, regulations and bylaws, and while many of these will have a public safety component, there are also many that do not. While we agree with the proposition that it would be problematic if the mere breach of any Act, regulation or bylaw on its own was sufficient to give rise to liability without some further qualification, we do not believe it is appropriate to require that the Act, regulation or bylaw should be directed to public safety. It would not achieve clarity in the law, it would be difficult to apply consistently, and it would have the potential to unduly narrow the scope of liability by focusing on the general nature of the offence that is breached, rather the nature of the particular breach and whether or not it involved a dangerous act.
- 4.21 Secondly, according to the Court in *Myatt*, the act that breaches the Act, regulation or bylaw also needs to be “an act likely to do harm to the deceased or to some class of person of whom he was one”.⁵⁶ In *R v Lee* the Court of Appeal applied this test, noting that this was a different method of expressing the concept that the act in question must be objectively dangerous, a principle that is “well established in New Zealand”.⁵⁷ The degree of likely harm was unqualified, and has been held simply to mean “some harm”.
- 4.22 In our view, the pertinent question should be simply whether or not the act is one that, in the circumstances, is likely to injure another. Whilst noting that this differs from the language of “harm” employed by the courts, we think it almost inevitable that in referring to “harm”, “injury” was in fact what was meant.⁵⁸ If harm in some broader sense – for example, encompassing psychological or emotional harm, as opposed to actual bodily harm – is in fact the current test, the question is whether we would be inappropriately narrowing the scope of criminal liability by referring instead only to likelihood of injury. We find it hard to imagine any circumstances from which death or injury has resulted, that could arise from conduct confined solely to a likelihood of some different kind of harm; if there was any likelihood at all of some injury, our proposed test will continue to capture it. Furthermore, if there are any such circumstances, we doubt whether the death or injury outcome is sufficiently foreseeable to render the conduct culpable.
- 4.23 Our draft places the same precondition on liability for omissions to perform a statutory duty – that is, the omission must, in the circumstances, have been likely to injure. Given the nature of the statutory duties, it would seem almost inevitable in most cases that a breach of them will be likely to injure. However, in the event that it is not, we can find no justification for criminalising the omission, when an unlawful act would not be criminalised.

⁵⁶ *R v Myatt*, above n 49, following the approach of the Court of Appeal in the unreported case of *R v Faigan*.

⁵⁷ *R v Lee*, above n 8, para 138.

⁵⁸ This conforms with the statement of Humphries J in *R v Larkin* [1943] 1 All ER 217, 219, restated in *R v Myatt*, above n 49, that the unlawful act “is an act likely to injure another person”.

SECTION 160(2) (C) AND (E) 4.24 Section 160(2) of the Crimes Act defines culpable homicide. Under section 160(2)(c) a person can be liable for culpable homicide if they cause death by both an unlawful act and an omission combined. Section 160(2)(e) includes the further ground of wilfully frightening a child under the age of 16 years, or a sick person.

4.25 We recommend the repeal of section 160(2)(c) because we regard it as unnecessary. In order to establish criminal liability on a homicide charge, the Crown needs to establish that the alleged unlawful act or omission to perform a statutory duty was a substantial and operating cause of death. In almost all cases, it will be possible and indeed quite straightforward to identify which of these two it is – either an act or an omission – in which case, either section 160(2)(a) or (b) respectively will apply. In cases in which an act and an omission have occurred that are both were substantial and operating causes of the death, it is open to the prosecution to lay two charges.

4.26 Section 160(2)(e) was widely regarded by those we consulted as somewhat arbitrary. While it is true that, in the absence of section 160(2)(e), such conduct would not be criminal, we do not treat it as criminal when an outcome short of death results, if it does not otherwise amount to an unlawful act or an omission to perform a statutory duty. If death did occur from such conduct, it would be extremely unfortunate and regrettable, but not, we think, sufficiently foreseeable to give rise to manslaughter liability. Nor is there any real risk that, for example, the caregivers of sick people will elect to try to frighten them to death as some sort of informal substitute for euthanasia (this being the only example anyone managed to supply as a potential justification for the provision). Furthermore, while the provision clearly attempts to protect the relatively vulnerable, it offers no protection for some others who are equally vulnerable – for example, very old people who are not “sick”, although they may well have hearts that are weaker than the majority of people with an illness.

4.27 While we did encounter a few differing views, our recommendation that both paragraphs (c) and (e) should be repealed was supported by virtually everyone we consulted.

MAXIMUM PENALTIES – NEW SECTIONS 157A AND 157B

4.28 New section 157A (unlawful acts and omissions likely to cause injury) and section 157B (injuring by unlawful act or omission) of our proposed draft Bill address, respectively, situations of endangering and grossly negligent injury.

4.29 The proposed offence in section 157A involves conduct that is likely to cause injury but does not do so. Although the minimum culpability threshold is gross negligence, the worst class of case may involve at least recklessness as to injury. We therefore regard it as equivalent to common assault, and recommend the same maximum penalty of 2 years imprisonment.

4.30 The proposed offence in 157B is in our view roughly analogous with the proposed offence of recklessly causing injury under new section 189(2). Although the worst class of case under section 157B would involve only gross negligence (since the other more serious charges would be available for higher levels of culpability), we do not regard the distinction between recklessness and gross negligence in this context as sufficiently great to warrant different maximum penalties. We therefore recommend that a 3-year maximum penalty in section 189(2) should also apply to section 157B.

Chapter 5

Ill treatment or neglect of children and other vulnerable victims

- INTRODUCTION 5.1 In late 2008, in response to a number of high profile cases involving the worst forms of child neglect and non-accidental death, the Minister of Justice Hon Simon Power invited us to expedite the Part 8 review, and to have particular regard to the offences aimed at the protection of children from ill treatment and neglect, and the adequacy of their maximum penalties.
- 5.2 There are, currently, two provisions on the statute book that establish offences of child neglect and ill treatment: section 10A of the Summary Offences Act and section 195 of the Crimes Act. There are also two applicable “duties” provisions (sections 151 and 152 of the Crimes Act). The duties provisions contain offences too,⁵⁹ and in addition, may be invoked when laying any other charges that refer to breach of a legal or statutory duty (eg, a homicide charge).⁶⁰
- 5.3 We are proposing significant reforms to the laws relating to child neglect and ill treatment – and also, to the neglect and ill treatment of equally vulnerable adults (eg, the elderly or impaired). There is no defensible rationale, in our view, for distinguishing between the two categories of victim.
- 5.4 The changes we are proposing can be summarised as follows:
- A redrafted section 195 of the Crimes Act 1961 (formerly titled “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.

59 Crimes Act 1961, ss 151(2), 152(2).

60 Crimes Act 1961, s 160(2)(b).

- Extending 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.
- 5.5 Our views on the child assault provisions are discussed in chapter 3. We are recommending the repeal of section 194(a), for the reasons outlined in that chapter.
 - 5.6 In our view, the repeal of section 194 will have the effect of making the law more, not less, robust. In child assault cases, the whole hierarchy of generally applicable assault, injury, homicide and endangering provisions discussed in the other chapters of this advice will be available to prosecutors.
 - 5.7 In addition, the section 195 ill treatment or neglect offence is framed in terms of “engaging in conduct” and, as such, does not exclude the possibility of an ill treatment charge being founded on the basis of an alleged assault. This is the current position as regards the legal scope of ill treatment, and we do not propose to change it. Section 195 will have a substantially increased maximum penalty of 10 years.
 - 5.8 We are recommending that section 153 of the Crimes Act should be repealed. That section has never been fully fit for purpose. It will no longer be necessary, in the light of our other proposed changes.

ILL TREATMENT OR NEGLECT OF A CHILD OR VULNERABLE PERSON

The current law

- 5.9 Section 195 of the Crimes Act and section 10A of the Summary Offences Act provide:

195 Cruelty to a child

Every one is liable to imprisonment for a term not exceeding 5 years who, having the custody, control, or charge of any child under the age of 16 years, wilfully ill-treats or neglects the child, or wilfully causes or permits the child to be ill-treated, in a manner likely to cause him unnecessary suffering, actual bodily harm, injury to health, or any mental disorder or disability.

10A Ill treatment or wilful neglect of child

Every person is liable to imprisonment for a term not exceeding 6 months or to a fine not exceeding \$4,000 who,—

- (a) Being a paid or unpaid staff member of a residence under the Children, Young Persons, and Their Families Act 1989, ill-treats or wilfully neglects any child under the age of 17 years who resides in that residence; or
 - (b) Being a person to whom the care or custody of a child under the age of 17 years has been lawfully entrusted, ill-treats or wilfully neglects that child.
- 5.10 Section 10A is extremely rarely charged: in the 10 years from 1999 to 2008, only 30 charges were laid. Its scope is, essentially, the same as section 195.

- 5.11 Section 195 covers a wide range of conduct. The terms “ill-treats” and “neglects” are undefined in the Act, which makes it difficult to articulate the precise bounds of the provision. Many cases where section 195 is in issue involve violence, and sometimes quite serious injuring charges.
- 5.12 Section 195 is similar to the equivalent English provision.⁶¹ In particular, the expression “wilfully ill-treats or neglects the child ... in a manner likely to cause him unnecessary suffering” is common to both provisions. Under the English statute, the concept of ill treatment expressly includes assault, provided the assault is likely to cause unnecessary suffering. Ill treatment may extend to bullying, or frightening, or any other course of conduct that is likely to cause the child unnecessary suffering.
- 5.13 Section 195 is generally charged in situations where there is a pattern of such behaviour over a period of time, so that there is more than one instance of ill treatment or wilful neglect. However, this is not always the case, and it is possible to charge a single instance of assault under section 195.⁶² The Court of Appeal has held that the particular form that ill treatment or neglect takes is not an ingredient of the offence. Particulars of the alleged behaviour must be provided by the Crown. The jury then assesses, in the round, whether the alleged specific incident or course of conduct is sufficient to amount to “ill treatment” or “neglect”. It is an evaluative process, undertaken by reference to the totality of evidence.⁶³
- 5.14 The New Zealand cases indicate that a wide range of behaviour falls under section 195. Examples of ill treatment or wilful neglect have included:
- Scalding a child in the bath due to insufficient supervision, and waiting an unreasonable time before seeking urgent medical attention;⁶⁴
 - Physical and mental abuse including excessive and menial domestic chores, deprivation of food, cold baths, verbal abuse, force-feeding of cold rotten food and hitting;⁶⁵
 - Hosing children down with cold water during winter;⁶⁶
 - Shaking an infant, causing brain damage;⁶⁷
 - Leaving children alone unsupervised for several days with resulting hygiene and health issues (dirty and smelly house, children developing infected sores and eczema, children wearing the same unlaundered clothes for many days) and safety issues (such as oven left on by children);⁶⁸
 - Assaults on children with hands, and implements such as spoons, belts, vacuum cleaner pipes and sticks, or inciting another adult to do so and watching;⁶⁹

61 Children and Young Persons Act 1933 (UK), s 1.

62 *R v Accused* [1994] DCR 883.

63 *R v Mead* [2002] 1 NZLR 594 (CA).

64 *Morgan v R* [2008] BCL 712 (HC).

65 *R v Mead*, above n 63.

66 *R v T* (11 May 2004) HC, AK CRI-2003-055-1514, para 9 Randerson J.

67 *Newton v Police* (1990) 6 CRNZ 630.

68 *Gear v Police* 27 (2004) TCL 12/3 HC, paras 5 – 7 Heath J.

69 *R v McFarlane* (17 May 2001) CA29/01 Doogue J for the Court; *R v Rowland* (2001) 24 TCL 11/6; [2001] BCL 393 (CA) Tipping J for the Court; *R v Moke and Lawrence* [1996] 1 NZLR 263 (CA) Thomas J for the Court.

- Neglecting a child's day to day care and health needs over a period of about a year; the child when found was "in a very compromised physical state with infestations of head lice, unhealthy hair and skin, and living in filthy household conditions ... [she] wore dirty clothing, did not shower or bathe regularly, was left at home alone, and slept in squalid conditions".⁷⁰

Our reform proposals – new section 195

5.15 Our new draft section 195 reads:

195 Ill-treatment or neglect of child or vulnerable adult

- (1) Every person 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 perform any statutory duty the omission of which, is likely to cause unnecessary 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 statutory 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) a vulnerable adult is 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;
 - (b) a child is a person under the age of 18 years.
- 5.16 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.⁷¹
- 5.17 We are recommending 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. This age, in our view, 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 "wilfully" requires ill treatment to have been inflicted deliberately,

⁷⁰ *R v R* [2009] NZCA 356.

⁷¹ See further the discussion of *R v Mead*, above n 63.

with a conscious appreciation that it was likely to cause unnecessary suffering.⁷² Neglect, too, will only be regarded as “wilful” where it is deliberate.⁷³ 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 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 just short of death. Furthermore, as the examples of ill treatment and neglect cases above illustrate, the section is 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.

5.18 We are recommending a number of other more minor changes.

5.19 First, any “person who is a staff member of any hospital, institution, or residence where the victim resides” will also fall within the proposed scope of section 195. This is largely a consequence of our proposal to repeal section 10A of the Summary Offences Act,⁷⁴ which has a similar provision that refers to staff members of any Child Youth and Family residence. We consider that a specific provision of this kind is necessary, because arguably not all such staff members can be said to have “actual care or charge” of the children in residential care. The precise legal status of some staff members (perhaps kitchen, cleaning or grounds staff, for example) is unclear. We consider it desirable to put the matter beyond doubt; given that the state has a special relationship to the children under its care, who are among our most vulnerable children, it is important to ensure that they are comprehensively protected. In our view, the policy reasons for ensuring that all Child Youth and Family staff members are subject to section 195 logically apply equally to staff of any hospital, institution or residential care facility in which a vulnerable victim resides – for instance, elderly people in residential care, people with intellectual disabilities who are in care, prisoners, or patients in hospitals. Our new section 195(2)(b) is therefore not exclusive to Child Youth and Family residences but cast in more general terms.

⁷² *R v Hende* [1996] 1 NZLR 153 (CA).

⁷³ *R v Sheppard* [1981] AC 394; [1980] 3 All ER 899 (HL), applied in New Zealand by the Court of Appeal in *R v R*, above n 70.

⁷⁴ See para 5.22 below.

- 5.20 Secondly, the language currently used in section 195 is “ill treats or neglects”, which our proposed draft suggests should be amended to “engages in conduct or omits to perform any statutory duty”. As already noted above, the change in language from “ill treatment” to “engages in conduct” is not intended to signal any change in approach; the explicit intention is rather to preserve the status quo. This is why we have referred to “engaging in conduct” in contrast to the “unlawful act” language employed in other proposed Part 8 provisions; “unlawful act” in this context might be interpreted as being confined to a single incident. The proposed reference to “omission to perform a statutory duty” will bring within the scope of this offence the extended statutory duties,⁷⁵ and also assists in making it clear on the face of the statute what constitutes neglect.
- 5.21 Finally, we recommend the following minor changes to the drafting language:
- Because “actual bodily harm” means “injury” as defined in section 2 of the Crimes Act, we recommend changing the current reference from “actual bodily harm” to “injury”.
 - Because of the same definition of “injury”, the current reference to “injury to health” was confusing and potentially undesirably narrow. We recommend this should instead be changed to “adverse effects to health”.
 - Section 195 currently applies to persons in “custody, control or charge”; section 10A applies to those in “care or custody”. In all of our proposed new sections, including new section 195, we recommend “actual care or charge”, removing the outdated reference to custody, which is no longer used by drafters or the courts (eg, the Family Court) and may give rise to confusion about intended scope (eg, whether legal or actual custody is the concept that is meant).⁷⁶
- 5.22 Again, no change in scope is intended to follow from these proposed changes. The intention is to provide clarification, and ensure consistency in terminology with changes made in other parts of the draft Bill, whilst preserving the status quo.

Repeal of section 10A of the Summary Offences Act 1981

- 5.23 As noted above, this offence is rarely charged.⁷⁷ 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.

⁷⁵ See paras 5.32 – 5.48 below.

⁷⁶ We considered that extending the scope of this section to “any person” would be unduly broad – potentially encompassing school bullying, for example.

⁷⁷ See para 5.10 above.

- 5.24 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.
- 5.25 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.⁷⁸
- 5.26 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.
- 5.27 However, we have deliberately chosen not to recommend a new statutory duty for this purpose. Implicitly, the existence of the offence does of course establish a duty. However, we do not think that it should be implemented by way of a new “duties” provision.⁷⁹ That approach would expose the household member to potential liability across the whole spectrum of criminal offences that refer to a statutory duty, from our proposed new endangering provision under new section 157A, to manslaughter under section 160 (depending on the circumstances of the individual case). In our view, while the nature of a co-habitation relationship is such that it is proper for there to be a degree of liability, the extent of such liability needs to be clear and circumscribed.
- 5.28 Our proposal is broader than the English offence in at least one key respect: that offence applies only when the child in question has died. Our proposed provision is triggered whenever there is a failure to respond to a known risk of death, serious injury, or sexual assault. We, and others whom we consulted, consider that this would be consistent with the government’s preferred preventive approach to child abuse and neglect.
- 5.29 The draft provision, as it appears in clause 24 of the Bill, is as follows:

195A Failure to protect child or vulnerable adult from risk of serious harm

- (1) Every one is liable to a term of 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, serious injury, or sexual assault as the result of an unlawful act by another person or an omission by another person to perform a statutory duty; and
- (b) fails to take reasonable steps to protect the victim from that risk.

⁷⁸ Criminal Consolidation Act 1935 (SA), s 14.

⁷⁹ See further sections 151 to 157 of the Crimes Act 1961.

- (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 or serious injury.
- (5) In determining whether a person is so closely connected with a particular household so 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 had a familial relationship with the victim and any other matters that may be relevant in the circumstances.

5.30 The offence has 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;⁸⁰
- 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, and is at least 18 years old;
- 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;
- The offender may be regarded as a “member” of a particular household even if he or she does not live in the household, if the defendant is “so closely connected” with the household that it is reasonable to regard him or her as a member;
- Relevant considerations in determining whether the offender is “so closely connected” will include the frequency and duration of visits to the household, and familial relationship (if any) with the child;
- “Serious injury” will share the definition already proposed in relation to the core assault and injury provisions (“grievous” or really serious actual bodily harm);
- The maximum penalty proposed for this offence is 10 years. This reflects the fact that the worst class of case will be one in which the child has died, and the negligence has been truly gross (eg, the offender deliberately closed his or her eyes to the conduct over a prolonged period).

⁸⁰ See para 5.46 below.

- 5.31 There are a number of aspects of the proposed provision that, potentially, may spark concerns about its scope. Some people expressed concern to us that its coverage would be too broad. Others thought that in some ways it was arbitrarily narrow – capturing a flatmate, for example, but not a school teacher whose degree of knowledge of and nexus with the child may be similar or even greater. Our response to this is twofold. First, it is arguably necessary to draw a line somewhere. We acknowledge the merits of the argument that any person in relation to whom the requisite degree of knowledge and proximity can be proved should be liable. However, we have taken the view that those who live with a child have a different kind of relationship and responsibility than others with whom the child may come into contact; the home should be a place of safety. Secondly, regarding concerns about undue breadth, we note that there are a number of ways in which the elements of the provision operate to place safeguards around the scope of liability. It only applies to the most serious cases, and only when there has been frequent contact with the victim in addition to status as a member of the household (or someone sufficiently closely connected with the household). But most importantly, the jury will need to be satisfied that there was a grossly negligent failure to take reasonable steps to protect the victim from harm. What constitutes “reasonable steps” will be a matter for the jury to determine, in the circumstances of each case.

SECTION 152
– DUTY OF
PARENT OR
GUARDIAN

- 5.32 Section 152 imposes a duty on parents, or those in place of parents, to provide their children under the age of 16 years with “necessaries”:

152 Duty of parent or guardian to provide necessities

- (1) Every one who as a parent or person in place of a parent is under a legal duty to provide necessities for any child under the age of 16 years, being a child in his actual custody, is criminally responsible for omitting without lawful excuse to do so, whether the child is helpless or not, if the death of the child is caused, or if his life is endangered or his health permanently injured, by such omission.
- (2) Every one is liable to imprisonment for a term not exceeding 7 years who, without lawful excuse, neglects the duty specified in this section so that the life of the child is endangered or his health permanently injured by such neglect.
- 5.33 While there is no authority on what is meant by the concept of “necessaries”, there is some basis for considering that it may be a somewhat broader concept than the “necessaries of life” referred to in section 151. Not everything that is arguably “necessary” to the reasonable raising of a child may fall within the quite narrow concept of the “necessaries of life” – the latter being confined to the food, water, medical care, and so on necessary to sustain life.

Reform proposals

Broadening the scope of the duty

- 5.34 In *R v Lunt*,⁸¹ in considering the liability of extended family members on a manslaughter charge, the Court of Appeal relied upon a common law duty upon a parent or person in loco parentis 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.⁸² In the light of our recommendation elsewhere that references to “legal duty” should be changed to “statutory duty”,⁸³ we have identified a need for this common law duty to be codified.
- 5.35 The new duty we recommend builds upon *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. 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 to a child (ie, actual bodily harm) 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 would be 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 the possibility of capturing such cases.
- 5.36 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.⁸⁴

Criminal responsibility and the offence provisions

- 5.37 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.
- 5.38 Under section 152, criminal responsibility is incurred in the circumstances set out in 152(1). Section 152(2) establishes an offence to capture cases where there has been a very serious breach of the duty, but (perhaps fortuitously) death has not resulted. In cases where death results, the duty may form the basis for a homicide charge.⁸⁵

81 *R v Lunt*, above n 51.

82 In that case, three adults were charged for the death of a child, the daughter of one of the three. The Crown alleged that all three adults had a parental duty, and had breached it, by failing to protect the girl from illegal violence. The Court of Appeal held that while this type of duty was not addressed by the Crimes Act sections, it existed, uncoded, at common law.

83 See paras 4.15 – 4.18 above.

84 Criminal Code Act 1899 (Qld), s 286.

85 See section 160(2) of the Crimes Act 1961.

5.39 We consider that the current statutory scheme is confusing, and unduly limited in its scope. Criminal responsibility only exists for breach of this duty in the very worst types of cases, because of the italicised words in 152(1), below.

(1) Every one who as a parent or person in place of a parent is under a legal duty to provide necessities for any child under the age of 16 years, being a child in his actual custody, *is criminally responsible for omitting without lawful excuse to do so, whether the child is helpless or not, if the death of the child is caused, or if his life is endangered or his health permanently injured, by such omission.*

5.40 The resulting gap in the law is capable of being addressed, to some extent, by the proposed neglect offences in the new section 195 of the Crimes Act discussed above. However, this creates undesirable confusion about the scope and structure of the statutory scheme, and a lack of transparency. It looks on the face of the section 152 duty as though parents will only be liable in the worst cases, when in fact, that is not true.

5.41 In any event, we consider that the criminal responsibility aspect of these provisions is redundant. The source of criminal liability is the offence provisions. If the reference to criminal responsibility legally adds nothing, it should not appear in the drafting at all. In our proposed redraft of section 152, the references to “criminal responsibility” have therefore been omitted.

5.42 In the light of our other proposed changes to the offence provisions, we have therefore concluded that the offence provision that currently appears in section 152(2) is no longer necessary. Our other proposals, if adopted, will ensure that offences are available to capture the whole range of cases in which the duty might be breached, from relatively minor endangering cases under new section 157A, to more serious consequences for which sections 157B or section 195 might be invoked, through to cases of death in which a homicide charge would be available.

Section 152: definition of “child”

5.43 Section 152 currently applies to children under 16. We recommend raising this age to under 18 years. Defining “child” in this way is consistent with New Zealand’s obligations under the United Nations Convention on the Rights of the Child. It is the age we have recommended in all of the proposed new and revised offences in this Part that refer to children.

Section 152: parents already “under a legal duty”

5.44 Unlike most of the other duties provisions, section 152 of the Crimes Act, as it is currently drafted, does not itself impose a duty. It applies to a parent or person in place of a parent who is already “under a legal duty”. The source of such parental duty is unclear. None of the authorities we reviewed was able to identify it. This is undesirable. Our proposed redraft alters the language slightly so that, consistent with the other duties provisions, it not only refers to, but also establishes, the duties in question.

SECTION 151
– DUTY OF
CAREGIVERS

5.45 Section 151 imposes a duty on caregivers in charge of vulnerable people, as follows:

151 Duty to provide the necessities of life

- (1) Every one who has charge of any other person unable, by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessities of life, is (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) under a legal duty to supply that person with the necessities of life, and is criminally responsible for omitting without lawful excuse to perform such duty if the death of that person is caused, or if his life is endangered or his health permanently injured, by such omission.
 - (2) Every one is liable to imprisonment for a term not exceeding 7 years who, without lawful excuse, neglects the duty specified in this section so that the life of the person under his charge is endangered or his health permanently injured by such neglect.
- 5.46 We think that the vulnerable person definition is appropriate and do not recommend any change in that respect. However, the duty imposed on those in charge of such people is too narrow in our view; it addresses only the most serious cases where life is endangered, there is permanent injury to health, or death occurs, and it requires only provision of the “necessaries of life”. We have already signalled in our discussion on section 195 and the proposed new section 195A that vulnerable adults in the charge of another should generally receive the same protection as children.⁸⁶ We therefore recommend that the duty in section 152 should be extended, to include an obligation to take reasonable steps to protect the vulnerable person from injury, thus aligning it with the proposed parental duty in section 151, and an obligation to provide any “necessaries”, not just the “necessaries of life”.
- 5.47 Some of those with whom we consulted doubted whether this expansion of the duty was appropriate. They argued that the obligations of parents to their children should be more extensive than the obligations of others such as police, prison officers and hospital or rest home staff) who are in charge of persons by reason of detention, age, sickness, mental impairment, or other cause.
- 5.48 In response, we note that the duty would require only reasonable steps to be taken. Moreover, the nature of the duty would vary accordingly to the nature and degree of the vulnerability, and liability for a breach of that duty would arise only when there had been gross negligence as required by section 150A – that is, a major departure from the standard of care expected of a reasonable person in those circumstances. We think it appropriate to use the criminal law to penalise conduct that fails to meet this fairly low threshold.

⁸⁶ See para 5.17 above.

5.49 Section 153 provides:

153 Duty of employers to provide necessities

- (1) Every one who as employer has contracted to provide necessary food, clothing, or lodging for any servant or apprentice under the age of 16 years is under a legal duty to provide the same, and is criminally responsible for omitting without lawful excuse to perform such duty if the death of that servant or apprentice is caused, or if his life is endangered or his health permanently injured, by such omission.
 - (2) Every one is liable to imprisonment for a term not exceeding 5 years who, without lawful excuse, neglects the duty specified in this section so that the life of the servant or apprentice is endangered or his health permanently injured by such neglect.
- 5.50 The “servant or apprentice” terminology is archaic. While the meaning of “apprentice” is probably clear, it is debatable whether a “servant” means anyone in a conventional modern day employment relationship by virtue of a “contract of services”, and whether that would extend to “contracts for services” (where the contractor is self-employed).
- 5.51 Liability under the section is also circumscribed in two other ways. First, the employer needs to have contracted to provide necessary food, clothing and lodging to the young person. The duty does not itself impose this obligation; it arises from a contractual undertaking, which presumably needs to be explicit. Secondly, liability only attaches in the worst category of cases – that is, when there has been a failure to feed, clothe or house a child and this results in death, danger to life or permanent injury to health. More minor forms of harm such as malnutrition, housing in squalid conditions or inadequate clothing will not establish a breach of the duty.
- 5.52 There are other legislative provisions that provide some protection for children in the workplace:
- The Education Act prohibits employers from employing children under the age of 16, during school hours or when it would interfere with their school attendance;⁸⁷
 - The Health and Safety in Employment Act imposes a general duty on all employers to do what is necessary to protect employees from dangerous situations in the workplace;⁸⁸
 - The Health and Safety in Employment Regulations 1995 restrict young people under the age of 15 from hazardous work and workplaces.
- 5.53 However, none of these provisions directly require the provision of the necessities of life in the circumstances described in section 153.
- 5.54 If section 153 was retained, we would want it expanded to cover a greater range of harms. However, we have concluded that it is not necessary at all, for three reasons.

⁸⁷ Education Act 1989, s 30.

⁸⁸ Health and Safety in Employment Act 1992, s 6.

- 5.55 First, as far as Police, Crown Law, the Ministry of Justice, and the Department of labour are aware, there has never been a section 153 prosecution. Arguably, this could suggest that the provision is effective as a deterrent. Alternatively, and more probably, it may tend to confirm our view that for a whole range of reasons, the section 153 duty is too limited to serve its purpose, if not obsolete.
- 5.56 Secondly, our proposed section 151, as redrafted, requires a person who has actual care or charge of another vulnerable person (as defined) to provide the “necessaries” and to take reasonable steps to protect that person from injury. While this does not cover all employment relationships, we are confident that where a contract exists for the provision of certain basic items (as currently required under section 153) there would be found to be a relationship of “care or charge”; furthermore, a relationship of “care or charge” may well exist even in the absence of a contract, depending on the circumstances. Section 151 is thus no narrower than the present scope of section 153, and in some respects will be rather broader if our recommendations are implemented.⁸⁹
- 5.57 Finally, our proposed redraft of section 195 is wide enough to cover all cases in which an employer has entered into a contractual arrangement to care for a child and has ill treated or neglected the child.
- 5.58 We therefore recommend that section 153 be repealed.

89 The scope of the duty is not limited to food, clothing, or lodging, but may be more extensive and include access to medical care and treatment, appropriate sleeping arrangements, and so on. As currently framed section 151 (like section 153) only attracts criminal liability in the worst classes of case; however, our proposed draft repeals subsection (2), so that the duty would give rise to liability in the whole range of neglect cases, from manslaughter to simply endangering (a new endangering offence is also proposed: see new section 157A). The duty to take reasonable steps to protect from harm is new.

Appendices



Appendix A

Altered provisions

CRIMES ACT PROVISIONS:	ACTION:
s 145 – Criminal nuisance	New s 157A substituted
s 150A – Standard of care required for persons under legal duties	Amended
s 151 – Duty to provide the necessities of life	Amended
s 152 – Duty of parent or guardian to provide necessities	Amended
s 153 – Duty of employers to provide necessities	Repealed
s 155 – Duty of persons doing dangerous acts	Amended
s 156 – Duty of persons in charge of dangerous things	Amended
s 157 – Duty to avoid omissions dangerous to life	Amended
s 160 – Culpable homicide	Amended
s 163 – Killing by influence on the mind	Amended
s 188 – Wounding with intent	New s 188 substituted
s 189 – Injuring with intent	New s 189 substituted
s 190 – Injuring by unlawful act	New s 157B substituted
s 191 – Aggravated wounding or injury	Repealed
s 192 – Aggravated assault	Subsection (1) repealed
s 193 – Assault with intent to injure	New s 189A(1) substituted
s 194 – Assault on a child, or by a male on a female	Repealed
s 195 – Cruelty to a child	Amended
s 196 – Common assault	New s 189A(2) substituted
s 197 – Disabling	Repealed
s 198 – Discharging firearm or doing dangerous act with intent	Repealed
s 199 – Acid throwing	Repealed
s 200 – Poisoning with intent	Repealed
s 201 – Infecting with disease	Amended
s 202 – Setting traps	Amended
s 202C – Assault with a weapon	Repealed
s 204 – Impeding rescue	Amended
SUMMARY OFFENCES ACT PROVISION:	ACTION:
s 10A – Ill treatment or wilful neglect of child	Repealed

Appendix B

The draft Bill

Crimes (Offences Against the Person) Amendment Bill

1

**Crimes (Offences Against the Person)
Amendment Bill**

**Crimes (Offences Against the
Person) Amendment Bill**

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**Crimes (Offences Against the Person)
Amendment Bill**

Part 1 cl 5

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Crimes (Offences Against the Person) Amendment Act **2009**.

2 Commencement

This Act comes into force 6 months after the date on which it receives the Royal assent.

3 Principal Act amended

This Act amends the Crimes Act 1961.

**Part 1
Crimes against the person**

4 Interpretation

Section 2(1) is amended by inserting the following definitions in their appropriate alphabetical order:

“**injury** means actual bodily harm and does not include psychological or emotional harm

“**serious** has the same meaning that grievous had immediately before the commencement of this Act

“**statutory duty** means a duty imposed by any Act, regulation, rule, or bylaw

“**unlawful act** means a breach of any Act, regulation, rule, or bylaw”.

5 Compulsion

(1) Section 24(1) is amended by omitting “grievous bodily harm” and substituting “serious injury”.

(2) Section 24(2) is amended by repealing paragraphs (g) and (h) and substituting the following paragraphs:

“(g) **section 188(1)** (causing serious injury):

“(h) **section 189(1)** (causing injury):”.

- 6 Force used in executing process or in arrest**
Section 39 is amended by omitting “grievous bodily harm” and substituting “serious injury”.
- 7 Preventing escape or rescue**
Section 40(1) is amended by omitting “grievous bodily harm” and substituting “serious injury”.
- 8 Treason**
Section 73(a) is amended by omitting “wounds or does grievous bodily harm” and substituting “causes serious injury”.
- 9 Section 145 repealed**
Section 145 is repealed.
- 10 New section 150A substituted**
Section 150A is repealed and the following section substituted:
“150A Standard of care applicable to persons under statutory duties or performing unlawful acts
“(1) This section applies in respect of—
“(a) the statutory duties specified in any of sections 151, 152, 155, 156, 157, and **195A**; and
“(b) unlawful acts referred to in **sections 157A, 157B**, or 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 perform a statutory 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 statutory duty applies or who performs that unlawful act.”
- 11 New section 151 substituted**
Section 151 is repealed and the following section substituted:

**Crimes (Offences Against the Person)
Amendment Bill**

Part 1 cl 15

“151 Duty to provide necessities and protect from injury

Every one who has actual care or charge of another person unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from that care or charge and unable to provide himself or herself with necessities is under a statutory duty—

- “(a) to provide that person with necessities; and
- “(b) to take reasonable steps to protect that person from injury.”

12 New section 152 substituted

Section 152 is repealed and the following section substituted:

“152 Duty of parent or guardian to provide necessities 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 statutory duty—

- “(a) to provide that child with necessities; and
- “(b) to take reasonable steps to protect that child from injury.”

13 Section 153 repealed

Section 153 is repealed.

14 Duty of persons doing dangerous acts

Section 155 is amended by—

- (a) omitting “legal duty” and substituting “statutory duty”; and
- (b) omitting “, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty”.

15 Duty of persons in charge of dangerous things

Section 156 is amended by—

- (a) omitting “legal duty” and substituting “statutory duty”; and

- (b) omitting “, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty”.

16 Duty to avoid omissions dangerous to life

Section 157 is amended by—

- (a) omitting “legal duty” and substituting “statutory duty”; and
- (b) omitting “, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty”.

17 New heading and sections 157A and 157B inserted

The following heading and sections are inserted after section 157:

“Unlawful acts or omissions likely to injure

“157A Unlawful acts and omissions likely to cause injury

Every one is liable to imprisonment for a term not exceeding 2 years who does any unlawful act or omits to perform any statutory duty if, in the circumstances, that act or omission is likely to injure another.

“157B Injuring by unlawful act or omission

Every one is liable to imprisonment for a term not exceeding 3 years who—

- “(a) does any unlawful act or omits to perform any statutory duty if, in the circumstances, that act or omission is likely to injure another and results in injury to another; or
- “(b) causes a person to do an act that results in injury to that person by threats of violence, or fear of violence, or by deception.”

18 Culpable homicide

Section 160 is amended by repealing subsection (2) and substituting the following subsection:

- “(2) Homicide is culpable when it consists in the killing of any person—

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- “(a) by an unlawful act if, in the circumstances, that act is likely to injure another; or
- “(b) by an omission to perform any statutory duty if, in the circumstances, that omission is likely to injure another; or
- “(c) by causing that person by threats of violence or fear of violence, or by deception, to do an act that causes his or her death.”

19 Death must be within a year and a day

Section 162(3) is amended by omitting “legal duty” and substituting “statutory duty”.

20 New section 163 substituted

Section 163 is repealed and the following section substituted:

“163 Killing by influence on the mind

No one is criminally responsible for the killing of another by any influence on the mind alone or for the killing of another by any disorder or disease arising from such influence.”

21 Further definition of murder

Section 168(1)(a) is amended by omitting “grievous bodily injury” and substituting “serious injury”.

22 New sections 188, 189, and 189A substituted

Sections 188 and 189 are repealed and the following sections substituted:

“188 Causing serious injury

- “(1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to injure any person, causes serious injury to any person.
- “(2) Every one is liable to imprisonment for a term not exceeding 4 years who causes serious injury to any person by assaulting any person or otherwise acting with reckless disregard for the safety of others.

“189 Causing injury

- “(1) Every one is liable to imprisonment for a term not exceeding 10 years who, with intent to injure any person, injures any person.
- “(2) Every one is liable to imprisonment for a term not exceeding 3 years who injures any person by assaulting any person or otherwise acting with reckless disregard for the safety of others.

“189A Assault

- “(1) Every one is liable to imprisonment for a term not exceeding 5 years who, with intent to injure any person, assaults any person.
- “(2) Every one is liable to imprisonment for a term not exceeding 2 years who assaults any person.”

23 Sections 190, 191, 192(1), 193, and 194 repealed

Sections 190, 191, 192(1), 193, and 194 are repealed.

24 New section 195 substituted

Section 195 is repealed and the following sections are substituted:

“195 Ill-treatment or neglect of child or vulnerable adult

- “(1) Every person 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 perform any statutory duty the omission of which, is likely to cause unnecessary 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 statutory 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) a **vulnerable adult** is a person unable, by reason of detention, age, sickness, mental impairment, or any other

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cause, to withdraw himself or herself from the care or charge of another person:

“(b) a **child** is a person under the age of 18 years.

“195A Failure to protect child or vulnerable adult from risk of serious harm

“(1) Every one is liable to a term of 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, serious injury, or sexual assault as the result of an unlawful act by another person or an omission by another person to perform a statutory duty; 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, serious injury, or sexual assault.

“(5) In determining whether a person is so closely connected with a particular household so 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 had a familial

relationship with the victim and any other matters that may be relevant in the circumstances.”

25 Section 196 repealed

Section 196 is repealed.

26 New section 197 substituted

Section 197 is repealed and the following section substituted:

“197 Disabling

Every one is liable to imprisonment for a term not exceeding 2 years who, with intent to stupefy or render unconscious any person, or with reckless disregard for the safety of others, stupefies or renders unconscious any person.”

27 Sections 198, 199, and 200 repealed

Sections 198, 199, and 200 are repealed.

28 New sections 201 and 201A substituted

Section 201 is repealed and the following sections substituted:

“201 Infecting with notifiable disease or other notifiable condition

- “(1) Every one is liable to imprisonment for a term not exceeding 14 years who intentionally transmits any disease to any person.
- “(2) Every one is liable to imprisonment for a term not exceeding 3 years who recklessly transmits a notifiable disease or other notifiable condition to any person.
- “(3) Every one is liable to imprisonment for a term not exceeding 2 years who recklessly puts any person at risk of contracting a notifiable disease or other notifiable condition.
- “(4) A person does not commit an offence against **subsection (2) or (3)** merely by refusing, or failing, to be vaccinated against the condition.
- “(5) If a person is convicted of an offence against **subsection (2) or (3)**, the court may, instead of, or in addition to, any other sentence or other order that may be imposed, make a health risk order under **section 113 of the Public Health Act 2009**, and **sections 91, 92, 108, 109, 114, 115, 116, 120,**

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124, and 125 of the Public Health Act 2009 apply with any necessary modifications.

- “(6) Before imposing a health risk order the court must obtain a report from the Medical Officer of Health on the current health risk of the person and the options for managing that risk.
- “(7) A **notifiable disease** or **notifiable condition** means a condition listed in **Schedule 1 of the Public Health Act 2009**.

“201A Defences to infecting with notifiable disease or other notifiable condition

It is a defence to a charge under **section 201(2) or (3)** that at the time that the defendant transmitted or put the other person at risk of contracting the notifiable condition, the other person knew the defendant had the condition and voluntarily accepted the risk of contracting the condition.”

29 New section 202 substituted

Section 202 is repealed and the following section substituted:

“202 Setting traps, etc

Every one is liable to imprisonment for a term not exceeding 2 years who,—

- “(a) with intent to injure or with reckless disregard for the safety of any person, sets or places or causes to be set or placed any trap or device; or
- “(b) is in occupation or possession of any place where a trap or device has been set or placed and who knows that the trap or device is set or placed there and, with intent to injure or with reckless disregard for the safety of any person, permits it to remain in that place.”

30 Section 202C repealed

Section 202C is repealed.

31 New section 204 substituted

Section 204 is repealed and the following section substituted:

“204 Impeding rescue

Every one is liable to imprisonment for a term not exceeding 2 years who—

- “(a) does any act that impedes or prevents any person who is saving, or attempting to save, his or her own life or another person’s life; and
- “(b) does that act with reckless disregard for the safety of the person whose life is in danger.”

32 Aggravated burglary

Section 235(a) is amended by omitting “grievous bodily harm” and substituting “serious injury”.

33 Assault with intent to rob

Section 236(1)(a) is amended by omitting “grievous bodily harm” and substituting “serious injury”.

34 Threatening to kill or do grievous bodily harm

- (1) The heading to section 306 is amended by omitting “**grievous bodily harm**” and substituting “**serious injury**”.
- (2) Section 306(1) is amended by omitting “grievous bodily harm” in each place where it appears and substituting in each case “serious injury”.

Part 2

Miscellaneous

35 Consequential amendments

The enactments listed in the Schedule are amended in the manner set out in the Schedule.

36 Transitional provision

- (1) The amendments and repeals made by this Act do not apply to any offence committed or alleged to have been committed (in whole or in part) before the commencement of this Act, and the principal Act, as in force before the commencement of this Act, continues to apply to any such offence.
- (2) Section 414 of the principal Act has effect (with any necessary modifications) if the date on which the offence was committed cannot be established with sufficient certainty.

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Schedule

Schedule
Consequential amendments

s 35

Part 1
Amendments to principal Act

Schedule 2

Paragraph (f) of form 4: omit “grievous bodily harm” in each place where it appears and substitute in each case “serious harm”.

Part 2
Amendments to other enactments

Aviation Crimes Act 1972 (1972 No 137)

Paragraphs (a) and (b) of the definition of **act of violence** in section 2(1): repeal and substitute:

- “(a) an assault as described in either of **sections 189A** and 192 of the Crimes Act 1961; or
- “(b) any of the crimes specified in sections **157B, 188, 189, 197, 198A, 198B, 202, or 209** of the Crimes Act 1961”.

Bail Act 2000 (2000 No 38)

Section 7(2): omit “against section 194 of the Crimes Act 1961 (which relates to assault on a child, or by a male on a female) or”.

Section 7(3)(b) and (c): repeal and substitute:

- “(b) **section 151** (duty to provide necessities and protect from injury):
- “(c) **section 152** (duty of parent or guardian to provide necessities and protect from injury):”

Section 7(3)(d): repeal.

Section 7(3)(f): repeal and substitute:

- “(f) **section 157B** (injuring by unlawful act or omission):”.

Section 10(2)(f) and (g): repeal and substitute:

- “(f) **section 188** (causing serious injury):
- “(g) **section 189** (causing injury):”

Section 10(2)(h): repeal.

Part 2—*continued***Courts Security Act 1999 (1999 No 115)**

Paragraph (a)(i) of the definition of **specified offence** in section 2:
repeal and substitute:

- “(i) sections 87, 121, **157B**, 167 to 177, **188, 189, 189A, 192**, 197, 198A, 198B, 202A, 305, or 306 of the Crimes Act 1961; or”.

Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980 (1980 No 44)

Items relating to sections 188 and 189 of the Crimes Act 1961 in Schedule 1: omit and substitute:

188 Causing serious injury

189 Causing injury

Items relating to sections 191, 198, 199, and 200 of the Crimes Act 1961 in Schedule 1: omit.

Criminal Investigations (Bodily Samples) Act 1995 (1995 No 55)

Items relating to sections 188(1) and (2) and 189(1) and (2) of the Crimes Act 1961 in Part 1 of the Schedule: omit and substitute:

Causing serious injury **188**

Causing injury **189**

Items relating to sections 191(1) and (2) of the Crimes Act 1961 in Part 1 of the Schedule: omit

Item relating to section 201 of the Crimes Act 1961 in Part 1 of the Schedule: omit and substitute:

Intentionally transmitting any disease **201(1)**

Schedule

District Courts Act 1947 (1947 No 16)

Section 188 Causing serious injury

Section 189 Causing injury

Section 191§ Aggravated wounding or injury

Section 198§ Discharging firearm or doing dangerous act with intent

Section 199§ Acid throwing

Section 200(1)§ Poisoning with intent

Section 201(1)	Intentionally transmitting any disease
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§as it read before the commencement of the **Crimes (Offences Against the Person) Act 2009**

Item relating to section 194 of the Crimes Act 1961 in Schedule 3:
omit.

Subparagraphs (c)(v) and (vi) of the definition of **specified serious offence** in section 29A(4): repeal and substitute:

“(v) **section 188** (causing serious injury):

“(vi) **section 189(1) (causing injury):**”

Subparagraphs (c)(vii) to (x) of the definition of **specified serious offence** in section 29A(4): repeal.

Part 2—*continued***Land Transport Act 1998 (1998 No 110)**—*continued*

Subparagraph (c)(xi) of the definition of **specified serious offence** in section 29A(4): repeal and substitute:

“(xi) **section 201(1)** (intentionally transmitting any disease):”

Maritime Crimes Act 1999 (1999 No 56)

Paragraphs (a) and (b) of the definition of **act of violence** in section 2: repeal and substitute:

- “(a) an assault as described in either of **sections 189A** and 192 of the Crimes Act 1961; or
- “(b) any of the crimes specified in sections **157B, 188, 189, 197, 198A, 198B, 202, or 209** of the Crimes Act 1961”.

Mutual Assistance in Criminal Matters Act 1992 (1992 No 86)

Items relating to sections 188(1), (2) and 189(1) and (2) of the Crimes Act 1961 in items 1 and 2 of the Schedule: omit and substitute:

188	Causing serious injury
189	Causing injury

Items relating to sections 191(1), 191(2), 198, 199, and 200 of the Crimes Act 1961 in items 1 and 2 of the Schedule: omit.

Item relating to section 201 of the Crimes Act 1961 in items 1 and 2 of the Schedule: omit and substitute:

section 201(1)	Intentionally transmitting any disease
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Parole Act 2002 (2002 No 10)

Paragraph (c) of the definition of **specified offence** in section 107(9): repeal and substitute:

- “(c) an offence against any of sections 171, 173 to 176, **188, 189, 198A, 198B, 208 to 210, 234, 235, and 236** of the Crimes Act 1961.”

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Schedule

Part 2—continued

Sentencing Act 2002 (2002 No 9)

Section 87(5)(b): repeal and substitute:

- “(b) an offence against any of sections 171, 173 to 176, **188**, **189**, 198A, 198B, 208 to 210, 234, 235, and 236 of the Crimes Act 1961.”

Summary Offences Act 1981 (1981 No 113)

Section 10A: repeal.

Items relating to sections 188(1), 188(2), 189(1), 189(2), 191(1), 191(2), 192, 193, 198A, 198B, 199, and 202C of the Crimes Act 1961 in Part 1 of Schedule 3: omit and substitute:

188	Causing serious injury
189	Causing injury
189A(1)	Assault with intent to injure
192	Aggravated assault
198A	Using any firearm against law enforcement officer, etc
198B	Commission of crime with firearm

Summary Proceedings Act 1957 (1957 No 87)

Section 186(c)(i), (ii), and (iii): repeal and substitute:

- “(i) **section 188** (which relates to causing serious injury):
- “(ii) **section 189** (which relates to causing injury):
- “(iii) **section 189A** (which relates to assault):”

Part 2—*continued***Summary Proceedings Act 1957 (1957 No 87)**—*continued*

Item relating to section 145 of the Crimes Act 1961 in Part 1 of Schedule 1: omit.

Item relating to sections 151, 152, and 153 of the Crimes Act 1961 in Part 1 of Schedule 1: omit and substitute:

151, 152 Neglect to provide necessities
and protect from injury

Part 1 of Schedule 1: insert after the item relating to section 154 of the Crimes Act 1961:

157A Unlawful acts and omissions
likely to cause injury

157B Injuring by unlawful act or
omission

Part 1 of Schedule 1: insert after the item relating to section 189 of the Crimes Act 1961:

189A Assault

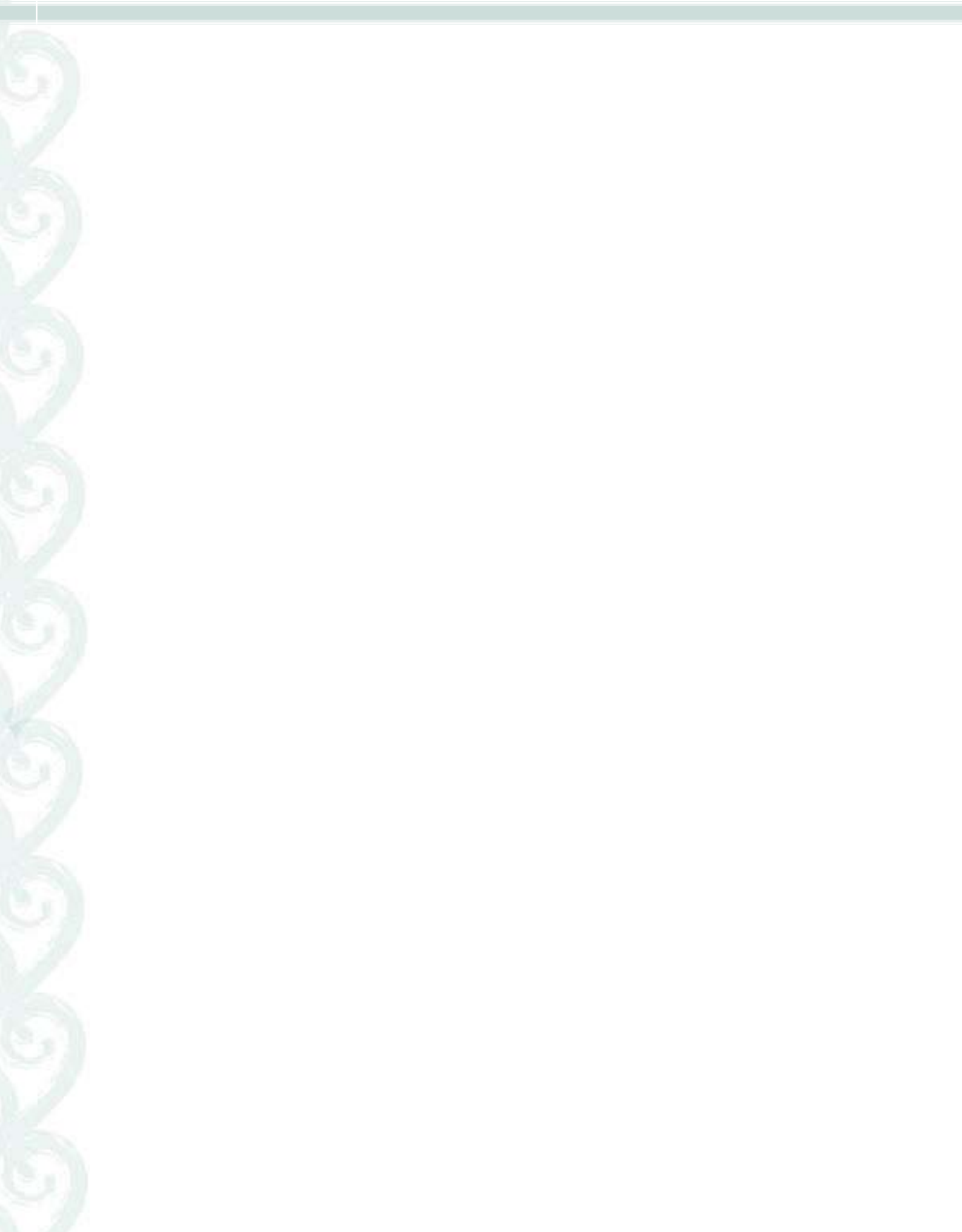
Items relating to sections 190, 193, and 194 of the Crimes Act 1961 in Part 1 of Schedule 1: omit.

Item relating to section 195 of the Crimes Act 1961 in Part 1 of Schedule 1: omit and substitute:

195 Ill-treatment or neglect of child
or vulnerable adult

195A Failure to protect child or
vulnerable adult from risk of
serious harm

Items relating to sections 196, 200(2), and 202C of the Crimes Act 1961 in Part 1 of Schedule 1: omit.



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