

**Submission to the Law Reform Commission of Hong Kong
on Causing or Allowing the Death or Serious Harm of a Child or Vulnerable Adult**

August 2019

1. Introduction

Justice Centre Hong Kong (Justice Centre) makes this submission in response to the consultation of the Law Reform Commission of Hong Kong (the Commission) on causing or allowing the death or serious harm of a child or vulnerable adult.

Justice Centre welcomes this proposal to increase protection for children and vulnerable persons in Hong Kong, but we hope this initiative benefits all relevant individuals, including migrant domestic workers, non-refoulement protection claimants (“Protection Claimants”), survivors of torture or cruel, inhumane or degrading treatment or punishment (“CIDTP”) and other marginalised individuals in a position of vulnerability.

2. Vulnerable Person (Recommendation 4)

The Commission’s proposed definition for a “vulnerable person” is:

“a person aged 16 years or above whose ability to protect himself or herself from an unlawful act or neglect is significantly impaired for any reason, including but not limited to, physical or mental disability, illness or infirmity”¹ (emphasis added)

We note the phrase “for any reason” is intended as a catch-all phrase for other situations of vulnerability². However, the Commission has only provided elderly persons as an example of vulnerable persons within the ambit of the offence in its proposed reformed model for the law in Hong Kong (Chapter 7)³.

In this regard, we note the Commission in its Overview (Chapter 1) discussed that persons may be rendered vulnerable through their position of dependency and their potential for exploitation, such as persons held in institutional settings; and/or victims of trafficking for the purpose of forced or compulsory labour, slavery or servitude⁴. We agree with this analysis and appreciate that the Commission has also included cases of abuse against domestic workers as examples of abuse against vulnerable adults⁵.

2.1 Comments

We ask that the Commission elaborate on situations of vulnerability which may fall within the scope of “vulnerable person” in its proposal, such as:

- Migrant domestic workers who are vulnerable to exploitation and abuse due to the live-in requirement, their socio-economic status and immigration status, amongst other factors;

¹ Proposed S25A(6)

² Para 7.19, The Commission’s Consultation Paper

³ Para 7.19, The Commission’s Consultation Paper

⁴ Para 1.37, The Commission’s Consultation Paper

⁵ Annex II, The Commission’s Consultation Paper

- Protection Claimants in Hong Kong who are vulnerable to exploitation due to their inability to work, socio-economic status, language abilities and legal status, amongst other factors;
- Protection Claimants in Hong Kong who are survivors of torture or CIDTP.

3. Duty of care (Recommendation 6)

The alternative basis of criminal liability for the proposed offence are⁶:

- (1) the Defendant had a “duty of care” to the victim; or
- (2) the Defendant “was a member of the same household as the victim and in frequent contact with the victim”.

“Duty of care” is defined, with reference to South Australian law⁷, as⁸:

- (1) the Defendant is a parent or guardian of the victim; or
- (2) the Defendant has assumed responsibility for the victim’s care.

We note that the South Australian offence of criminal neglect is intended to apply in institutional settings where there is an assumption of a duty of care⁹. Discussions on the proposed offence’s application in institutional settings in Hong Kong is limited in the Commission’s proposal, however.

3.1 Immigration Detention

We continue to remain concerned about the treatment of Protection Claimants, who may be children or vulnerable persons, in immigration detention. Our concerns include: prolonged detention, arbitrary or otherwise unlawful detention, inadequate medical assistance to detainees, the re-traumatisation of survivors of torture, human trafficking and/or CIDTP, and significant obstacles to accessing legal representation.

Furthermore, the Hong Kong Government has yet to develop coherent and transparent policy or guidance to ensure that vulnerable persons are not detained unlawfully and for prolonged periods of time¹⁰. In particular, there is insufficient publicised guidance or policy to ensure the timely identification of survivors of torture or CIDTP and thereby positively ensure they are not detained due to their specific vulnerability¹¹.

Whilst the Immigration Department does not maintain statistics on the number of Protection Claimants who are under immigration detention¹², Justice Centre estimates that 30-40% of

⁶ Proposed S25A(1)

⁷ Para 7.27; Recommendation 6, The Commission’s Consultation Paper

⁸ Proposed S25A(2)

⁹ Para 4.22, The Commission’s Consultation Paper

¹⁰ Immigration Department, “Guidelines and Related Immigration Ordinance”, at: https://www.immd.gov.hk/eng/useful_information/enforcement.html

¹¹ Survivors of torture or CIDTP often experienced detention in their home countries; prolonged detention therefore have profound psychological impact upon them. For more information, see Guideline 7: Detention of Vulnerable Persons at UNHCR, “UNHCR’s Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers” (February 1999). At: <https://www.refworld.org/pdfid/3c2b3f844.pdf>

¹² See the Immigration Department’s response at Accessinfo, “Immigration Detention”, at: https://accessinfo.hk/en/request/immigration_detention

our clients, including dependent children, have been detained at some point during their protection claims¹³. As of 2019, amongst our clients who were detained, around 26% have been identified by us as survivors of torture and/or CIDTP and as such should not have been detained.

3.2 Comments

We ask that the Commission elaborate on the proposed offence's application in institutional settings, in particular, whether the Immigration Department may have assumed responsibility for the care of persons under immigration detention.

4. Member of the same household and frequent contact (Recommendation 6)

Under the Commission's proposal, a person is regarded as a "member of the same household as the victim" if¹⁴:

Despite not living in that household, the defendant visits it so often and for such periods of time that it is reasonable to regard the defendant as a member of it.

We note that the Commission decided to not incorporate express reference to "a staff member of any hospital, institution, or residence, where the victim resides" under the New Zealand model into the proposal¹⁵. Nonetheless, the Commission noted that this would not preclude a staff member in an elderly care home from being charged with the proposed offence¹⁶.

4.1 Comments

We reiterate our concern regarding immigration detention stated above.

We ask that the Commission clarify:

- The extent to which this basis of liability may apply to institutional settings apart from elderly care or residence facilities;
- The definition of "household" in the proposed Section 25A(3)(a); in particular, whether it may include detention centres
- The definition of "visit" in the proposed Section 25A(3)(a); in particular, whether it may include a staff member who visits a "household" as part of her employment. Following that, whether it may include immigration officers who work at detention facilities.

5. Conclusion

As stated previously, there remains a lack of coherent and transparent policy and guidance to ensure vulnerable persons and children are promptly and adequately screened for medical needs and to determine suitability for detention. Justice Centre takes this opportunity to call upon all stakeholders, including the Commission, to look into the urgent need to reform Hong Kong's laws on immigration detention.

¹³ This data was collated from the 3rd quarter of 2017 onwards (ongoing) and could therefore slightly underrepresent the whole.

¹⁴ Proposed S25A(3)(a)

¹⁵ Para 7.30, The Commission's Consultation Paper

¹⁶ Ibid

On a related policy issue, there remains an absence of legislation to prohibit human trafficking or forced labour in Hong Kong. Justice Centre welcomes the Commission's proposal as it has the potential to offer further protection to victims of trafficking. We remain concerned, however, that current laws criminalise only some of the constituent elements of human trafficking rather than ensuring perpetrators are held accountable and victims are protected¹⁷. We are also concerned that in the absence of legislation on human trafficking, victims of trafficking, who may be migrant domestic workers or elderly care home workers, may face criminal liability under the Commission's proposal.

For further information, please contact Rachel Li (rachel@justicecentre.org.hk), Research and Policy Officer at Justice Centre Hong Kong.

About Justice Centre Hong Kong

Justice Centre Hong Kong is a non-profit human rights organisation working to protect the rights of Hong Kong's most vulnerable migrants: refugees, other people seeking protection and survivors of torture, human trafficking and forced labour.

For more information, please visit www.justicecentre.org.hk

¹⁷ For more information on Hong Kong's law and policy on human trafficking, see Justice Centre Hong Kong "Not Stopping Here: Hong Kong as a Transit Site for Human Trafficking" (January 2019) and "Coming Clean: the Prevalence of Forced Labour and Human Trafficking for the Purpose of Forced Labour amongst Migrant Domestic Workers in Hong Kong" (March 2016), available at: <https://www.justicecentre.org.hk/publications/>