



OBLIGATION TO PROTECT CHILDREN AND VULNERABLE ADULTS

CRIMES AMENDMENT ACT (Nq 3) 2011 – Protection of Children & Vulnerable Adults

A number of important amendments to the Crimes Act 1961 came into force on 19 March 2012. These amendments are intended to protect *children* and *vulnerable adults* from ill-treatment, abuse or neglect by extending the existing legal duties and introducing a new offence of failing to protect a child or vulnerable adult.

This Guideline sets out and discusses the legal duties and the offences as they apply from 19 March 2012. It is intended that this Guideline will be revised once the provisions have been considered and applied by the courts.

Duties to provide necessities and protect from injury – sections 151 and 152

Everyone who is a parent, guardian, or a person who has actual care or charge of a child,¹ or actual care or charge of a "*vulnerable adult*"² who is unable to provide himself or herself with necessities, has a legal duty to:

- (a) provide the child or vulnerable adult with necessities;³ and
- (b) take reasonable steps to protect the child or vulnerable adult from injury.

A person will only be criminally responsible for omitting to discharge or perform the duty to provide necessities and protect the person from injury if, in the circumstances, the omission is a major departure from the care expected of a reasonable person to whom the legal duty applies (section 150A).

Ill-treatment or neglect of a child or vulnerable adult – section 195

It is a criminal offence for any person who has actual care or charge of a child or vulnerable adult, or who is a staff member of any hospital, institution, or residence where the *child* or *vulnerable adult* resides to:

- (a) *intentionally engage in conduct that is likely to cause suffering, injury, adverse effects to health, or any mental disorder or disability to a child or vulnerable adult; or*
- (b) *omit to discharge or perform any legal duty, the omission of which is likely to cause suffering, injury, adverse effects to health, or any mental disorder or disability to a child or vulnerable adult.*

A person will only be criminally responsible if the conduct engaged in, or the omission to perform the legal duty, is a *major departure from the standard of care expected of a reasonable person*. This offence is punishable by a term of imprisonment not exceeding 10 years.

Importantly, staff at any hospital, institution or residential care facility in which a vulnerable victim *resides* will fall within the scope of this provision. It is not clear how "*resides*" will be interpreted. It seems clear that, for example, elderly people in residential care, people with intellectual disabilities or

¹ For the purposes of these sections a **child** is a person under the age of 18 years.

² A **vulnerable adult** is defined as "a person unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person".

³ **Necessaries** is not defined, but will include commodities and services necessary to sustain life, such as food, clothing, housing, warmth and medical care.

mental illness in residential care, and prisoners will *reside* for the purposes of this provision. Conversely, a patient who is seen in the Emergency Department is unlikely to *reside* in the hospital. However, it is less clear whether a patient who is admitted for a short period of time (say 3-4 weeks) may be regarded as *residing* in the hospital.

Failure to protect a child or vulnerable adult – section 195A

There is a new offence of failing to protect a *child or vulnerable adult* from *risk of death, grievous bodily harm, or sexual assault*. This offence is punishable by a term of imprisonment not exceeding 10 years.

This is the amendment that has provoked the most discussion as it creates a positive duty on certain people to intervene, and exposes them to criminal liability if they fail to take *reasonable steps* to protect the *child or vulnerable adult* from the actions or omissions of others.

A person will be criminally responsible for failing to protect a child or vulnerable adult (the victim) if he or she:

- (a) *resides in the same household as the victim, or is a staff member of any hospital, institution or residence where the victim resides; and*
- (b) *has frequent contact with the victim; and*
- (c) *knows that the victim is at risk of death, grievous bodily harm, or sexual assault as the result of an unlawful act by another person, or by an omission by another person to perform a statutory duty (for example, by failing to seek appropriate and timely medical care); and*
- (d) *fails to take reasonable steps to protect the victim from that risk.*

Member of the same household

A person is regarded as a *member* of a particular household even if he or she does not live in the household, if the offender 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 (section 195A(4)). Relevant considerations will include the *frequency and duration of visits to the household and whether the person has a familial relationship with the victim* (section 195A(5)).

Accordingly, it is likely that extended family members and partners of parents who have frequent contact with the household will fall within the scope of this duty. It is much less likely that a person who regularly visits the household in a professional capacity (for example a social or whānau worker) would be considered to be a *member* of the household. However, it is important to remember that, in any event, any social worker who knows that a victim is at risk of harm should take reasonable steps to protect that victim from that risk.⁴ In addition to helping protect the victim, this will also help to protect the social worker from any potential employment, professional disciplinary, civil or criminal proceedings.

Staff member of any hospital, institution, or residence where the victim resides

A staff member of any hospital, institution, or residence where the victim *resides* will be subject to the duty to take *reasonable steps to protect a child or vulnerable person from a known risk of harm*. While there is some uncertainty as to how broadly or restrictively this section will be interpreted (for

⁴ For example, Principle 3.10 of ANZASW's Code of Ethics states that: "*Members work in ways that encourage and enables self-determination by clients. If a client lacks capacity, or is otherwise unable to act with self determination, there is a duty to protect the client's rights and welfare*". For social workers, this ethical obligation overlays the discretion to report suspected child abuse or neglect to Children Youth and Family or a police constable under section 15 of the Children, Young Persons, and Their Families Act 1989.

example, the issue as to what "resides" means is referred to above), all social workers and particularly those who are employed in long term care or detention facilities should familiarise themselves with this Guideline and with the relevant policies and guidelines of their organisation.

What does this mean in practice?

Social workers must take reasonable steps to protect children and vulnerable adults where there is a known risk of harm. What constitutes reasonable steps will depend on the circumstances of each case and may include, for example:

- Notifying the appropriate agency: for example, Child Youth and Family, Elder Abuse and Neglect Prevention, or the Police (note: *any constable who believes on reasonable grounds that it is critically necessary to protect a child from injury or death may enter and remove a child without warrant* under section 42 of the Children, Young Persons, and Their Families Act 1989);
- Making an application to the Court for personal orders, or for a review of decisions by an Enduring Power of Attorney, where abuse or neglect is suspected;
- Segregating or removing the suspected offender from the victim's vicinity where, for example, the suspected offender and victim both reside at the hospital, institution or residence.

Many organisations will have policies in place which set out how a risk of harm ought to be managed, and what steps ought to be taken to protect the vulnerable person. You should be aware of these, contribute to their review, and comply with their requirements. If you are an employer or a manager you should also ensure that your staff are made aware of, and comply with any policies that are in place.

If you are unsure about what action you should take, you should discuss the matter with your professional supervisor, your line manager and/or your employer.

Legal support

In the unlikely event that you are investigated by the Police for a possible prosecution under the above provisions, you may be entitled to legal representation under the provisions of the Association's indemnity insurance.

For more information please contact either:

ANZASW National Office

03 349 0190 and speak to the Chief Executive

Or

ANZASW Legal Advisory Helpline 0800 694294 & during normal business hours Press 1 for assistance