

New Zealand Law Society

Crimes Amendment Bill (No. 2)

1. The New Zealand Law Society (Society) welcomes the opportunity to comment on the Crimes Amendment Bill (No. 2) (the Bill). The Society has a number of comments on the Bill, intended to clarify the meaning and scope of the legislation.

Clause 4: Interpretation

Clause 4(1) – definition of “vulnerable adult”

2. This clause introduces the definition of “vulnerable adult” incorporated in the new ss195 and 195A offences. The definition of “vulnerable adult” includes those who are unable to withdraw themselves from the care of charge of another by reason of “detention”.
3. This has the potential to draw those responsible for persons held in Police or Corrections Service custody within the scope of the offence. If a prison officer or police officer commits a serious breach of duty, or fails to take reasonable steps to prevent harm, he or she may be criminally liable. It is not clear if this is intended.
4. This issue may also have implications for the definition of the s195A offence, as discussed below. For example, the argument can be made that any prison facility, particularly any maximum security facility, is an environment in which all inmates are to a greater or lesser extent at risk of grievous bodily harm.
5. If prison officers and Police are intended to be within the scope of the offence with respect to detainees, then consideration should be given to the appropriate level of knowledge, and degree of risk of harm, necessary to complete the offence.

Recommendation

6. That the Committee clarify the circumstances in which detention will render an adult a “vulnerable adult” for the purposes of the proposed ss195 and 195A.

Clause 4(2) – definition of “claim of right”

7. The present drafting of the amended definition is unclear, and could be made plainer.

Recommendation

8. That the proposed definition be amended as follows:

“Claim of right, in relation to any act, means a belief, held at the time of the act, in a proprietary or possessory right to the property in respect of which the offence is alleged to have been committed.”

Clause 7: New sections 195 and 195A substituted**Proposed section 195A – Failure to protect child or vulnerable adult**

9. The proposed offence under s195A places those who come in frequent contact with children or vulnerable adults under an obligation to take reasonable steps to prevent harm to that child or vulnerable adult, where the person knows of a risk of death, grievous bodily harm or sexual assault.
10. It is important that the scope of the offence be defined as precisely as possible, to minimise the likelihood of over-reporting. An offence of this character carries with it an inevitable potential for over-reporting, as those who come into contact with children or vulnerable adults seek to protect themselves from even the suggestion of default. A precise definition will at least minimise this negative impact.
11. Commission of the offence is contingent on knowledge of a “risk” of harm to the child or vulnerable adult. The section is unclear as to how serious this risk must be to attract liability. It would benefit from the level of risk being more precisely defined, for example as ‘material’, ‘appreciable’ or ‘substantial’.
12. Further, it is not clear if it is necessary for harm to have resulted to the child or vulnerable adult as a result of the defendant’s omission before the offence is complete. As it stands, the offence is complete upon failure to take reasonable steps, regardless of whether harm results.
13. Finally, there may be a disparity between the level of culpability necessary to constitute the offences under ss195 and 195A. The former requires an intentional and “major” departure from the relevant standard of care. The latter is constituted merely by a failure to take reasonable steps. Both are subject to the same maximum penalty.
14. This seems incongruous, when the s195 offence relates to those who have actual care or charge of the victim (among others), while the s195A offence applies to bystanders in frequent contact

with the victim. The former would seem to be under a greater moral obligation to take steps to protect the child, yet greater malfeasance is required to attract liability.

Recommendation

15. That the Committee clarify the level of risk necessary to attract liability under s195A.
16. That the proposed section 195A is amended to state whether or not harm to the child or vulnerable adult is a necessary component of the offence.
17. That the Committee satisfy itself that the relative levels of culpability necessary to constitute the offences under the proposed ss195 and 195A are broadly equivalent.

Conclusion

18. The Society wishes to appear in support of this submission.

A handwritten signature in black ink, appearing to read 'Jonathan Temm', is written over a light grey rectangular background.

Jonathan Temm
President

2 June 2011