LEGISLATION NOTES

The Copyright (Infringing File Sharing Amendment Act) 2011: A Fair and Effective Regime?

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I INTRODUCTION

The Copyright (Infringing File Sharing) Amendment Act 2011 (the Act) came into force on 1 September 2011, amending the Copyright Act 1994 (the principal Act).[1] Despite being very controversial and heavily criticised by many in the public,[2] it was passed under urgency[3] with wide cross-party support, 111 votes to 11.[4]

When the Hon Simon Power MP, Minister of Justice, introduced the 2011 Bill into Parliament, he pronounced its purpose as being "to provide a fair and effective regime for the enforcement of copyright against illegal file sharers".[5] It is these two criteria, fairness and effectiveness, by which the Act will be analysed in this note.

II OVERVIEW OF THE REGIME

Under the Act, copyright holders (rights owners) can send Internet protocol address providers (IPAPs)[6] information about copyright infringements detected at Internet protocol addresses (IP addresses). The IPAPs are then

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1 Copyright (Infringing File Sharing) Amendment Act 2011, s 2.

2 See generally the submissions to the Copyright (Infringing File Sharing) Bill 2011.

3 For general criticism of the excessive use of urgency to pass non-urgent legislation, see Hamish McQueen "Parliamentary Business: A Critical Review of Parliament's Role in New Zealand's Law-Making Process" (2010) 16 Auckland U L Rev 1 at 19–20.

4 (12 April 2011) 671 NZPD 18129. Only the Green Party and Independents Chris Carter and Hone Harawira voted against the Bill. However, the Green Party only opposed the possibility of account suspension as a remedy for infringing file sharing, but otherwise "applauded the introduction of this legislation": Copyright (Infringing File Sharing) Amendment Bill 2011 (119-2) (explanatory note) ["Explanatory note 119-2"] at 8.

5 (22 April 2010) 662 NZPD 10422.

6 Copyright Act 1994, s 122A. "IPAP" is a term created by the Act, and was specifically defined separately from "Internet service provider" (ISP) in the principal Act so as to exclude those that do not allocate IP addresses to its account holders, do not charge its account holders for its services, or primarily cater for transient users (examples being universities, libraries and businesses that provide Internet access but are not traditional ISPs): see Explanatory note 119-2, above n 4, at 2.

required to match the IP addresses with the relevant account holder's details and issue an infringement notice to that customer within seven days.[7] There are three types of infringement notices:

1. A **detection notice** is sent the first time an infringement against a particular rights holder is matched to an account holder.[8] There is then a 28-day period where no further infringement notices (by the same rights owner) can be sent.[9] If no further infringements against the same rights owner occur within nine months after the date of the detection notice, the notice expires.[10]

2. If a further infringement does occur after the 28-day period has elapsed but before the notice has expired, a **warning notice** is issued. The warning notice lists the infringement triggering that notice as well as any other infringements that occurred since the date of the preceding detection notice.[11] Again, if no further infringements occur within nine months, the warning notice expires.

3. If a further infringement occurs after 28 days of the warning notice but before the expiration of the notice, a final **enforcement notice** is issued.[12] The enforcement notice discloses the same details as the warning notice and further explains that enforcement action may be taken against the account holder.[13] There is then a quarantine period of 35 days in which no further infringement notices may be issued to the account holder.[14] At the end of the 35 days, all 3 notices (detection, warning and enforcement) expire.[15]

Once an enforcement notice has been issued, a rights owner may apply to the Copyright Tribunal for an order that the account holder pay the rights owner a certain sum.[16] For efficiency, proceedings before the Tribunal are normally to be determined on the papers.[17] If the Tribunal is satisfied that each of the three alleged infringements triggering the notices was an infringement of the rights owner's copyright and occurred at the account holder's IP address, and that the three notices were issued in accordance

7 Copyright Act 1994, s 122C.
8 Ibid, s 122D.
9 Ibid, s 122E(1)(b).
10 Ibid, s 122D(3).
11 Ibid, s 122E(2).
12 Ibid, s 122F.
13 Ibid, s 122F(2).
14 Ibid, s 122F(3).
15 Ibid, s 122F(4).
16 Ibid, s 122I.
17 Ibid, s 122L.

with the Act, it must order the account holder to pay the rights owner a sum.[18] That sum is to be determined in accordance with the Copyright (Infringing File Sharing) Regulations 2011 (the Regulations), and is to consist of both a compensatory and a deterrent element.

In order to progress to the next stage/notice, each infringement must be against the same rights owner. For example, this means that where an account holder has infringed against one rights owner, and after 28 days infringes against a different rights owner, the second rights owner can only issue a detection notice; it cannot issue a warning notice in reliance on the infringement against the first rights owner. However, rights owners may appoint an agent.[19] This would allow enforcement action to be taken against an account holder who had received three notices for infringements against three different rights owners, provided those owners had previously appointed the same person or representative body to act as their agent.[20]

The Challenge Procedure

After each infringement notice is issued, the account holder has 14 days within which to challenge the notice (via the IPAP).[21] The Schedule to the Regulations gives two examples of possible grounds for a challenge: that the notice was sent to the wrong account holder, or that some or all of the alleged infringements did not take place. However, the Act itself does not provide any examples of grounds upon which a notice may be challenged, so it is not known what grounds will be valid.

Upon receiving a challenge, the rights owner has 28 days to accept or reject that challenge, otherwise the challenge will be deemed to be accepted and the notice cancelled.[22] Nothing in the Act or Regulations governs when a rights owner must accept a challenge, so it is presumably in their interest to reject all challenges. Challenges and any responses to those challenges are to be attached to the application to the Tribunal for enforcement action.[23] If rejected, the challenges and any responses become part of the papers on which the proceedings are determined. It is not clear what effect, if any, this information would have on the determination.

Suspension of Internet Accounts

The Act repeals and replaces the even more unpopular s 92A of the principal Act, which had provided that ISPs must have a policy for terminating the accounts of repeat infringers.[24] Section 92A was introduced

18 Ibid, s 122O.
19 See the s 122A definition of "rights owner".
20 See Explanatory note 119—2, above n 4.
21 Copyright Act 1994, s 122G(2).
22 Ibid, s 122H.
23 Ibid, s 122J(2)(d).
24 Copyright (Infringing File Sharing) Act 2011, s 4.

by the Copyright (New Technologies) Amendment Act 2008 but was never brought in force before its repeal.[25] This was a political decision,[26] as the provision had been the subject of much public outcry and protest.[27] Many had argued that suspension as a remedy would not only be ineffective but also disproportionate, with some claiming that Internet access is a human right.[28]

As a compromise, the Act enables a rights owner to apply to the District Court to suspend an account holder's Internet, but not until a later date to be set by Order in Council.[29] This is expected to happen no earlier than 2013,[30] and only if evidence indicates that the existing notice and penalty regime is not having the necessary deterrent effect.[31]

III FAIRNESS

One of the primary concerns about the legislation is that it could hold liable many people who are not guilty of infringing file sharing. This liability could arise either because of the regime's absolute liability nature, or its presumptions of infringement. The harshness of these two aspects may be mitigated to an extent by the discretion the Tribunal has in determining the amounts of payments to rights owners.

Absolute Liability of Account Holder

The thrust of the regime is that it holds an account holder liable for any infringing file sharing conducted through their account. This could cause difficulties for those who share their Internet access with others, such as in families, shared flats, businesses, schools, universities, libraries, cafés and so on. Nowhere in the Act does it allow an account holder to challenge an infringement notice on the basis that he or she was not the sharer of the infringing file.[32] Rather, the regime operates on an absolute liability basis, so that all that has to be established is that the infringement occurred at an IP address of the account holder.[33]

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25 Copyright (New Technologies) Amendment Act 2008 Commencement Order (No 2) 2008, cl 2(2).

26 Chris Keall "Section 92A to be scrapped" *The National Business Review* (New Zealand, 23 March 2009).

27 Pat Pilcher "Mass Internet black-out in blog protest" *The New Zealand Herald* (New Zealand, 23 February 2009).

28 Explanatory note 119—2, above n 4, at 6. Finland, for example, has made Internet access a legal right for every citizen: "Finland makes broadband a 'legal right'" *BBC News* (United Kingdom, 1 July 2010).

29 Copyright Act 1994, s 122R.

30 Ministry of Economic Development "Copyright (Infringing File Sharing) Amendment Act" <www.med.govt.nz>.

31 Explanatory note 119—2, above n 4, at 6.

32 Presumably, this factor will be taken into account by the Tribunal in setting the amount payable to the rights owner for deterrent purposes, as any relevant circumstances can be taken into account at this stage: Copyright (Infringing File Sharing) Regulations 2011, reg 12(3).

33 Copyright Act 1994, s 122O(1)(ii).

The Commerce Committee had considered whether some account holders (such as universities) should be exempted on the grounds that they cannot control an infringer, but ultimately rejected this approach in favour of putting the onus on account holders to take measures to ensure that infringing file sharing does not occur on their account.[34] The question raised is, how might this be done in practice? For one, flatmates may be expected to open separate Internet accounts, or else run the risk that their other flatmates could share infringing files and expose the account holder to liability under the Act. Schools and universities will likely have to ensure that file-sharing applications cannot be run on their computers. There may also be grave consequences for the future of New Zealand's open or widely shared wi-fi networks.[35]

Even if an account holder has taken all *reasonable* measures to ensure that infringing file sharing does not occur, that is not a defence under the Act. Accordingly, if an account holder's wireless network has been hacked, or an infringing file sharer has found some other way to use an account holder's Internet without their permission, the account holder would still be liable.

Presumption of Infringement

In proceedings before the Tribunal, an infringement notice creates the presumptions that: each incidence of file sharing identified in the notice constitutes an infringement of the rights owner's copyright in the work identified; the information recorded in the notice is correct; and the notice was issued in accordance with the Act.[36] It has been asserted that this creates a presumption of guilt contrary to the general presumption of "innocent until proven guilty".[37] This is a misconception. As explained above, the regime requires proof that the infringement occurred at the account holder's IP address, not that the account holder infringed copyright. It does not presume that any particular person was guilty of infringement. Furthermore, s 25 of the New Zealand Bill of Rights Act 1990 (NZBORA), which provides for "[m]inimum standards of criminal procedure" and gives everyone charged with an offence "the right to be presumed innocent until proved guilty according to law", does not apply as the regime is a civil one (albeit, certainly with a punitive aspect). Even if it did, the effect of s 4 of the NZBORA would still mean that the Act remains valid.

Account holders who are given an infringement notice may rebut the presumption of infringement by claiming either that there was no infringement or that it did not occur at the account holder's IP address. The

34 Explanatory note 119—2, above n 4, at 5–6.

35 For example, university wi-fi networks.

36 Ibid, s 122N.

37 See for example Alex Walls "'3 strikes' file sharing law kicks in from today" *The National Business Review* (New Zealand, 11 August 2011).

definition of file-sharing in s 122A(1) leaves room for the general principle of copyright law that a "substantial part" of a work must be dealt with in order to make a finding of breach of copyright.[38] The account holder therefore would not be liable if he or she had shared less than a substantial part of a work. The account holder might also suggest that the IPAP had matched the wrong IP address, perhaps due to dynamic IP address issues.

Furthermore, Supplementary Order Paper 230 to the Bill clarifies that the account holder does not have to "disprove" the presumptions. Once the account holder has submitted evidence *or* given reasons why the presumptions do not apply, the onus is on the rights owner to satisfy the Tribunal (presumably on the balance of probabilities) that the presumptions do apply.[39] How this will work in practice is not yet clear. The Act is silent on how much must be done by the account holder to put the onus on the rights owner, but as it is enough for the account holder to give reasons without submitting evidence, it appears the threshold is rather low.

Discretion in Awarding Damages

The Regulations do not provide clearly how to determine the amounts account holders should have to pay rights owners. They merely state that the Tribunal must determine the reasonable cost of purchasing the work that was infringed and the costs of the rights owner in issuing the notices and applying to the Tribunal (the compensatory element), as well as "an amount that the Tribunal considers appropriate as a deterrent against further infringing" (the deterrent element).[40]

This discretion in assessing the amounts payable could mitigate some of the harshness of the absolute liability effects of the regime. Section 122O(5) allows the Tribunal to decline to make an order for payment if, in the circumstances of the case, it is satisfied that making the order would be "manifestly unjust" to the account holder. It is expected, however, that the Tribunal will typically award rights owners at least $275 in reimbursement, being $200 for bringing the application[41] and up to $25 for each of the infringement notices.[42] This alone will be a severe fine if the account holder did not in fact infringe copyright but was liable by virtue of the regime's absolute liability nature.

38 Explanatory note 119—2, above n 4, at 3.

39 Copyright Act 1994, ss 122N(2) and (3). See also Supplementary Order Paper 2011 (230) Copyright (Infringing File Sharing) Amendment Bill 2011 (119—1) (explanatory note) at 2.

40 Copyright (Infringing File Sharing) Regulations 2011, reg 12.

41 Ibid, reg 8.

42 Ibid, reg 7.

IV EFFECTIVENESS

If the regime does not catch serial copyright infringers, its effectiveness will be limited. The first main problem is that there already exist ways to download illegally while avoiding the scheme. Proxy servers, virtual private networks (VPNs) and seedboxes are a few of the tools that determined infringers have at their disposal to escape detection. Those who are not so technologically savvy can still get around the regime by resorting to other methods of downloading. The regime only encompasses "file sharing" which, under s 122A, requires the use of an application or network enabling simultaneous sharing of material between multiple users, commonly known as peer-to-peer file sharing (for example, BitTorrent). It therefore does not cover illegal streaming of copyrighted materials (such as through YouTube), or downloading direct from a server (such as through Rapidshare). Rights owners may still seek to enforce their rights using other copyright law remedies, but this is difficult, costly and time-consuming, and importantly, rights owners cannot rely on s 122C to require IPAPs to match the identified infringing IP address with the account holder, making identification of infringers more difficult.

Another issue is whether rights owners will have enough incentive to bring claims under the regime. The costs of issuing notices and applying to the Tribunal are recoverable if the rights owner wins at Tribunal stage, but they would otherwise be out of pocket. For many small-scale infringers, the Tribunal might well consider that the $275 "minimum" payments already constitute a sufficient deterrent against further infringing.[43] In these cases, rights owners would still be out of pocket as the general rule in these hearings is that parties are left to bear their own costs.[44] This would, quite rightly, incentivise rights owners to bring claims against serious infringers, against whom they are likely to obtain "deterrent" payments. Unfortunately, these are the same people who are most likely to find ways to evade the legislation.

V CONCLUSION

The approach the Tribunal takes to setting awards under s 122O will have a significant impact on the success of the regime. If it refuses to award any amount for deterrent purposes over and above the rights owners' costs of sending notices and bringing the application, this would rightly incentivise rights owners to bring claims mainly against more serious infringers. The existence of the scheme itself, and perhaps the occasional claim against

43 See ibid, reg 12(3)(c).

44 Copyright Act 1994, s 122O(7).

minor infringers, may act as a sufficient deterrent for the majority of would-be infringers.

Yet the Tribunal can only do so much, and other inherent flaws in the regime — mainly the absolute liability of the account holder and the fact that many ways exist to avoid detection under it — could easily result in its downfall. The media attention that has surrounded the regime (much of it negative) shows that the Act is politically precarious, despite passing with wide cross-party support. The day the Act came into force Labour announced that it would remove the termination provisions if elected.[45] The whole regime might well be repealed (or at least, substantially amended) if the first few cases before the Tribunal attract negative publicity.

Traditional business and distribution models cannot survive as technology progresses, and Parliament will always be one step behind trying to keep pace with such progress. Innovation and adaptation are instead needed, by making legal downloads more accessible and attractive than illegal ones and competing with illegal downloads on factors other than price. Such factors could include the moral attractiveness of legal downloading, as demonstrated by the success of Radiohead's pay-what-you-want freely downloadable album, *In Rainbows*, which still sold more in CD copies than their previous two recent releases.[46] Admittedly, while subsequent releases in pay-what-you-want form might not attract the same amount of hype and success, it is an example of the kind of unorthodox thinking that is needed to combat illegal file sharing in the long run; not another "three-strikes" regime.

45 Clare Curran "'Termination clause' to go within 90 days" (press release, 1 September 2011).

46 Sean Michaels "In Rainbows outsells last two Radiohead albums" *The Guardian* (United Kingdom, 16 October 2008).

Third-Party Violence Against Children: The Crimes Amendment Act (No 3) 2011

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I INTRODUCTION

The level of child abuse in New Zealand is well documented. Astonishingly, an average of 10 children die at the hands of the people closest to them each year.[1] Child, Youth and Family confirmed 13,315 avoidable hospital admissions in 2008–2009 for children under five.[2] In the period 2009–2010, there were 21,000 confirmed cases of abuse and neglect, with 1,286 children admitted into hospitals around New Zealand as a result of assault, neglect or maltreatment.[3]

The Crimes Amendment Act (No 3) 2011 (the Act) received the royal asset on 19 September 2011 and will come into force on 19 March 2012. The Act makes two amendments of note. First, it strengthens the duties to protect contained in the Crimes Act 1961. Secondly, the Act creates two new offences of "ill-treatment or neglect of child or vulnerable adult" and "failure to protect child or vulnerable adult".

The Act represents the end of a process that began in 2008 when the National Government announced that addressing child abuse would be a priority in criminal justice reform. Hon Simon Power, the then Minister of Justice, invited the Law Commission to expedite its 2007 review of Part 8 of the Crimes Act 1961, with a particular focus on ensuring that children are protected adequately by the offences contained in Part 8 of the Crimes Act. The recommendations set out in the Law Commission's report and several cabinet papers now form part of the Crimes Amendment Act 2011.[4]

II DUTIES TENDING TO THE PRESERVATION OF LIFE

The provisions in ss 151 and 152 of the Crimes Act 1961, as they previously stood, did not impose a duty to protect on either parents or those with charge of persons unable to provide themselves with the necessaries of life.

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1 "Green Paper for Vulnerable Children" (2011) Children's Action Plan <www.childrensactionplan.govt.nz>.

2 Ministry of Social Development *Every child chrives, belongs, achieves: Ka whai oranga, ka whai wāhi, ka whai taumata ia tamaiti: The Green Paper for Vulnerable Children* (2011) at 2 [Green Paper].

3 Ibid.

4 See Law Commission *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person* (NZLC R111, 2009).

In *R v Lunt*, Blanchard J affirmed that the previous duty to provide necessaries of life in ss 151 and 152 could not be seen as imposing a duty to protect.[5] Therefore members of a household that were neither perpetrators of, nor (legally speaking) parties to, ill treatment or neglect could not be held liable under the Crimes Act for their failure to intervene "no matter how outrageous or how obvious the ill treatment or neglect of the child may be".[6]

The Law Commission acknowledged that this was a serious deficiency in the law. It recommended an extension of ss 151 and 152 to include a duty to protect and a further amendment to s 152 to include an obligation to provide "necessaries".[7] These recommendations are now mirrored in the Crimes Amendment Act.

The amendments to s 151 place everyone who has actual care or charge of a person who is a vulnerable adult who is unable to provide himself or herself with necessaries, under a legal duty to provide that person with necessaries and to take reasonable steps to protect that person from injury. Similarly, under the amended s 152 everyone who is a parent or a person in place of a parent and who has actual care or charge of a child under the age of 18 years is now under a legal duty to provide that child with necessaries and to take reasonable steps to protect that child from injury.

The extended scope of responsibility under these sections will capture cases not only where the breach has been a serious one and death has resulted, but also where death has not yet occurred.[8] They will not, therefore, simply provide the basis for a prosecution for manslaughter, but will also apply to any instances of abuse where there has been a failure to protect. This will ensure that irrespective of how serious the consequences of the breach are, a criminal offence provision containing appropriate penalties is available to prosecute the omissions of the passive parent or caregiver.[9]

III OFFENCES OF CHILD NEGLECT AND ILL TREATMENT

Prior to the enactment of the Act the law specifically addressing child neglect and ill treatment was limited to two provisions: s 10A of the Summary Offences Act 1981 and s 195 of the Crimes Act. The Act repeals both s 10A and s 195 and substitutes a new s 195 and s 195A of the Crimes Act.

5 *R v Lunt* [2004] 1 NZLR 498 (CA) at [23]–[24].
6 See Law Commission, above n 4, at [31].
7 Ibid, at [38].
8 Ibid, at [5.38].
9 Ibid, at [5.37].

Section 195

Section 195, "ill-treatment or neglect of a child or vulnerable adult", extends the previous s 195 offence of "cruelty to a child" to cover those caring for vulnerable adults. The new section provides that:

> (1) Every one 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 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 (the **victim**) if the conduct engaged in, or the omission to perform the legal duty, is a major departure from the standard of care to be expected of a reasonable person.

This section is notable in three respects. First, it should be noted that the maximum penalty has been increased from five to ten years to address the culpability of such cases where the child or vulnerable adult is near death. Secondly, defendants no longer have recourse to an "ignorance or thoughtlessness" defence and will be liable if the omission to perform a legal duty or the intentional conduct is a "major" departure from the standard of care expected of a reasonable person.[10] Finally, liability is not limited to a person who has actual care or charge of the victim, but instead extends to "a person who is a staff member of any hospital, institution, or residence where the victim resides".[11] The Law Commission recommended this extension on the basis that the state has a special relationship to children and vulnerable adults who come under its care, for it is they who are often the most vulnerable to abuse.[12]

Section 195A

Section 195A introduces a failure to protect provision into New Zealand law. Subsection (1) of that section provides:

> Every one is liable to 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, grievous bodily harm, or sexual assault as the result of—
> (i) an unlawful act by another person; or
> (ii) an omission by another person to discharge or perform a legal duty if, in the circumstances, that

10 Crimes Amendment Bill (No 2) 2011 (284—1), cl 195(1).
11 Ibid, cl 195(2)(b).
12 Law Commission, above n 4, at [5.19].

omission is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies; and

(b) fails to take reasonable steps to protect the victim from that risk.

This section is modelled on s 5 of the United Kingdom's Domestic Violence, Crimes and Victims Act 2004, which provides for an offence of causing or allowing the death of a child or vulnerable adult.[13] However, unlike s 195A the United Kingdom provision only applies to the most serious cases where the child or vulnerable adult has died.[14]

For the purposes of subsection one, "persons" are defined as a member of the same household as the victim; or a person who is a staff member of any hospital, institution, or residence where the victim resides.[15] In the explanatory note to the Bill, this extension of liability to those outside of the familial circle is explained on the following basis:[16]

> [S]ometimes there may be people in sufficient proximity to a child who are neither parents (thus under a duty), nor perpetrators of the offending, nor parties to it in the legal sense, who nonetheless have a duty to the child because of their proximity, and who have a level of culpability that the law at present is not able to recognise.

The Law Commission report highlighted several concerns regarding the scope of the proposed provision. While some have argued that the coverage of the offence would be too broad, others expressed concerns that the offence would be arbitrarily narrow, imposing liability on a flatmate but not on a teacher, for example.[17] There must, however, be a line to which liability extends. Those who live with a child have a higher degree of responsibility for that child than those who simply come into contact with them.[18] Likewise, the state has a responsibility for those in its care.

The provision includes a number of safeguards that restrict the scope of liability.[19] These safeguards include the requirement for frequent contact and knowledge that the child is at risk. Furthermore, the jury will need to be satisfied that the failure to take reasonable steps to protect the child from harm was grossly negligent.[20] Exactly what would constitute "reasonable steps" is uncertain, however, and may require further judicial or legislative explanation.

There is also concern around the age at which such a duty should

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13 See Domestic Violence, Crimes and Victims Act 2004 (UK), s 5.
14 Law Commission, above n 4, at [5.28].
15 Crimes Amendment Bill (No 2) 2011 (284—1), cl 195A(2).
16 Crimes Amendment Bill (No 2) 2011 (284—1) (explanatory note).
17 Law Commission, above n 4, at [5.31].
18 Ibid.
19 Ibid.
20 Ibid.

apply. Cabinet has previously agreed to provide for a new offence that places a duty to protect on parents over the age of 18 and other members of the same household.[21] The Ministry of Justice however recognised several difficulties with restricting the application of the offence to those aged over 18. The restriction would mean that parents under the age of 18 would be required to protect their children from injury under the proposed extended s 152 of the Crimes Act but would be under no obligation to protect their child from sexual assault.[22] This effect would be unsatisfactory given that children should be protected equally from all forms of violence. Furthermore, the obligation of protection on parents under 18 years of age would be less than other adults who reside in the same home as the child and who may or may not be directly related.[23] It was also emphasised that all parents, irrespective of age, should be held to the same standard as those who are in frequent contract with a child. Section 195A now mirrors the recommendations of the Ministry of Justice. It is important to note however that a person under the age of 18 cannot be charged under s 195A unless the victim is a child and the person is the child's parent.

Some commentators have suggested that such an extension of liability is too onerous given that many teenage parents are themselves at risk of harm or may not be of sufficient maturity to recognise when it is necessary to seek help or where help is in fact available.[24] The Ministry of Justice addressed such concerns in its 2011 Regulatory Impact Statement. In assessing whether reasonable steps have been taken in protecting the victim when they were at risk of death, grievous bodily harm, or sexual assault, the Ministry anticipates the courts will consider the position of the teenager in making such a determination.[25] In addition, those under 17 would be dealt with in the Youth Court and consequently may avoid conviction and instead be referred to various mentoring and parenting programmes.[26]

However, as the Ministry correctly acknowledged, the true impact of the extension of s 152 and the introduction of s 195A is difficult to measure, especially in light of the radically new approach to third party liability.

IV CONCLUSION

Children are particularly vulnerable to abuse. The relationship they have with their parents is distinctive in that it "exhibits a unique paradox", for

21 Ministry of Justice *Regulatory Impact Statement: Agency Disclosure Statement: Crimes Amendment Bill* (2011) at 4.

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid, at 5.

26 Ibid.

children are the most vulnerable to abuse by their parents, the people on whom the law imposes the highest duty to protect them.[27] A passive parent's inaction is therefore of a special kind, for he or she plays a morally and legally significant part in the process in which the criminal harm occurs.[28] Therefore:[29]

> It remains vitally important for society that such dreadful occurrences and such wilful omissions are taken seriously by the Courts and that a strong message is sent in the hope that others may think twice before they permit another such situation to occur.

The changes contained in the Act will be a positive step towards prosecuting adequately passive parents' failure to protect their children. The courts will now have the ability to punish such omissions more easily, particularly in cases where a child eventually dies at the conclusion of weeks or months of abuse, in circumstances where the perpetrator resides in the same residence and the passive parent has knowledge of the abuse but fails to take any steps to prevent its continuation. The extended scope of s 152 will capture those cases where death has not yet occurred but the child has had his or her life endangered or his or her health permanently injured by such an omission. Therefore, the changes will ensure that irrespective of how serious the consequences of the breach are, a criminal offence provision containing appropriate penalties can be used to prosecute the omissions of passive parents.[30]

Whether the amendments to the Crimes Act will affect the number of children abused in the home each year, only time will tell. There are no simple solutions to the problems of child abuse. Legislative change is only one measure that must be taken to address the issue of family violence in New Zealand. The government and the judiciary alone cannot protect vulnerable children. It is an issue that must be addressed at community level too and as stated in the recently published Green Paper for Vulnerable Children: [31]

> Children will thrive, belong, achieve when they are supported by parents, caregivers, family, whānau, hapū, iwi, community and the Government. We all have responsibility for our children.

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27 Bryan A Liang and Wendy L Macfarlane "Murder by Omission: Child Abuse and the Passive Parent" (1999) 36 Harv J on Legis 397 at 440.

28 William Wilson *Central Issues in Criminal Theory* (Hart Publishing, Oxford, 2002) at 86.

29 *R v Harris* HC Wellington CRI-2004-078-1816, 26 August 2005 at [17].

30 Law Commission, above n 4, at [5.37].

31 Green Paper, above n 2, at 9.