



CHANGES TO THE CRIMES ACT



From next month, failure to protect a vulnerable child or adult could be deemed a criminal offence. Nurses and other health workers must know how best to protect their patients.

By NZNO lawyer Margaret Barnett-Davidson

Nurses, midwives and caregivers do not, as a rule, have to concern themselves with any changes to the Crimes Act. The Crimes Act 1961 essentially lays out all the criminal offences for which people in New Zealand can be tried. Health professionals and caregivers are preoccupied daily with providing the best care possible to patients and so do not normally associate their actions with a potential breach of criminal law.¹

Nurses and midwives intuitively know their practice is far from attracting any sanction under the criminal law. The threshold for any failure to provide care for a patient, or neglect of that duty of care, amounts to a major departure from the standard of care expected of a reasonable nurse or midwife. This is far from what nurses and midwives daily aspire to in caring for patients.²

Recent changes to the Act were primarily designed to widen the criminal accountability net for the offence of ill-treatment, neglect and serious violence against children. The changes expand the legal duties of those caring for children and increase the maximum penalty for this offence. As part of the recent changes, however, from March 19, the Crimes Act includes a new offence against a new group defined as "vulnerable adults" who, like children, for various reasons are not able to remove themselves from a risk of serious harm.³

The changes to the Act include the repeal of the offence of Cruelty to a Child (section 195), replacing this with Ill-treatment or Neglect of Child or Vulnerable Adult (s195), and the new offence of Failure to Protect Child or Vulnerable Adult (s195A).

It is the latter new offence which nurses, midwives and caregivers need to be aware of, as it creates potential criminal liability for a failure to protect a vulnerable person from the potential actions of others – a crime of omission – rather than the more usual crime of commission.

The elements of the new offence have wide reaching implications for health-related institutions and practitioners. This article provides an overview of what the elements of the new offence are, and advice to health workers on how best to protect the vulnerable adult who they know is at risk.

Under the new section 195A, a staff member

of any hospital, institution, or residence where a child or vulnerable adult resides, who has frequent contact with the vulnerable adult, and who knows s/he is at risk of serious harm,⁴ due to the unlawful actions by another person or because someone else has grossly neglected their duty of care to that person, is liable to a maximum of 10 years in prison, if the staff member fails to take reasonable steps to protect the vulnerable adult from that risk. A vulnerable adult is defined in the Act 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".

The duty to protect could extend to staff in any hospital, institution or residence and can include doctors, nurses, midwives, caregivers, support workers and ancillary staff. These staff can include emergency department staff, Plunket nurses, public health and district nurses, midwives, community mental health nurses, aged-care health professionals and caregivers, staff in IHC and mental health residences in the community, all district health board (DHB) staff, and any health professionals who screen patients for risk of family violence.

The elements of the offence, when looked at one by one, hopefully make charges under the offence very unlikely. For example, the nurse who cares for a vulnerable adult such as an elderly resident in a nursing home or hospital would have to have frequent contact with the patient, know the patient was at risk of very serious harm by another person as described in the offence, and then fail to take reasonable steps to protect the patient from that risk.

However, if a nurse has a suspicion based on evidence that another person poses a risk of serious harm to their patient, s/he should act

on such a suspicion and err on the side of caution, rather than waiting for clear knowledge.

The duty to protect vulnerable adults from the known risk of serious harm has always been a duty nurses have attended to. Nurses will observe and report such risks as part of their ongoing risk assessment in the course of their care of a patient.

Taking reasonable steps

Failure to take reasonable steps to protect has not, however, previously had the potential to be a criminal offence. Therefore, once this change comes into force, it is essential nurses have good systems in place wherever they work that facilitate the reasonable steps they must take to protect such patients.

Such reasonable steps would involve reporting the knowledge to a manager or decision maker who can then decide, for example, not to discharge a mental health patient home to a risky environment where serious harm might occur. It is imperative nurses document such reporting of a patient known to be at risk, clearly and in full, in the patient's notes. Such reporting and follow up has always been, and remains, a patient advocacy skill and a hallmark of nurses' and midwives' professional autonomy.

All hospitals, institutions and residences where such children or vulnerable adults reside will need to put policies in place to ensure reasonable steps are clear and can be taken when there is a known risk.

No doubt, as next month's enforcement date gets closer, there will be further collaborative policy work involving DHBs, the Ministry of Health, the various regulatory authorities such as the Medical and Nursing Councils, professional groups such as NZNO, and other relevant government departments who will enforce the new changes, eg Police and Crown Law. This will ensure the protection of children and vulnerable adults can be facilitated without the risk of potential criminal liability to all those who care for such people. •

References and footnotes

1) Keenan, R. (gen ed) (2010) *Health care and the Law*, 4th Ed. New Zealand: Brookers Ltd.

2) Section 150A of the Crimes Act 1961 outlines the standard of care required of persons under legal duties.

3) New Zealand Parliament (2011) *Crimes Amendment Bill (No 2)*. www.parliament.nz/en-NZ/PB/Legislation/Bills/7/e/d/00DBH0H_BILL10599_1-Crimes-Amendment-Bill-No-2.htm. Retrieved 25/01/12.

4) Serious harm, under the Act, is defined as "death, grievous bodily harm or sexual assault".