



Law Commission

(Law Com No 279)

CHILDREN: THEIR NON-ACCIDENTAL DEATH OR SERIOUS INJURY (CRIMINAL TRIALS)

A Consultative Report

April 2003

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultative report, completed on 15 April 2003, is circulated for comment and criticism. It does not represent the final views of the Law Commission, although it does contain recommendations which we are minded to make to Government.

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It would be helpful if, where possible, comments sent by post could also be sent on disk, or by e-mail to the above address, in any commonly used format.

It may be helpful, either in discussion with others concerned or in any subsequent recommendations, for the Law Commission to be able to refer to and attribute comments submitted in response to this consultative report. Any request to treat all, or part, of a response in confidence will, of course, be respected, but if no such request is made the Law Commission will assume that the response is not intended to be confidential.

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THE LAW COMMISSION

CHILDREN:

THEIR NON-ACCIDENTAL DEATH OR SERIOUS

INJURY

(CRIMINAL TRIALS)

CONTENTS

	<i>Paragraph</i>	<i>Page</i>
EXECUTIVE SUMMARY		iv
Proposals rejected	2	iv
Recommendations we are minded to make		
Evidence and procedure		
Scope of the recommendations	8	v
A statutory statement of principle	12	vi
Evidential and procedural recommendations	13	vi
Substantive law	16	vii
PART I: INTRODUCTION		1
Background to the Consultative Report	1.3	1
Some preliminary points		
A two track approach	1.10	4
The need for the prosecution to prove that a crime has been committed	1.14	5
The current law	1.16	5
Partial solutions under the current law	1.26	9
Inferring joint enterprise	1.27	9
Prosecutions for cruelty or neglect	1.32	10
Using one suspect as a prosecution witness	1.35	11
Previous discussions of the need for reform	1.37	13
The format of this report	1.42	14
PART II: THE EXTENT OF THE PROBLEM		15
PART III: THE CIVIL LAW OF CHILD PROTECTION		19
Views of respondents to the informal consultation paper	3.2	19
The legal framework for civil proceedings	3.14	22

	<i>Paragraph</i>	<i>Page</i>
The standard of proof	3.17	23
Cases involving unexplained injuries	3.23	25
Admissibility of evidence in civil proceedings	3.38	31
Use of evidence obtained in civil proceedings	3.44	32
Confidentiality of evidence in civil proceedings	3.46	33
Conclusion	3.52	35
PART IV: OUR APPROACH TO REFORM		37
The duty to protect children from harm	4.4	37
The impact of the European Convention on Human Rights and other international obligations	4.7	38
Our initial approach – focussing on Article 6	4.8	38
A more comprehensive, better-balanced approach	4.16	40
Does Article 8 of the ECHR have an impact on these issues?	4.24	42
Conclusions on the impact of the ECHR	4.27	43
Our proposed approach to the substantive law	4.32	45
The range of application of our scheme		
Which children?	4.34	46
Should our scheme extend to vulnerable adults?	4.35	46
To which offences should our recommendations apply?		
“Death of or serious injury to a child”	4.36	47
To which categories of person should our proposals apply?		
Who has “responsibility” in this context?	4.40	49
To which categories of defendant should special rules apply?	4.56	51
PART V: OPTIONS WHICH WE REJECT		53
Introduction	5.1	53
Reverse burdens of proof		
Placing a legal burden on the defendant	5.3	54
Imposing an evidential burden	5.20	59
Compulsory questioning	5.28	61
Admitting incriminating statements made by one defendant against the other	5.41	66
Reforming the substantive offence of manslaughter	5.55	70
PART VI: EVIDENTIAL AND PROCEDURAL CHANGES		75
Introduction	6.1	75
Recognising a responsibility to give an account	6.4	76

	<i>Paragraph</i>	<i>Page</i>
Safeguards	6.10	78
Establishing a case to answer	6.15	79
The drawing of inferences from silence		
The historical context	6.24	81
The Criminal Justice and Public Order Act 1994	6.27	82
Consequences of our recommendations for the operation of the Criminal Justice and Public Order Act 1994	6.34	84
Compliance with Article 6 of the ECHR	6.44	87
A full circle	6.50	88
The trial judge’s duty to ensure fairness	6.54	90
PART VII: NEW CRIMINAL OFFENCES?		91
An aggravated form of child cruelty or neglect		
The position of the informal consultation paper	7.3	91
The response leading to a development of the recommendation	7.9	93
Cruelty or neglect leading to serious injury	7.14	94
An offence of failing to take reasonable steps to prevent abuse		
The approach in the informal consultation paper	7.15	95
A different approach	7.17	96
What would be “serious harm deriving from ill-treatment”?	7.24	97
An illuminating example	7.25	98
Conclusion	7.26	98
PART VIII: CONSULTATION ISSUES		100
General issues	1	100
Rules of evidence and procedure	7	101
New offences	12	102
Responses	15	103
APPENDIX: LIST OF RESPONDENTS TO THE INFORMAL CONSULTATION PAPER		104

EXECUTIVE SUMMARY

1. In this consultative report, the Law Commission is consulting on recommendations we are minded to make to the Government to deal with cases in which a child, under the age of 16, has been non-accidentally killed, or seriously injured, by one or other or all of a small group of people, at least one of whom has responsibility for the child's welfare.¹ Research referred to in Part II demonstrates that this is a relatively common occurrence but that in almost 75% of known cases the person who has inflicted the death or serious injury is not prosecuted. The primary reason for this is that the rules of evidence and procedure make it impossible in many cases for fact finders to be given the opportunity accurately to decide which member(s) of the small group of people who must have inflicted the injuries or killed the child is guilty. This is because the present law, as reflected in the decision of the Court of Appeal in *Lane and Lane*,² requires the trial judge to withdraw the case from the jury at the end of the prosecution case before any of the defendants has given evidence if at that stage the prosecution are unable to establish a 'case to answer' against either defendant.

PROPOSALS REJECTED

2. A number of possible proposals were put forward by the Commission's Criminal Law Team in an informal consultation paper which was issued in December 2002. Those which are summarised in paragraphs 3, 4, 5 and 7 were not supported by the Team in that paper but the proposal summarised in paragraph 6 was supported by the Team. As a result of the responses which we received to that paper, the Law Commission has decided to reject each of them and is not consulting on them.
3. We are not minded to recommend that a legal burden should be imposed upon a defendant to provide an explanation for a child's death or injury which, if it were not discharged, would result in the defendant being convicted of murder or manslaughter. Detailed consideration was given to the view, expressed by a few eminent respondents to the informal consultation paper, that the child's right to protection under Articles 2 and 3 of the European Convention on Human Rights would justify the imposition of a legal burden upon the defendant. We believe, however, that it would be wrong to convict a person of such an offence if the jury, though not sure that the offence was committed by that defendant, were obliged, as a matter of law, to convict him or her because they were not persuaded, on the balance of probabilities, that the defendant did not kill or injure the child. We are of the view that if a provision to this effect were to be enacted, either it would be 'read down' by the courts so that only an evidential burden would be imposed, or it would be declared incompatible with Convention rights under the Human Rights Act 1998.

¹ The background to this report is explained at paragraph 1.3.

² (1986) 82 Cr App R 5.

4. We are not minded to recommend that there should be an evidential burden on a defendant to raise a defence where the prosecution has satisfied the court that a child has suffered non-accidental death or injury and the defendant is within a known small group of people one, or some, or all of whom must have killed or injured the child. We believe that imposing an evidential burden would create an unacceptable risk of unjust convictions. People would be at risk of being automatically convicted by virtue of a rule of law where they have failed to give, or adduce, evidence in cases where the prosecution has not proved all the elements of the offence against them.
5. We are not minded to recommend the imposition of a direct obligation upon defendants to provide an account of the child's death or injury, with a criminal penalty imposed if the defendant fails to do so. Such an approach would not, in our view, withstand challenges under the ECHR or the Human Rights Act 1998.
6. The Team put forward for consideration the admission, as part of the prosecution case, of evidence of a pre-trial statement made by one defendant against the other, in order to determine whether there is a case to answer against that other defendant. This suggestion met with a large measure of opposition from respondents to the informal consultation paper. We are not minded to recommend any further change to the law on co-defendants' statements.
7. We are not minded to recommend that there should be substantive proposals to amend the law of manslaughter to deal with this issue.

RECOMMENDATIONS WE ARE MINDED TO MAKE

Evidence and procedure

Scope of the recommendations

8. We are minded to recommend that the recommendations in this consultative report should apply in cases of non-accidental death or serious injury to children under the age of 16. Having considered the protection available to children under both domestic legislation and international treaties, we are of the view that 16 is the most appropriate age under which to extend protection. This fits with the offence under section 1 of the Children and Young Persons Act 1933, which plays an important role in our recommendations for reform of the substantive law. We believe that it is important to maintain consistency in this respect.
9. The recommendations would apply in cases where a child has suffered non-accidental death or serious injury.
10. The recommended changes in the rules of procedure and evidence will apply in cases where the death or serious injury must have been caused by one of a defined group of individuals, at least one of whom had responsibility for the child's care at the time of the death or injury.
11. Where these conditions are satisfied, the recommended changes to the rules of procedure and evidence will apply in trials for the offences of: murder; manslaughter; assault under sections 18 or 20 of the Offences Against the Person

Act 1861; rape; indecent assault; child cruelty under section 1 of the Children and Young Persons Act 1933; and the new offence, which we provisionally propose in Part VII, of failing, so far as is reasonably practicable, as a person responsible for the child, to prevent serious harm through ill treatment to a child.

A statutory statement of principle

12. We are minded to recommend that, as part of the State's compliance with its obligation to protect children under Articles 2 and 3 of the ECHR, there should be the following statutory statement making clear, respectively, the rights of the State in respect of, and the position of those who are responsible for the welfare of, a child who has suffered a non-accidental death or serious injury:
 - (1) The State is entitled, through the police and/or the courts, when investigating, or adjudicating upon, criminal liability for such an occurrence, to call for an account of how it came about from those who were at the time responsible for the welfare of such a child;
 - (2) The responsibility of such a person for the welfare of such a child includes providing such an account as he or she can if lawfully asked for one by the police and/ or the courts;
 - (3) The responsibility of a person under (2) does not require him or her to act inconsistently with their privilege against self incrimination.

Evidential and procedural recommendations

13. We are minded to recommend that, in a case to which these recommendations apply, where the court is satisfied, to the criminal standard, at the conclusion of the prosecution case that:
 - (1) a child has suffered non-accidental death or serious injury;
 - (2) the defendants are, or are within, a defined group of individuals, one or other or all of whom must be guilty of causing the death or serious injury; and
 - (3) that at least one of the defendants is a person who has responsibility for the welfare of the child

the decision whether the judge should withdraw the case from the jury must be postponed until the close of the defence case.

14. We are of the view that it is logical that in this type of case the decision as to whether there is a case fit to go to the jury must be postponed until the defence has had the opportunity to give evidence. This is because, typically, the only people who can directly confirm or deny the facts surrounding the death or serious injury are the defendants, or the victim who will be dead or too young to give evidence. It is illogical that the court should decide whether to leave the case to the jury when, of necessity, the only available direct evidence cannot yet have been given. The change would remove from the defence a tactical advantage but

we do not believe that it would do injustice. It would remove a present hindrance to the effective discharge of the State's duty to protect the fundamental human rights of the child.

15. We are minded to recommend that in a case which falls within the criteria in paragraph 13:
 - (1) If a defendant, who had responsibility for the welfare of the child, does not give evidence, the jury should, in the case of that defendant, be permitted to draw such inferences from this failure as they see fit but must be directed to convict the defendant only if, having had regard to all the evidence and to any inference which they are permitted to draw having had regard to any explanation given for his or her silence, they are sure of the defendant's guilt.
 - (2) The judge, at the close of the defence case, must withdraw the case from the jury if, having regard to all the evidence before the court and to any inference which the jury may draw from the defendant's failure to give evidence, a conviction would be unsafe or the trial would otherwise be unfair.

Substantive law

16. We are minded to recommend that there should be an aggravated form of the existing offence of child cruelty under section 1 of the Children and Young Persons Act 1933, where the offence results in the death of the child. We emphasise that guilt of the aggravated form of this offence can only arise where the defendant would be guilty of the basic offence. This aggravated offence would carry a maximum sentence of 14 years imprisonment. An important feature of this offence is that it enables the label of responsibility for the death of the child to be attached to the defendant.
17. We provisionally propose that a new offence should be created whereby a person who has undertaken responsibility for a child fails, so far as is reasonably practicable, to protect that child from serious harm deriving from ill treatment.
18. Serious harm deriving from ill treatment will be established where the child is the victim of an offence of: murder; manslaughter; assault under section 18 or 20 of the Offences Against the Persons Act 1861; rape or indecent assault.
19. Such an offence would be punishable by a maximum sentence of 7 years imprisonment.
20. We put this forward for consultation as a provisional proposal. It arose out of the responses we received to the informal consultation exercise. It was not put forward for consultation in the Team's informal consultation paper. It is not, therefore, at this stage as firm a proposal as those which we are minded to recommend.

21. We are minded to recommend that wherever, for the purposes of the recommendations in this consultative report, the definition of an offence, or a rule of evidence or procedure, requires that a person has “responsibility for the welfare of a child”, that shall have the same meaning as the phrase ‘has responsibility for any child or young person’ pursuant to sections 1 and 17 of the Children and Young Persons Act 1933.
22. We would make it clear, however, that, for the purposes of this report, a person is not to be presumed to be responsible for the welfare of a child in accordance with sections 1 and 17 of the 1933 Act *merely* by reason of being engaged by a social services authority to deal with the child who is the subject of a care order made in favour of that authority.

PART I

INTRODUCTION

- 1.1 The proposals in this consultative report are intended to address a problem which has been recognised for many years by judges, academics and practitioners, and which has been highlighted by the press. It can be exemplified at its most intractable in the following situation:

A child is cared for by two people (both parents, or a parent and another person). The child dies and medical evidence suggests that the death occurred as a result of ill-treatment. It is not clear which of the two carers is directly responsible for the ill-treatment which caused death. It is clear that at least one of the carers is guilty of a very serious criminal offence but it is possible that the ill-treatment occurred while one carer was asleep, or out of the room.

- 1.2 As the law stands, as a result of the Court of Appeal's ruling in *Lane and Lane*¹ it is likely that such a trial would not proceed beyond a defence submission of 'no case to answer'. As a result, neither parent can be convicted, and one or other parent, or both, might well have literally 'got away with murder'. It should be remembered that even though one parent may not have struck the fatal blow or blows, he or she may be culpable either through having participated in the killing actively or by failing to protect the child. In many cases of this type it is difficult, or impossible, to prove this beyond reasonable doubt, and therefore neither parent can be convicted.

BACKGROUND TO THE CONSULTATIVE REPORT

- 1.3 This consultative report is the result of work which has been carried out since mid-2002. The project was announced in the Law Commission's 36th Annual Report, 2001 as follows:²

Non-accidental injury to children

5.13 Work will start shortly on a new project concerning non-accidental injury to children caused by their parents or carers. This project has arisen from our work on criminal liability for assisting and encouraging crime.

5.14 The problem it addresses is how to establish criminal liability in a case where it is apparent that one or both defendants must have committed the crime but there is no evidence which will allow the court to identify which, so as properly to apportion blame. At present it appears to be the law that a parent will be guilty of an offence where violence against their child is committed by another if (s)he fails to intervene by taking reasonable steps to prevent the harm where (s)he

¹ (1986) 82 Cr App R 5.

² (2001) Law Com No. 275, published 26 March 2002 (footnote omitted).

is able to so do. However, if there is no evidence as to which parent or carer was responsible and no evidence to establish the presence of both parties at the scene of the assault, there may be no basis for a finding of guilt in respect of either.

5.15 Accordingly, we will investigate whether there are any changes to the law, whether substantive or procedural, which would allow the conviction of those guilty of violent offences (or neglect) towards children for whose care they are responsible in circumstances where, presently, the courts are obliged to acquit them, and to make recommendations for changes in the law where it is thought to be appropriate.

- 1.4 The Commission's original intention was to produce a consultation paper in early 2003. However, we became aware of growing pressure to find a solution to this particular problem as soon as possible and also of the possibility that it might be the subject of legislation in the Criminal Justice Bill currently before Parliament. For these reasons it was decided to accelerate the normal consultation process. In December 2002 the Commission's Criminal Law Team produced an informal consultation paper which was circulated to various members of the judiciary, academics and professional bodies. A large number of responses were received.³ We are extremely grateful to all those who responded so promptly and so fully to that paper. The responses have been extremely valuable in directing the thinking of the Team and informing the decisions of the Commission. Not only has it become clear which proposals have attracted considerable support and which have been subject to opposition, but the responses have also opened up new avenues of approach. Following an analysis of the responses, the Law Commissioners have considered these issues, and have come to certain decisions. This consultative report is the outcome of that process.
- 1.5 This is an area with which the National Society for the Prevention of Cruelty to Children has been concerned for some time. We are currently awaiting the publication of the final Report of the Working Group set up by the NSPCC to consider this problem. We have been working closely with them throughout and we are hugely grateful to them for the generosity with which they have shared their thoughts and have allowed us access to their work in order to assist us in our efforts. We anticipate that many of the Working Group's recommendations will fall outside the scope of the legal issues addressed by this consultative report. A number of their likely recommendations could be implemented within the current legal framework. We know, however, that they have turned their minds to matters of law reform and we have taken their views, as expressed in the course of their work and in responding to our informal consultation, fully into account. It should also be noted that several members of the Working Party responded independently to the informal consultation paper.

³ The respondents are listed in the Appendix to this report.

- 1.6 In the course of the Committee stage of the Criminal Justice Bill in the House of Commons, a proposed amendment to the Bill was tabled which reflected some of the proposals which were contained in the informal consultation paper.⁴ The amendment was withdrawn, although the Parliamentary Under-Secretary of State for the Home Department, Hilary Benn, gave a number of undertakings. He acknowledged that the “issue has proved intractable for far too long”, that it is an issue which goes to the heart of public confidence, and he gave a commitment that the Government will deal with it.⁵ Although he stated that the Government was attracted to many aspects of the proposed clause, he highlighted the complexity of the area and made reference to the need for further work, specifically noting the work being carried out by the NSPCC and the Law Commission. In his view:

The nub of the issue is that we need to take account of the Law Commission’s work.⁶

- 1.7 Having stated that the Government believes that the correct course of action would be to wait until our recommendations are published, the Minister went on to state:

I also give my Hon. Friends the absolute assurance that the Government want to take action on the issue. We are committed to legislating on the matter, once we have found the right solution ... we are keen to see the Law Commission’s further views We will then proceed with legislation as quickly as possible, either in the [Criminal Justice] Bill if there is still time, or in a future Bill, because we are committed to making a difference on that aspect of the law.⁷

- 1.8 In the light of these commitments, Vera Baird QC, MP for Redcar, withdrew the proposed amendment, although she once again stressed the importance of the issue.

- 1.9 The recommendations which the Law Commission is minded to make and which are contained in this consultative report are therefore the fruit of detailed consideration by: the Criminal Law Team; a substantial number of respondents who have considered the issues in depth and provided us with their insights; and by the Law Commissioners. The views of the Commission which they reflect are firmer than would be put forward in a consultation paper, and represent the recommendations which we are presently minded to make to the Government. We will welcome responses to this consultative report to enable us to finalise our recommendations which we anticipate making to the Government by this

⁴ The amendment was proposed as New Clause 27 by Dr. Desmond Turner, Vera Baird and Ian Lucas on Friday 28th February 2003. The debate took place on 4th March 2003 in the House of Commons Standing Committee B.

⁵ *Hansard* (HC, Standing Committee B) 4 March 2003, col 1268.

⁶ *Hansard* (HC, Standing Committee B) 4 March 2003, col 1269.

⁷ *Ibid.*

summer. Given that we have already carried out an informal consultation process and received a large number of detailed responses to that paper, the consultation period for responses to this consultative report will be shorter than is typically the case. We would be grateful to receive responses to this consultative report by the end of May, in order to enable us to formulate our recommendations to the Government this summer.

SOME PRELIMINARY POINTS

A two track approach

- 1.10 An important issue concerning the fundamental aim of this project was tellingly expressed by Professor David Ormerod⁸ in his response to the informal consultation paper and should, we believe, be addressed at the outset. He stated that we should be careful to recognise two distinct aims which the project might have.
- 1.11 One would be to craft reforms in order to allow more cases to be left to the jury, with the aim of convicting more people who cause physical harm to a child (with the emphasis being placed on the causative link). This aim would have in its sights one particular aspect of the problem which has been highlighted, namely that the present procedures have the effect that “those who *might* be responsible for *causing* the death or serious injury are not having their behaviour subjected to scrutiny by a jury”.⁹ This would maintain the current focus of the law in seeking to establish who caused the physical harm to the child.
- 1.12 A second, alternative, or possibly additional, aim of reform would be to craft changes to the substantive law in order to “convict of *some different type of offence* all those adult carers who had responsibility for the welfare of the child at the time of the injury/ death”.¹⁰ The basis for this would be that the defendant was guilty of a “wrong” underpinning the offence, that of failing adequately to ensure the safety of the child. As Professor Ormerod stated:
- The fundamental difference would be that unlike in [the first alternative] the concern would not be to be convicting a greater proportion of those who caused harm, but to convict a greater proportion of those whose child suffers non-accidental injury.¹¹
- 1.13 It is important to recognise this distinction, as it must always be borne in mind that any new offences which are enacted for the fulfilment of Professor Ormerod’s second purpose must be justifiable in and of themselves. New offences should not be proposed simply as a means to induce defendants into giving evidence, although this may be a beneficial side effect. Although, inevitably,

⁸ University of Leeds.

⁹ Professor David Ormerod, in his response to the informal consultation paper, 29 January 2003.

¹⁰ *Ibid.*

¹¹ *Ibid.*

there will be some interaction between these alternative aims of reform, the procedural dimension should remain separate and distinct from reform of the substantive law. New offences should not be used solely as a remedy to resolve the procedural problems associated with obtaining convictions for another type of offence. Therefore, although a new substantive offence may have collateral procedural advantages, in that a defendant who would previously have been unwilling to give evidence may be persuaded to do so, we would emphasise that a new offence should be justifiable on its own terms.

The need for the prosecution to prove that a crime has been committed

- 1.14 A further issue upon which we should make our position clear at the start of this consultative report concerns the type of case with which our recommendations are concerned. We are only concerned with those cases in which the prosecution is able to establish to the criminal standard of proof that the child died a non-accidental death, or suffered non-accidental serious injury and where, as a result of the present law of procedure and evidence, no one can be convicted of a crime which has undoubtedly been committed but where the perpetrator(s) are within a known group of individuals.
- 1.15 We are well aware that there is another, very troubling, set of cases where there is a converse problem. These are where there have been wrongful convictions of parents for offences of homicide where there is real doubt whether there has been any crime committed at all. This is because of a serious disagreement within the medical profession as to whether, in certain types of case, a child has died accidentally or non-accidentally.¹² We particularly have in mind cases of cot death and shaken baby syndrome. We are not addressing these cases at all. We wish to make it abundantly clear that our recommendations would only ever apply where the Crown can prove beyond reasonable doubt that a child has suffered non-accidental serious injury or death.

THE CURRENT LAW

- 1.16 Where one person with the requisite *mens rea* kills or injures a child, that person will (in the absence of a valid defence) be guilty of a criminal offence, such as murder or manslaughter, or one of the various non-fatal offences against the person. Another person who assists or encourages these actions may also be guilty of one or other of these offences under the normal principles of accessory liability.
- 1.17 In many cases of the type under consideration it cannot be proved which of two or more defendants was directly responsible for the offence and it cannot be proved that whichever defendant was not directly responsible must have been

¹² There are, however, also cases in which disagreement between medical experts has led to wrongful acquittals. Expert evidence relating to the controversial condition of “temporary brittle bone disease” has been discredited by members of the judiciary in several cases for this reason: *Re X (Non-Accidental Injury: Expert Evidence)*, [2001] 2 FLR 90; *Re AB (A Minor) (Medical Issues: Expert Evidence)*, [1995] 1 FLR 181.

guilty as an accomplice. In the present context this may have involved an isolated act of violence by one parent, and the other parent may have been absent at the time. The present law is that there is no *prima facie* case against either and therefore both defendants must be acquitted at the conclusion of the prosecution case. This problem has been recognised by the judiciary for a considerable number of years, as was exemplified by Lord Goddard in *Abbott*:¹³

If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it is left to the accused persons to get out of it if they can, that would put the onus upon them to prove themselves not guilty. Finemore J remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time when the murder was committed; but the prosecution could not show that either sister A or sister B had committed the offence. Probably one or other must have committed it, but there was not evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law maintained that the prosecution should prove its case.¹⁴

1.18 This approach was confirmed in *Bellman*:¹⁵

[I]f the evidence shows that one of two accused must have committed a crime but it is impossible to go further and say which of them committed it, both must be acquitted.¹⁶

1.19 In *Gibson and Gibson*¹⁷ the Court of Appeal attempted to distinguish *Abbott*. The Court of Appeal appeared to suggest (obiter) that where two people had joint custody and control of a child they might both be convicted of manslaughter, regardless of any evidence against either of presence, on the basis of an inference that they were jointly responsible and so both guilty as charged. O'Connor LJ stated:

Is the criminal law powerless in the situation presented by this case? We think not. In law the defendants had joint custody and control of their baby. They were under a duty to care for and protect their baby... .

The evidence established that while in their joint custody and control the baby had sustained grievous bodily harm which had been inflicted

¹³ [1955] 2 QB 497.

¹⁴ *Ibid*, at p 503–4.

¹⁵ [1989] AC 836.

¹⁶ *Ibid*, at p 849.

¹⁷ (1985) 80 Cr App R 24.

by one, other or both parents. There being no explanation from either parent, and no evidence pointing to one rather than the other, the inference can properly be drawn that they were jointly responsible and so both guilty as charged. This is not reversing the burden of proof. The case is quite different from that envisaged in *Abbott*, in particular the two sisters charged with murder, because the deceased was not in their joint custody or control.¹⁸

1.20 In *Lane and Lane*,¹⁹ however, the Court of Appeal allowed appeals by two parents who had been convicted of manslaughter of their child, finding that the trial judge had been led into error by reliance upon the quotation from *Gibson and Gibson*. Croom-Johnson LJ stated that there was no justification for inferring the presence of both defendants or active participation by the non-striking parent, and that the jury should not have been invited to draw an inference that, in the absence of an innocent explanation, the parents were jointly responsible.

1.21 In relation to a failure by a parent to offer an explanation for a child's injuries, Croom-Johnson LJ pointed out in *Lane and Lane* that it may be that a defendant 'does not know the true explanation or has no means of knowing the facts which require explaining'. He stated:

... lack of explanation, to have any cogency, must happen in circumstances which point to guilt; it must point to a necessary knowledge and realisation of that person's own fault. To begin with, one can only expect an explanation from someone who is proved to have been present. Otherwise it is no more consistent with that person either not knowing what happened or not knowing the facts from which what happened can be inferred, or with a wish to cover up for someone else suspected of being the criminal. There may be other reasons.²⁰

1.22 In *Lane and Lane*, Croom-Johnson LJ stated that the result "distressing though it may be, is that a serious crime committed by someone goes unpunished".²¹ This has been the outcome in several subsequent cases involving children. For example, in *Aston and Mason*²² convictions for manslaughter were quashed by the Court of Appeal. The Lord Chief Justice stated:

We have felt forced to come to the unwelcome conclusion that there was nothing in the evidence at the close of the prosecution case which indicated that one of the appellants rather than the other was responsible for inflicting the fatal injuries. Each of them had the opportunity. ... Nor can we find any evidence upon which the jury might have concluded that the two of them were acting in concert

¹⁸ *Ibid*, at p 30.

¹⁹ (1986) 82 Cr App R 5.

²⁰ *Ibid*, at p 14.

²¹ *Ibid*, at p 18.

²² (1992) 94 Cr App R 180.

There was, so far as we can see, no evidence upon which the jury could properly come to the conclusion that either of these two expressly or tacitly agreed that Doreen should suffer physical harm; or that either had wilfully and intentionally encouraged the other to cause injury to Doreen. Even allowing for the possibility that the minor bruising about the face and body may have happened at the same time as the fatal injuries, there was no evidence that there was any opportunity for one to intervene in an attempt to stop the activities of the other *vis-à-vis* the baby. Regrettably, this is one of those situations exemplified by the judgment of Lord Goddard in *Abbott*. The verdict cannot stand. The appeals must be allowed and the convictions of manslaughter quashed.²³

1.23 Similarly, in *Strudwick*²⁴ manslaughter convictions were quashed by the Court of Appeal. The prosecution had not proved a *prima facie* case of manslaughter against either or both of the appellants, because it could not show who had caused the injuries which killed the child.

1.24 In *S and C*²⁵ the child had suffered a series of assaults over a three month period and also “a number of serious and horrifying injuries during a 19-hour period (or thereabouts)”. The mother and her boyfriend blamed each other. In relation to the assaults, which took place over a three month period, the Court of Appeal decided that a case could not be made against either the mother or the mother’s boyfriend since the Crown could not prove in whose charge the child was when the assaults took place. On the other hand, in relation to the injuries which took place over a 19-hour period while the mother was present in the house at all times, it was a proper inference that she assaulted the child or was a party to it occurring. Nevertheless, the mother’s conviction was quashed because the judge, in his summing up:

... did not make clear the four possible approaches the jury could take: that it was a joint enterprise; that C alone assaulted the child while S was asleep; that S alone assaulted the child while C was out or asleep; or that both must be acquitted because the jury could not be sure which of the two assaulted the child.²⁶

1.25 The current law is summarised by Smith & Hogan:

If all that can be proved is that the offence was committed either by D1 or by D2, both must be acquitted. Only if it can be proved that the one who did not commit the crime must have aided and abetted it can both be convicted. This is as true where parents are charged with injury to their child as it is in the case of any other defendants. The only difference is that one parent may have a duty to intervene to prevent the ill-treatment of their child by the other when a stranger

²³ At p 185.

²⁴ (1994) 99 Cr App R 326.

²⁵ [1996] Crim LR 346.

²⁶ *Ibid*, at p 346.

would have no such duty. It is for the prosecution to prove that the parent who did not inflict the injuries must have aided and abetted the infliction by failure to fulfil that duty or otherwise.²⁷

PARTIAL SOLUTIONS AVAILABLE UNDER THE CURRENT LAW

- 1.26 The cases considered in the previous section demonstrate the difficulties which arise under the current law. There is, however, a group of cases in which convictions have been obtained, despite difficulties in identifying the person who inflicted injuries upon the child. These cases will be considered in this section.

Inferring joint enterprise

- 1.27 In *Marsh and Marsh v. Hodgson*²⁸ both parents agreed that they had been together with the child, who was in their joint company throughout the period of two days in which the non-accidental injuries must have been caused. Both parents were convicted, and on appeal to the Divisional Court, Ashworth J. said:

... there was strong evidence which the justices accepted to show that the injuries to this child were inflicted by human agency. Secondly, there was evidence to show that in all probability those injuries were inflicted on or about June 3. Thirdly, there was evidence, accepted by the justices, to the effect that both the defendants admitted that they had been in charge, and joint charge, of this child during June 3 and 4. No doubt there would be moments when one or other of the defendants would be absent, but the substance of that answer was that: we were both responsible for this child throughout June 3 and 4.²⁹

- 1.28 It was held that the prosecution had presented ample evidence calling for an answer from the defendants, as the evidence demonstrated that “the child’s injuries had been caused by human agency and that the defendants were jointly in charge of the child at the material time”. As the defence put forward was “untenable”, the defendants’ appeal was rejected.

- 1.29 In *Lane and Lane*³⁰ Croom-Johnson LJ emphasised that the point of that case was that “in effect both parents were there all the time”.³¹ He described the case as “a straightforward application of the ordinary principles of proof in criminal law”.³²

- 1.30 In *Russell and Russell*³³ Lord Lane CJ stated:

²⁷ Smith & Hogan, *Criminal Law* (10th ed, 2002) p 151 (footnotes omitted).

²⁸ [1974] Crim LR 35.

²⁹ Cited in *Lane and Lane* (1986) Cr App R 5 at pp 11–12 (page 5 of the original transcript of *Marsh and Marsh v Hodgson* [1974] Crim LR 35).

³⁰ (1986) 82 Cr App R 5.

³¹ *Ibid*, at p 12.

³² *Ibid*.

³³ (1987) 85 Cr App R 388.

Generally speaking, parents of a child are in no different position from any other defendants jointly charged with a crime. To establish guilt against either, the Crown must prove at the least that that defendant aided, abetted, counselled or procured the commission of the crime by the other. The only difference in the position of parents, as opposed to others jointly indicted, is that one parent may have a duty to intervene in the ill-treatment of their child by the other where a stranger would have no such duty.³⁴

In this case, the child had died as a result of an overdose of methadone. The Court of Appeal upheld the parents' conviction for manslaughter because the parents admitted that they had jointly administered methadone to the child on previous occasions. Lord Lane CJ stated that this was a fact from which, in the absence of any explanation, the jury could infer that the administering of the drug on a later occasion was also a joint enterprise.

- 1.31 This approach may be useful where both of the defendants have admitted to conduct which is similar to the conduct which eventually causes the child's death. Professor Glanville Williams, however, criticised the decision in his article 'Which of you did it?'.³⁵ He described the decision as a miscarriage of justice to all concerned³⁶ and considered the Court of Appeal's conclusions that both parents were present at the time to be "unconvincing".³⁷ In his view it constituted a "mighty leap in reasoning"³⁸ to infer from an admitted involvement in earlier administration of small quantities of a drug that there was a joint enterprise to the administration of the massive fatal dose. He considered that it was "extraordinary"³⁹ to uphold the conviction where both defendants had given all the evidence that might be expected of an innocent person.

Prosecutions for cruelty or neglect

- 1.32 In *Lane and Lane*, Croom-Johnson LJ suggested that the maximum penalty for the offence under section 1 of the Children and Young Persons Act 1933 should be increased. This was done by section 45 of the Criminal Justice Act 1988. As a result, the maximum sentence for this offence is now 10 years imprisonment. There are a number of cases in which convictions for child cruelty or neglect under this provision have been obtained, even though convictions for other offences have not been possible. For example, in *Strudwick*,⁴⁰ although the manslaughter convictions were quashed (see above⁴¹), convictions for cruelty

³⁴ *Ibid*, at p 393.

³⁵ (1989) 52 MLR 179.

³⁶ *Ibid*, at p 191.

³⁷ *Ibid*, at p 192.

³⁸ *Ibid*, at p 193.

³⁹ *Ibid*.

⁴⁰ (1994) 99 Cr App R 326

⁴¹ See para 1.23.

were upheld on appeal. The mother's boyfriend had admitted using some violence towards the child, and the mother had seen this violence. The sentences for manslaughter had been 15 years for the mother's boyfriend and 10 years for the mother. The convictions for two counts of child cruelty were punished by sentences of ten years and seven years concurrently for the mother's boyfriend, and seven years and five years concurrently for the mother.

1.33 In *S and M*⁴² the child's father found bruising on the child. The medical evidence indicated that the bruising had been sustained between 12 hours and three days before. The child's mother, and the mother's boyfriend, blamed the father for the child's injuries. There was no evidence as to which adult had assaulted the child and the prosecution did not argue that there was a joint enterprise between them. The Crown case was that one had assaulted the child and the other had been guilty of wilful neglect by failing to seek medical attention for the child after the injuries had been inflicted. They were both convicted of cruelty contrary to the Act and their appeals were dismissed. The Court of Appeal stated that there was evidence of neglect for the jury to consider, in the sense that the appellant or appellants had refrained from seeking medical aid, because he or she was reckless as to whether the child might be in need of medical treatment or not.

1.34 As part of his contribution to the report of the NSPCC Working Group, Christopher Kinch QC analysed sentences for child cruelty imposed since 1988, when the maximum sentence was increased to 10 years. He commented:

A review of the sentences in cases reported in the sentencing encyclopaedia and elsewhere suggests that after 1988, the courts began to impose sentences well in excess of the previous maximum in serious cases of cruelty. More recently the courts have been prepared to impose sentences in the region of eight years imprisonment for the worst cases.⁴³

Using one suspect as a prosecution witness

1.35 Where the child's injury must have been committed by one of two people, the prosecution may have to decide whether to bring charges against both, or to prosecute one person and to use the other person as a witness for the prosecution. This happened in *Lewis*.⁴⁴ The child was 14 months old, was taken to the hospital by the mother and was found to have suffered a spiral fracture to his right arm. The mother's boyfriend denied causing the injury. He was prosecuted for causing grievous bodily harm to a child. The child's mother gave evidence for the prosecution. She gave evidence that, on the day before the child's injury was discovered, she had left the house to go shopping for 40 minutes while the child was asleep. She said that the defendant had agreed to "listen out for" the child

⁴² [1995] Crim LR 486.

⁴³ Christopher Kinch QC, Papers for the NSPCC "Which of you did it" Conference in Cambridge, 2 November 2002, Defence Perspective, para 7.2.

⁴⁴ Court of Appeal, Criminal Division, unreported, 5 September 1997, case no 96/8306/X5.

during this time. She denied injuring the child herself and said that she did not know how the child was injured. At the end of the prosecution case a submission of no case to answer was made but the judge ruled that there was evidence for consideration by the jury. The defendant gave evidence on his own behalf and denied that he had injured the child. He also denied that he had agreed to listen out for the child. He was convicted of causing grievous bodily harm with intent to do grievous bodily harm. He appealed against conviction. One of his grounds for appeal was that the judge should have upheld the submission of no case to answer. In relation to this argument, having taken into account both the defendant's argument that there was no reasonable basis for the Crown to prefer the mother's account of events and the line of authority starting with *Abbott*⁴⁵ and including *Aston and Mason*,⁴⁶ Otton LJ stated:

We have considered that submission with considerable care. Cases of child abuse are always anxious and this is no exception. However, we have come to the conclusion that the learned recorder was right to let the case go to the jury. [The mother] had given evidence which clearly implicated the appellant. Her evidence on the substantial issue in the case was neither inherently weak nor tenuous: she described how she had left the baby in the appellant's care; the behaviour and demeanour of the child in the period after her return and the hours thereafter. This was consistent with the evidence of Dr Matthew. In our view this was a case where the jury were called upon to decide whether they accepted her evidence and to draw the inference that the injury was inflicted by the appellant. In our view the learned recorder's exercise of discretion cannot be faulted.

Moreover, there was no error in principle in the prosecution proceeding on the basis of the mother's evidence against the appellant or in calling her as the principal Crown witness in the trial rather than charging her. The line of authority from *Abbott* ... is not authority, in our view, for the proposition that both should be charged and stand trial in a situation where a child within their joint care suffers physical abuse. In our view the prosecution had a discretion, depending upon how they viewed the case and the evidence at its disposal, to proceed against one, or both, or neither. We cannot say that that discretion was in any way exercised capriciously or other than fairly. We therefore find no substance in that first ground of appeal.⁴⁷

- 1.36 We recognise that prosecutors may face difficulties in deciding how to exercise this discretion in cases where two people are blaming each other for the child's death or injury. We do not believe, however, that these difficulties can be usefully addressed through legal reforms. This is, in truth, an area where the CPS will have to continue conscientiously to apply its own well established policies in the light of the particular facts of individual cases. There is no evidence, nor would

⁴⁵ [1955] 2 QB 497.

⁴⁶ (1992) 94 Cr App R 180.

⁴⁷ Court of Appeal, Criminal Division, unreported, 5 September 1997, case no 96/8306/X5.

we expect there to be any, that the CPS or anyone would consider that this problem can be addressed successfully by a practice of invariably charging one of those who must have committed the offence and relying on the other to give evidence.

PREVIOUS DISCUSSIONS OF THE NEED FOR REFORM

- 1.37 The problems considered in this paper were discussed by Professor Griew in his article 'It must have been one of them',⁴⁸ and by Professor Glanville Williams in his article 'Which of you did it?'.⁴⁹ Both articles were very critical of the decision in *Gibson and Gibson*,⁵⁰ and supportive of the decision in *Lane and Lane*.⁵¹ Professor Griew said:

Cases of child abuse have given particular difficulty. Recent case law got briefly onto a wrong footing because of a dictum in *Gibson and Gibson*...

This was fairly plainly erroneous and was soon effectively discredited in *Lane and Lane*. ...

The true view appears to be that, to establish the complicity of one parent in the other's act of injuring the child, there must be evidence to justify a finding either of 'joint enterprise' – which requires active assistance or encouragement – or of encouragement passively given by failing to take steps that he or she might have taken in discharge of his or her duty to protect the child. It simply cannot be assumed – in the absence of any other evidence – that a parent present when his or her child was injured actively assisted or encouraged the act. And there may have been no time to protect the child or, if one parent was in terror of the other, no breach of duty in failing to do so.⁵²

- 1.38 Professor Griew did not suggest that the rule in *Lane and Lane* should be reversed. Professor Williams' conclusions were even less supportive of changes to increase the effectiveness of the criminal law in such cases:

Public money would be far better spent on providing refuges for battered wives, and the mothers of battered children, than on prosecutions of parents and sentences of imprisonment the social advantage of which is highly doubtful.⁵³

- 1.39 On the other hand, the *Report of the Royal Commission on Criminal Justice*⁵⁴ recognised the difficulties which arise where a crime may have been committed,

⁴⁸ [1989] Crim LR 129.

⁴⁹ (1989) 52 MLR 179.

⁵⁰ (1985) 80 Cr App R 24.

⁵¹ (1986) 82 Cr App R 5.

⁵² [1989] Crim LR 129 at p 132–3 (footnotes omitted).

⁵³ (1989) 52 MLR 179 at p 199.

⁵⁴ (1993) Cm 2263, chapter 4, para 25.

more than one person is present and it is impossible to say who has committed the offence. The Report stated that this “typically happens when one of two parents is suspected of injuring or murdering a child but it is impossible to say which one”.

- 1.40 The Royal Commission stated that it had “every sympathy with the public concern over such cases”⁵⁵ but rejected the possibility of evidential changes to allow adverse inferences to be drawn from a parent’s failure to provide an explanation for the child’s injuries. This is one of the issues being considered by the NSPCC Working Group and upon which we make certain recommendations.
- 1.41 There are certain other issues which are relevant to this problem but upon which we express no opinion in this report. First, the admissibility of evidence of a defendant’s previous misconduct has been considered by the Law Commission and is the subject of a recent report.⁵⁶ The Criminal Justice Bill, which is currently before Parliament, includes provisions to reform the law in this area. Issues relating to expert evidence were considered in the Auld Report.⁵⁷ These issues are relevant to a wide range of criminal proceedings and it would not be sensible, in our view, to attempt to address them in the context of this report.

THE FORMAT OF THIS REPORT

- 1.42 We consider the extent of the problem in Part II, taking account of the relevant research and the experience of those who responded to our informal consultation paper. In Part III we examine the way in which the civil law deals with this particular problem. In Part IV we set out our approach to the reforms which we propose. In Part V we identify the options for reform which we are rejecting and explain why we are doing so. This is, in our view, important as there are a number of possible ways to reform the law and it is necessary to explain why certain approaches are unacceptable so as to place in context those which we believe to be appropriate. Finally in Parts VI and VII we set out, respectively, the evidential and procedural changes and the changes to the substantive law which we are minded to recommend.

⁵⁵ *Ibid.*

⁵⁶ Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273.

⁵⁷ *A Review of the Criminal Courts of England and Wales*, October 2001, Chapter 11 paras 129-151.

PART II

THE EXTENT OF THE PROBLEM

2.1 It was abundantly clear from the responses which we received to the informal consultation paper that this is an area which has aroused concern in members of the judiciary, practitioners and academics. Although there are differences of opinion as to the best way in which to tackle this issue, there is near universal recognition that the problem is extremely serious and that reform is necessary. Rose LJ, Vice-President of the Court of Appeal Criminal Division, began his response by stating that “[t]he present position is wholly unsatisfactory”. Curtis J echoed this, noting that “[h]aving tried a number of murders in which babies are the victim, I consider the law is long overdue for reform”. Buxton LJ noted at the outset of his response that:

[The informal consultation paper] gives a depressingly accurate account of the way in which courts, in the civil as well as the criminal jurisdiction, have felt obliged to subordinate the particular interests of child protection to the demands of general and non-situation specific rules of English procedure.

2.2 In this section we will give consideration to research which has been undertaken in order to establish the scale of the problem. The NSPCC Working Group sought information from 43 police forces throughout England and Wales in an attempt to address the question “are these but isolated, sensationally reported, cases or is there truly a failure in our society to afford justice to child victims of serious crime?”.¹ The findings of the Working Group were summarised by the Chair of the Group, Her Honour Judge Isobel Plumstead.

2.3 The research revealed that during the three year period covered by the survey “no less than three children under 10 years old *a week* were killed or suffered

¹ Judge Isobel Plumstead, Papers for the NSPCC “Which of you did it” Conference in Cambridge, 2 November 2002, Introduction and Background, para 8.

The police forces were asked to give details about cases where children were suspected of being killed unlawfully or receiving serious injury between 1 January 1998 and 31 December 2000, where more than one parent or carer could possibly have been responsible for the child’s injuries. The 40 police forces which responded gave information about 492 children aged 10 years and under who had been unlawfully killed or seriously injured during this period. Of these 492 children, the NSPCC received details of 366 cases which had either reached a conclusion in court, or which had been discontinued prior to court. Of these 366 cases, 225 were discontinued prior to reaching court, 21 defendants were acquitted, 21 dismissed, and in 99 cases there was a successful prosecution. Further statistics were given by the Solicitor General in a Written Answer to a question from Vera Baird MP (*Hansard*, (HC) 24 February 2003 col 57W). The Department of Health gave information on 133 serious case notifications, a serious case notification being concerned with cases in which there has been the death of or serious injury to, a child where abuse and/ or neglect may have been a factor. Of those 133 cases, there were 103 in which the child had died, and 30 in which the child had suffered serious injury.

serious injury”.² Of these children, just over half were under 6 months old, and 83% were under 2 years old. 61% of investigations which reached a conclusion resulted in no prosecution, due either to a police or Crown Prosecution Service decision. Of the 27% of cases which resulted in conviction for a criminal offence, only a small proportion of those led to conviction for either homicide (murder or manslaughter) or wounding/ causing grievous bodily harm.

2.4 Judge Plumstead noted that there was a lack of data as to how many children incur injuries which are not reported to the police although there may be medical suspicion that the injuries were non-accidental. She said, however, that experience of care proceedings would suggest that there is likely to be a degree of under reporting, in particular if the injury is less serious or isolated.

2.5 The nature of this type of case is such that it would be rare that the identity of those adults who were with the child when the offence was committed would not be known. She noted that “[i]n almost all cases, it can be said with certainty that one of two people must have caused the serious injury”.³ She stated:

The conclusion must be drawn that it is lack of evidence against supposed individual perpetrators which leads to so few of the cases of serious and fatal injury against children coming to the criminal courts. Of those cases that do proceed, the majority result in convictions (69%).⁴

2.6 Further support for the conclusion that there is a significant problem with the law as it currently operates can be derived from other research into prosecutions for child abuse.⁵ A study undertaken by the Department of Law at the University of Bristol found that where a very young child had been physically assaulted and had been in the care of a number of different people, it was particularly difficult to identify the perpetrator of the offence. A police officer was quoted as stating:

If you have a victim without a voice then you have got to prove that whoever had responsibility for that child is the person who caused that injury. ... The CPS will not prosecute a case where there is a possibility someone other than the offender has caused that injury.⁶

2.7 The study also revealed a problem concerning the attitude of the police:

² Her Honour, Judge Isobel Plumstead, Papers for the NSPCC “Which of you did it” Conference in Cambridge, 2 November 2002, Introduction and Background, para 9.

³ *Ibid*, para 13.

⁴ *Ibid*, para 14.

⁵ Department of Law, University of Bristol: Gwynn Davis, Laura Hoyano, Caroline Keenan, Lee Maitland and Rod Morgan, “An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions: A Report for the Home Office” (1999).

⁶ *Ibid*, at p 43.

Some police officers whom we interviewed did not believe that they could charge two parents who had sought treatment for their child, even where the child's injuries were clearly non-accidental.⁷

In addition the study demonstrated that police officers involved in some cases of this type did not believe that charges under the Children and Young Persons Act 1933 reflected the seriousness of the child's injuries. Cases were cited in which children had suffered serious injuries and the defendants had received either non-custodial or short sentences.⁸

- 2.8 Research has also been undertaken by a multidisciplinary team from the Cardiff Family Studies Research Centre⁹ on the cases of 68 children under the age of two who had suffered subdural haemorrhage between 1992 and 1998. The research identified that "the main suspects at the start of the police investigation were usually the natural parents of the child and occasionally other carers".¹⁰
- 2.9 The study highlighted a problem identified in Part I above which is particularly acute in cases involving non-accidental injury to children. It noted that in many of the cases included in the study it was impossible to identify a single perpetrator of the crime as, at the time of the crime, the child had been in the care of more than one person. In this context, the rule in *Lane and Lane*¹¹ operates to the effect that "unless it can be proved that one carer failed to intervene to prevent the harm (and is thus liable for aiding and abetting the assault), no conviction is possible".¹² The research went on to state that its findings "clearly indicate that the greatest obstacle to prosecution in cases of SBS ["shaken baby syndrome"] is proving who inflicted the injury".¹³ Further, the research found that this is not a problem which is uniquely associated with SBS.¹⁴
- 2.10 Although the nature of this type of crime makes it particularly difficult to assess the precise number of cases involved, the research referred to demonstrates that the type of scenario which is typical in such cases represents a widespread problem. The inevitable conclusion on the basis of this research seems to be that a significant number of children are being killed or seriously injured and that a relatively small number of those responsible are being convicted of any criminal

⁷ *Ibid*, at p 44.

⁸ In one such case the child's arm had been broken. The research stated "[This defendant] was also dealt with for a spate of burglaries, and was sentenced to a total of 30 months imprisonment" (at p 44).

⁹ Cathy Cobley, Tom Sanders and Philip Wheeler, "Prosecuting Cases of Suspected 'Shaken Baby Syndrome' – a review of current issues" [2003] Crim LR 93.

¹⁰ *Ibid*, at p 97.

¹¹ (1985) 82 Cr App R 5.

¹² [2003] Crim LR 93 at p 98.

¹³ *Ibid*.

¹⁴ The study referred to the Guardian, "Killing with impunity", September 24 2000, which made reference to the NSPCC research referred to earlier at paras 2.2 and 2.3.

offence. Concern has also been expressed that where a conviction has been obtained, the charges and sentences do not reflect the gravity of the offence.

2.11 We conclude, therefore, that there is ample evidence from disparate sources that the present rules of evidence and procedure which apply in criminal trials represent a significant obstacle to the effective investigation into and identification and punishment of those who are guilty of the most serious offences against the most vulnerable members of society. Furthermore, the alternative offences, for which the present rules and procedures do permit convictions, do not appear satisfactorily to reflect the responsibility for the death of a child either through the label by which guilt of the offence attaches to the conduct or in the severity of the penalties available.

2.12 This is not a situation about which there can be any complacency. In subsequent Parts of this report we consider the impact of international obligations upon the State both to ensure fair trials and to protect the fundamental human rights of, amongst others, children. The present unhappy state of affairs calls into question whether we have currently achieved a correct balance between these different, often competing, rights. It is our view that we should carefully examine our present laws and procedures to see whether their present configuration may be changed to achieve a better balance between the right of a defendant to a fair trial and the duty upon the State to protect the fundamental rights of children who are victims, by having an effective system for identifying and punishing those who have attacked and, often, killed them.

PART III

THE CIVIL LAW OF CHILD PROTECTION

- 3.1 Where there is a suspicion that a child has been a victim of non-accidental injury, civil proceedings may be initiated by a local authority (or the NSPCC) under Part IV of the Children Act 1989. If the child has survived the injury, these proceedings may be brought to protect the child from a risk of further injury. Where the child has died as a result of abuse, civil proceedings may be used to protect other children in the household, or other children who are being cared for by a person who is suspected of causing the child's death. As a result, family courts, as well as criminal courts, will often deal with cases in which it is clear that the child has suffered a non-accidental injury, but it is unclear who inflicted the injury.

VIEWS OF RESPONDENTS TO THE INFORMAL CONSULTATION PAPER

- 3.2 At the outset it must be recognised that the family and criminal courts fulfil very different roles. Concern was expressed by a number of respondents to our informal consultation paper that reform of criminal proceedings in the context of non-accidental injury to children should not hamper the work which is done in the family courts.
- 3.3 Dame Elizabeth Butler-Sloss, President of the Family Division, expressed strong concern about this type of case. She noted that the family courts are often faced with the type of situation in which a child has been killed or injured whilst in the care of one or more adults and it is unclear which carer is responsible. On occasion it may be that the family court finds that the adult has injured the child, despite an acquittal in the Crown Court. She highlighted the difficulty which the family courts face in establishing the best means of protecting other children in the family who may be thought to be at risk from the adult suspected of having committed the offence.
- 3.4 Hughes J, drawing on his experience as a judge in the family jurisdiction, highlighted in his response to the informal consultation paper the differing aims of the family and criminal jurisdictions. However, he went on to add:

[T]he family experience does teach one thing. Even with very wide inclusionary rules of evidence, including (a) the ability to draw whatever conclusions appear justified from an absence of explanation or account of movements, and (b) the power (if safe) to take into account the out-of-court statements of others, and even with a different standard of proof, there are some cases in which it is impossible to say which of two or more possible culprits was responsible. It follows that there will inevitably be such cases, and no alteration of the rules of law or evidence will change that fact.

It must therefore be acknowledged that even if all the material evidence can be admitted before the jury, the nature of these cases is such that in some cases the jury, even with all the information, could not be sure which defendant is guilty.

In these circumstances the prosecution would rightly fail as our judicial system requires that the jury be sure of a defendant's guilt before convicting him or her. Whilst recognising that point, it is, nonetheless, important to do all that can properly be done to ensure that the jury has all the relevant evidence to enable them to make a decision as to the defendant's guilt or innocence.

- 3.5 Some of our judicial respondents stressed the danger of seeking a scapegoat through criminal prosecution in order to remedy the wrong done to the child. In many of these cases emotions run high, often fuelled by their being reported in the media, and some of our respondents suggested that the effect of this may be that the jury will want to hold *someone* responsible for the death or serious injury of the child. A potential danger was highlighted that a carer may be treated by the jury as presumptively guilty, regardless of the contrary directions of the judge.
- 3.6 We are aware of this risk. The procedural reforms which we are minded to recommend and which we set out in detail in Part VI, impose a duty on the judge to withdraw the case from the jury at the end of the defence case if, in his judgment, a conviction would be unsafe or the trial would be unfair.
- 3.7 We would, nonetheless, point out that there have been many cases which have aroused public outrage and strong emotions, reflected by media coverage, but which have been successfully tried by juries. It would mark a serious departure from established principles of criminal procedure to contemplate that truly horrific cases should not be tried by juries.
- 3.8 One senior circuit judge acknowledged that there was much wisdom and good sense, as well as humanity, in the opinion of Professor Glanville Williams, cited in the informal consultation paper,¹ that there are many cases in which “[t]he criminal process, as distinct from care proceedings, can do little good in these situations, and can do much harm”.² In making this point he drew attention to the current “unattractive tendency nowadays, encouraged by certain sections of the media, to try to make somebody pay (and pay in a painful and humiliating way) for any incident in which something has gone wrong and somebody has been killed or seriously injured”. He stated, and we agree, that the instinct to use the criminal courts in order to give effect to this attitude should not be at the expense of compromising the important role which is fulfilled by the family courts.
- 3.9 Some respondents emphasised that caution should be exercised. For example, Crane J stated:

My preliminary comment is that one should be cautious about changing the criminal law in one area with the result that it is inconsistent with that in other areas. The greater scope for

¹ Professor Glanville Williams, “Which of you did it” (1989) 52 MLR 179 at p 194.

² *Ibid*, at p 194.

ascertaining the truth and protecting children in the family jurisdiction should be given great weight.

He went on to add that, in his opinion, there should be greater recognition of the powers of the family courts and, in particular, he suggested that there should be greater willingness on the part of the family courts to give judgment, even if anonymised, in public. He added “I suggest that judges in the Crown Court should when appropriate more often draw attention to the alternative remedies available”.

- 3.10 Concern was also expressed by a number of respondents that a more appropriate means of dealing with this problem would be to improve the services which are available. For example one experienced High Court judge argued that:

... the only real way to improve the prospects of convicting the correct carer ... is to improve the evidence that it was one rather than the other carer who was responsible ... by ensuring that health visitors and other professionals who have regular contact with every child meet all carers, ask about any concerns in relation to the welfare of the baby and at the same time assess and note in writing family conditions.

- 3.11 This was echoed by Professor Ormerod who stated:

An ideal response to the problem must come in the shape of a multi-agency approach with the most careful legal investigation and prosecution supported by better monitoring of parenting, better education of parenting skills and broader public awareness of the frequency of these terrible crimes.

- 3.12 The Criminal Bar Association offered its perspective on the role of the Family Division in this type of case in its response. It suggested that the nature of civil proceedings makes the family courts a more appropriate forum for dealing with this type of case. Reference was made to the fact that the child’s interests are paramount in the civil courts and that the perspective is forward looking, as opposed to the approach in the criminal courts, in which the emphasis is on “whether and, if so, to what extent, to mete out punishment”.

- 3.13 We have a great deal of sympathy with the view expressed in these various comments. We would not wish any changes in criminal law and procedure to be such as would increase the prospect of a criminal conviction at the expense of cutting across the effectiveness of the civil system for protecting the interests of children at risk. Rather, we believe that the criminal law should support the civil law which protects children but that measures must be taken in order to improve the effectiveness of the criminal law in prosecuting those responsible for this type of crime. We believe that the measured and carefully considered package of recommendations which we are minded to make would preserve the balance of interests between the two jurisdictions. In the light of these comments, we now summarise the current operation of the civil law of child protection.

THE LEGAL FRAMEWORK FOR CIVIL PROCEEDINGS

3.14 Although this report is concerned with reform of the criminal law, it is important to recognise the wide-ranging powers which are available to the courts. The Children Act 1989 sets out both the ‘public’ and ‘private’ law remedies relating to children. A wide range of orders is available to the family court in order to safeguard and promote the interests of children. The family courts can control the exercise of parental responsibility through granting residence orders, contact orders, prohibited steps orders and specific issue orders.³ In the context of child protection, the family court has power to protect children using both short- and long-term orders. For example, emergency protection orders last for eight days, can be extended by seven days and are subject to review after 72 hours. These orders are available where the court is satisfied that there is reasonable cause to believe that the child is likely to suffer “significant harm”.⁴ Other measures to ensure the immediate protection of children from threatened harm include police protection⁵ and child assessment orders.⁶ Where longer-term protection is required, the family court may make care or supervision orders and these orders are available on an interim basis.⁷ Where a court makes an interim care order, or an emergency protection order, an “exclusion requirement” may sometimes be included, which will allow the child to remain at home, provided that an unidentified person who is a threat to the child is kept away.⁸

3.15 Section 31(2) of the Children Act 1989 establishes a ‘significant harm’ test:

A court may only make a care order or supervision order if it is satisfied-

- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
- (b) that the harm, or likelihood of harm, is attributable to-
 - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
 - (ii) the child’s being beyond parental control.

3.16 This provision has been considered many times by the Court of Appeal and House of Lords.

³ These orders are found in s 8 of the 1989 Act and are known collectively as ‘section 8 orders’.

⁴ Children Act 1989, s 44.

⁵ *Ibid*, s 46.

⁶ *Ibid*, s 43.

⁷ *Ibid*, s 38.

⁸ *Ibid*, sections 38A and 44A.

The standard of proof

- 3.17 Criminal proceedings require proof 'beyond reasonable doubt'. The standard of proof required in care proceedings was considered by the House of Lords in *Re H (Minors) (Sexual Abuse: Standard of Proof)*.⁹ A stepfather was accused by his 15-year-old stepdaughter of having raped her over a period of years from when she was seven or eight. He was charged with rape and was acquitted. The judge in the care proceedings was unable to say, with sufficient certainty, on the standard of proof which he applied, that this rape had occurred. Lord Nicholls considered the content of the standard of proof on the preponderance of probability, which is the standard of proof in such proceedings. He explained that a court will be satisfied that an event occurred if it considers that "on the evidence, the occurrence of the event was more likely than not".¹⁰ He went on, however, to explain that the court will take into account that "the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability".¹¹ He gave a number of examples to support this, such as that fraud is usually less likely than negligence, and deliberate physical injury is usually less likely than accidental physical injury. He went on to add:

Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.¹²

- 3.18 Lord Nicholls went on to discuss the possibility of the application of a third standard, higher than the civil standard of the balance of probability but lower than the criminal standard of proof beyond reasonable doubt. He stated:

The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences.¹³

Although he recognised that such a standard may have certain advantages, he expressed doubt that it would add much of assistance to the civil test and

⁹ [1996] AC 563.

¹⁰ *Ibid.*, at p 586.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, at p 587.

expressed concern that it “would risk causing confusion and uncertainty”. He concluded:

As at present advised I think it is better to stick to the existing, established law on this subject. I can see no compelling need for a change.¹⁴

- 3.19 Although the House of Lords in *Re H* rejected a third standard of proof, in a recent decision, *R (McCann and others) v Crown Court at Manchester and another; Clingham v Kensington and Chelsea Royal London Borough Council*,¹⁵ Lord Steyn and Lord Hope referred to a “heightened civil standard”.¹⁶ The case concerned whether applications for anti-social behaviour orders should be characterised as criminal or civil proceedings, in order to determine whether hearsay evidence should be admissible and the appropriate standard of proof. Lord Steyn said:

Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary: *In re H (Minors) (Sexual Abuse: Standard of Proof)*.¹⁷ For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard. ... This approach should facilitate correct decision-making and should ensure consistency and predictability in this corner of the law.¹⁸

- 3.20 Lord Hope of Craighead added that in certain contexts there is now a “substantial body of opinion”¹⁹ that the seriousness of the matters to be proved, and the implications of proving them, should be taken into account. He noted that “if this is done the civil standard of proof will for all practical purposes be indistinguishable from the criminal standard”.²⁰

¹⁴ *Ibid.*

¹⁵ [2002] 3 WLR 1313.

¹⁶ *Ibid.*, at paras 37 and 83.

¹⁷ [1996] AC 563, at p 586D-H, per Lord Nicholls of Birkenhead.

¹⁸ [2002] 3 WLR 1313 at para 37.

¹⁹ *Ibid.*, at para 83.

²⁰ *Ibid.* He cited as having recognised this point: *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, 354 para 31 per Lord Bingham of Cornhill CJ; *Gough v Chief Constable of the Derbyshire Constabulary* [2002] 3 WLR 289, 313, para 90 per Lord Phillips of Worth Matravers MR.

3.21 For present purposes, it is unnecessary to examine these developments in detail, as the roles fulfilled, respectively, by care orders and anti-social behaviour orders are quite different. Whatever the position may be in relation to imposing anti-social behaviour orders or sex offender orders upon a person, Lord Lloyd in his dissenting speech in *Re H and R*²¹ pointed out the dangers of applying a high standard of proof in child protection cases:

It would be a bizarre result if the more serious the anticipated injury, whether physical or sexual, the more difficult it became for the local authority to satisfy the initial burden of proof, and thereby ultimately, ... secure protection for the child.²²

3.22 *Re H and R* was a case in which there was a dispute as to whether a sibling had suffered any abuse at all. The conclusion was that the evidence was not sufficiently cogent to establish that she had been abused. The House of Lords decided that there was, therefore, insufficient evidence to find that the other children were likely to suffer significant harm in future. It is important to bear in mind that, as we emphasised in Part I of this report, we are only concerned with those cases in which the court *is* satisfied that the child has *already* suffered significant harm, but it cannot be proved who is responsible. We now consider that type of case.

Cases involving unexplained injuries

3.23 In *Re B (Minors) (Care Proceedings: Practice)*,²³ it was not clear which of the child's parents was responsible for the child's injury. Wall J summarised his conclusions as follows:

Question 3

Where: (a) parents have two children; (b) one child has been non-accidentally injured in the care of her parents and the other has not been injured; (c) there is no other possible perpetrator; but (d) the court is unable on the *In Re H* standard to decide which parent inflicted the injuries; can it be argued either (i) that the threshold criteria are not met in relation to the uninjured child, alternatively (ii) that where one parent is off the scene (as here, where the father is in prison) both children can properly be returned to the other parent, because there is no factual basis upon which it can be said that either child is at risk of harm in the future?

The answer to both parts of this question, in my judgment, is an emphatic "No". The argument to the contrary, in my judgment, is based on a misunderstanding of *In Re H and R (minors) (sexual abuse: standard of proof)*²⁴ and *Re M and R (minors) (expert opinion:*

²¹ [1996] AC 563.

²² *Ibid.*, at p 577.

²³ [1999] 1 WLR 238.

²⁴ [1996] AC 563.

evidence).²⁵ Furthermore, it strikes at the whole philosophy of child protection embodied in the Children Act 1989 and seeks to import into care proceedings the unsatisfactory rule of criminal law that if a jury cannot decide which of two people is responsible for the death of a child, or serious injury to a child, each is entitled to an acquittal.²⁶

3.24 Wall J went on to express concern that the statutory provisions dealing with child protection must not be frustrated. He considered that to find that a child in the scenario outlined above has been non-accidentally injured by one or both of her parents whilst both parents were caring for her “is sufficient to satisfy the threshold criteria under section 31(2) of the Children Act 1989 in relation to both children”.²⁷ This remains the case even if the court cannot be satisfied on the balance of probabilities that one parent rather than the other inflicted the injuries. Further, he held that this applies even if one parent is removed from the scene (as in this case where the father was in prison), as “[t]he finding of fact is that the child was injured by either or both of her parents. The risk to the child from each parent must therefore be substantial”.²⁸

3.25 He reiterated his concern that care proceedings should not become subject to the problems which are faced by criminal courts when dealing with a case of this type. He drew attention to the different aims of the criminal courts and care proceedings, highlighting that the criminal courts must be satisfied beyond reasonable doubt of a person’s guilt before he or she can be punished, whereas the priority in care proceedings is the protection of the child. He concluded:

A finding of fact that a child has been injured by one of his two parents and that each is as likely to have done it as the other means that he is at risk from each. In these circumstances you clearly cannot protect a child from risk by leaving him with one parent.²⁹

3.26 In *Lancashire CC and Another v B (A Minor); Same v W (A Minor)*³⁰ the House of Lords considered a case in which the child might have been injured by someone who was not a ‘primary carer’. Lord Nicholls recognised that many children nowadays are cared for by a number of people, not solely their parents, a circumstance which presents difficulties if a child is non-accidentally injured. The number of potential perpetrators makes establishment of the facts particularly difficult and the judge’s task becomes one of penetrating “the fog of denials, evasions, lies and half-truths which all too often descends in court at fact finding hearings”.³¹ This change in the family unit necessitates, in his view, a

²⁵ [1996] 4 All ER 239.

²⁶ [1999] 1 WLR 238 at p 246–7.

²⁷ *Ibid*, at p 248.

²⁸ *Ibid*, at p 249.

²⁹ *Ibid*, at p 250.

³⁰ [2000] 2 WLR 590.

³¹ *Ibid*, at p 596.

change in the interpretation of section 31(2)(b)(i),³² as care is shared making it impossible for the court to “distinguish in a crucial respect between the care given by the parents or primary carers and the care given by other carers”.³³ For this reason the phrase “care given to the child” can be applied to the care given by any of the carers. In taking this approach Lord Nicholls considered that a balance was being struck between having regard to the changes in the way in which children are cared for and “encroaching to the minimum extent on the general principles underpinning s.31(2)”.³⁴ The change in the way in which many children are cared for is a situation which, in his opinion, Parliament had not foreseen, and thus:

The courts must therefore apply the statutory language to the unforeseen situation in the manner which best gives effect to the purposes the legislation was enacted to achieve.³⁵

- 3.27 He recognised that one effect of this approach is that the condition in the statute “may be satisfied when there is no more than a possibility that the parents were responsible for inflicting the injuries which the child has undoubtedly suffered”.³⁶ He also expressed his recognition that this may leave the judge who must decide whether to make a care order or supervision order in a particularly difficult position, as he will be unable to ascertain which individual perpetrated the injuries. He highlighted the possibility that “parents who may be wholly innocent, and whose care may not have fallen below that of a reasonable parent, will face the possibility of losing their child, with all the pain and distress this involves”.³⁷ He stressed, however, that although this is a possibility, it is not a certainty that a court will make a care order and “it goes without saying that when considering how to exercise their discretionary powers in this type of case judges will keep firmly in mind that the parents have not been shown to be responsible for the child’s injuries”.³⁸
- 3.28 Although he recognised these serious concerns, Lord Nicholls emphasised that the overwhelming factor “is the prospect that an unidentified, and unidentifiable, carer may inflict further injury on a child he or she has already severely damaged”,³⁹ and that this outweighs the distress which may be caused to all involved.

³² See para 3.15 for the wording of this subsection.

³³ [2000] 2 WLR 590 at p 596.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*, at p 597.

³⁸ *Ibid.*

³⁹ *Ibid.*

3.29 In *Re G (A Child) (Care Order: Threshold Criteria)*⁴⁰ Hale LJ, discussing the situation in which a child *has* suffered non-accidental injury by one or both parents but it is impossible for a judge to decide which one, made reference to the guidance given by the House of Lords in *Re H and R*⁴¹ In her view “the threshold of incredulity that such things can ever take place [is] much lower once it is clear that the thing has indeed taken place”.⁴² The effect of the judge being unable to decide which carer is the perpetrator has the effect that a later hearing must proceed on the basis that each carer is a possible perpetrator, although this has not been proven. She stated:

That is an ironic result of the decision in *Re H*, because the main thrust of that case was to decide that children should not be subject to care orders on the basis that something *may* have happened rather than on the basis that it *did* happen.⁴³

3.30 This consequence of the approach highlighted by Hale LJ in *Re G* is exemplified by the judgement of Thorpe LJ in *Re B (Children) (Non-Accidental Injury: Compelling Medical Evidence)*.⁴⁴ The key passage in his judgment seems to indicate that once the fact of non-accidental injury has been proved or admitted then, in the face of mutual silence or denunciation, the evidential burden shifts. He referred to the type of case in which it could not be said with certainty that a defendant was the sole perpetrator of all the injuries to the child and compared the role of the family court judge in that situation to the position of the judge and jury in a criminal case, in which the defendants either offer no explanation or both blame the other.

The same sort of dilemma faces the judge in a situation such as this, where it is incumbent upon him to apply the elevated civil standard of proof. A degree of heightened cogency is necessary to enable the judge to say that it could *not* possibly have been the mother. It seems to me that that standard could not possibly have been met given the key factors identified by [counsel for the child] in his skeleton argument, particularly the fact that the mother's case was that really there had been no occasion when [the mother's ex-boyfriend] had been alone with this baby, other than the babysitting occasions and, obviously, the hours immediately preceding death when [the mother's ex-boyfriend] was up and about and she was deeply asleep.⁴⁵

3.31 A different approach was taken by the Court of Appeal in the case of *Re O and N (children) (non-accidental injury: burden of proof)*.⁴⁶ Ward LJ emphasised that “[i]t

⁴⁰ [2001] 1 FLR 872.

⁴¹ [1996] AC 563.

⁴² [2001] 1 FLR 872, at p 822, para 44.

⁴³ *Ibid.*

⁴⁴ [2002] 2 FLR 599.

⁴⁵ *Ibid.*, at p 606 (emphasis added).

⁴⁶ [2002] 2 FLR 1167.

is not for the parent to exculpate himself or herself”,⁴⁷ although he did state that there is an evidential, though not a legal, burden on the parents to provide an explanation for the child’s injuries which happened whilst in their care. He applied the test of whether the local authority had established on the balance of probabilities that the mother had inflicted the harm. He concluded:

Applied to this case which is different in the sense that harm has been established, nevertheless the finding of the court is that the case against the mother cannot be elevated beyond suspicion that she may have harmed her baby. As I have indicated that does not establish that she did. On the facts of this case the fact of her harming the child in the past could be the only basis for asserting a risk of her harming the child in the future. The suspicions and doubts do not establish a risk of future harm by her. In my judgment, this case must proceed henceforth upon the clear basis and understanding by all concerned, lawyers, social workers and experts, that L was not harmed by her mother and there is no risk that either L or C is at risk of suffering physical harm from her.⁴⁸

- 3.32 This decision has been subject to criticism by Hayes and Hayes,⁴⁹ who reiterated that the role of care proceedings is not to attribute guilt or innocence to the defendant, but rather to protect the child. They argued that the Court of Appeal had been misguided in *Re O and N*, and that the “cogent evidence test” as proposed in *Re B* is correct. They stated:

The Court of Appeal directed that the court should ask itself the question ‘is there cogent evidence that enables the court to identify who has caused the significant harm to the child?’. If the truth cannot be established, then it directed that the court should avoid making a positive finding that one party was the sole perpetrator. It should keep all carers in the frame.⁵⁰

- 3.33 The House of Lords has recently delivered its judgment in *Re O and N*⁵¹ It considered the approaches taken in the Court of Appeal by both Thorpe LJ in *Re B*,⁵² and Ward LJ in *Re O and N*.⁵³ Lord Nicholls, delivering the leading judgment with which the other Law Lords concurred, considered that in this type of case:

Quite simply, it would be grotesque if such a case had to proceed at the welfare stage on the footing that, because neither parent,

⁴⁷ *Ibid*, at p 1177 para 23.

⁴⁸ *Ibid*, at p 1178 para 26.

⁴⁹ Hayes and Hayes, “Child Protection in the Court of Appeal” [2002] Fam Law 817.

⁵⁰ *Ibid*, at p 827.

⁵¹ *In re O and N (Minors); In re B (Minors) (2002)* [2003] UKHL 18.

⁵² [2002] 2 FLR 599.

⁵³ [2002] 2 FLR 1167.

considered individually, has been proved to be the perpetrator, therefore the child is not at risk from either of them.⁵⁴

- 3.34 He took the view that this would be a “self-defeating interpretation of the legislation”,⁵⁵ and stated that:

The preferable interpretation of the legislation is that in such cases the court is able to proceed at the welfare stage on the footing that each of the possible perpetrators is, indeed, just that: a possible perpetrator.⁵⁶

- 3.35 He went on to discuss the approach which the judge must take, having regard to the facts found at the preliminary hearing. He stated:

When the facts found at the preliminary hearing leave open the possibility that a parent or other carer was a perpetrator of proved harm, it would not be right for that conclusion to be excluded from consideration at the disposal hearing as one of the matters to be taken into account. ... to exclude that possibility altogether from the matters the judge may consider would risk distorting the court’s assessment of where, having regard to all the circumstances, the best interests of the child lie.⁵⁷

- 3.36 Therefore, the approach adopted by Ward LJ in the Court of Appeal was not followed. In the light of the factual conclusion that the evidence was not sufficient to exclude the mother and positively identify the father as perpetrator, “it would be quite wrong for the case to proceed on the false basis that the mother had been found not to be the perpetrator”.⁵⁸ The decision of Thorpe LJ in *Re B* was upheld.

- 3.37 Of course, the purpose of this paper is to consider the need for law reform in the context of criminal proceedings which *are* concerned with the attribution of guilt or innocence. It is pertinent to note, however, that family courts frequently deal with the same type of case which we are considering, where it can be proved that a child has suffered non-accidental injury, but it cannot be proved who inflicted the injury. We do not underestimate the difficulties which family courts face in dealing with these cases, which are illustrated by the cases referred to in this section. The family courts, however, have considerable advantages over criminal courts when dealing with these issues. Section 31 of the Children Act 1989 imposes a threshold of “significant harm” which the court must cross before it has jurisdiction to make a care order. Having crossed this threshold, the court can decide in exercise of its discretion not to make a care order on the basis of the welfare principle and the principle of non-intervention.

⁵⁴ *Ibid*, at para 27.

⁵⁵ *Ibid*, at para 28.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*, at para 31.

⁵⁸ *Ibid*, at para 33.

Admissibility of evidence in civil proceedings

- 3.38 Not only is there, at least nominally, a different standard of proof in the family and civil courts, but the rules of evidence operate differently. We now consider those rules of evidence.
- 3.39 The rules of evidence operate differently in civil and criminal proceedings. Furthermore, proceedings which are concerned with the protection of children have been recognised as a special category of civil proceedings (see *Re L (A Minor) (Police Investigation: Privilege)*).⁵⁹ As a result, there are some types of evidence which will be admissible in civil proceedings under the Children Act 1989, but which are not admissible in criminal proceedings arising out of the same facts. For example, hearsay evidence is admissible in civil proceedings, but will often be inadmissible in criminal proceedings. The rules relating to the admissibility of expert evidence are also more restrictive in criminal proceedings.
- 3.40 In addition, it seems to be the case that a judge hearing civil proceedings can compel a person to give evidence to explain the circumstances in which a child has been injured. Section 98 of the Children Act 1989 provides:
- (1) In any proceedings in which a court is hearing an application for an order under Part IV or V, no person shall be excused from –
 - (a) giving evidence on any matter; or
 - (b) answering any question put to him in the course of his giving evidence,

on the ground that doing so might incriminate him or his spouse of an offence.
 - (2) A statement or admission made in such proceedings shall not be admissible in evidence against the person making it or his spouse in proceedings for an offence other than perjury.
- 3.41 Although section 98 appears to make a person who is alleged to have injured the child a compellable witnesses in care proceedings, the judgment of Thorpe LJ in *Re B (Non-Accidental Injury)*⁶⁰ suggests that parents have a right to choose not to give evidence. That case was distinctive in that the parents did not give any oral evidence and, although Thorpe LJ approved of the trial judge’s approach in refusing to draw any inferences from that decision, he stated that “there were inevitably risks of consequences for them in having stood aside”.⁶¹

⁵⁹ [1997] AC 16.

⁶⁰ [2002] 2 FLR 1133.

⁶¹ *Ibid*, at p 1139 para 26.

- 3.42 However, in *Re M (Care Proceedings: Disclosure: Human Rights)*⁶² Elizabeth Lawson QC (sitting as deputy judge in the high court) identified the case as one in which the child had suffered non-accidental injuries and if both parents remained silent the court might not be able to establish which parent was responsible. In that case the mother had provided a written statement. The mother's Counsel argued that, having done this, she should not have to give oral evidence. Elizabeth Lawson QC insisted that the mother should give oral evidence and treated her as a compellable witness under section 98 of the 1989 Act. One purpose in doing so was to clarify discrepancies between her statement and that of the father.
- 3.43 *Re M* concerned whether the mother's statement of responsibility should be disclosed to the police. This issue is considered in the next section.

USE OF EVIDENCE OBTAINED IN CIVIL PROCEEDINGS

- 3.44 Where civil and criminal proceedings arise out of the same facts, it may be necessary to consider whether evidence obtained in one set of proceedings should be made available in the other. In particular, it may be important to decide whether evidence obtained in care proceedings can be disclosed to the police. This may occur where care and criminal proceedings are proceeding in parallel. For example, there are a number of cases in which a parent who is awaiting trial on criminal charges has attempted to postpone the resolution of care proceedings until after the conclusion of the criminal trial. In *R v Inner London Juvenile Court ex parte G*⁶³ the father argued that his criminal trial would be prejudiced if he gave evidence in the care proceedings and his position in the care proceedings would be prejudiced if he were to remain silent in those proceedings in order to protect his defence at the criminal trial. The father's application to adjourn the care proceedings was dismissed by the magistrates,. That decision was upheld on application for judicial review by Bush J. In *Re S (Care Order: Criminal Proceedings)*,⁶⁴ however, the Court of Appeal decided that, in a case as serious as murder, it was preferable for the criminal trial to be concluded first and the care proceedings to follow unless there were exceptional circumstances requiring the child's long-term future to be decided without delay. On the other hand, in a case concerning neglect, the Court of Appeal decided in *Re TB (Minors) (Care Proceedings: Criminal Trial)*⁶⁵ that each case had to be decided on its own merits and there was no automatic bar to the hearing of care proceedings when related criminal proceedings were pending. Finally in *Re L (Care: Confidentiality)*⁶⁶ the parents were awaiting trial on murder charges. They argued that it would be unfair to require them to give evidence in care proceedings relating to a surviving child, since this would prejudice their position

⁶² [2001] 2 FLR 1316.

⁶³ [1988] 2 FLR 58.

⁶⁴ [1995] 1 FLR 151.

⁶⁵ [1996] 1 FCR 101.

⁶⁶ [1999] 1 FLR 165.

in the criminal proceedings. Johnson J stated that these submissions were lacking in substantial merit and hoped that the issue of confidentiality would not be used as a basis for seeking postponement of care proceedings until the conclusion of related criminal proceedings.

- 3.45 An eminent academic lawyer in his response to the informal consultation paper noted that it may prove an attractive option to complete civil proceedings before the criminal prosecution, as evidence given in civil proceedings, although not admissible, may provide valuable investigative leads for the police. He stated:

There would seem to me to be very substantial value in securing as much incriminating material as possible by conducting the civil hearings before the criminal prosecution, despite the reservations about the impact this might have on the candour of revelations in civil proceedings and that this might frustrate the more inquisitorial nature of those proceedings.

Confidentiality of evidence in civil proceedings

- 3.46 We have already referred to section 98 of the Children Act 1989, which prevents the use in criminal proceedings⁶⁷ of a “statement or admission” made in care proceedings. The scope of the protection offered by section 98 has been considered in several cases: see for example, *Oxfordshire County Council v P*,⁶⁸ *Cleveland County Council v F*,⁶⁹ *Re G (Minor) (Social Worker: Disclosure)*,⁷⁰ *Re W (Minors) (Social Worker: Disclosure)*.⁷¹
- 3.47 In *Re C (A Minor) (Care Proceedings: Disclosure)*⁷² the father had confessed in care proceedings to harming a child. The Court of Appeal ordered, on the application of the police, disclosure of the judgment and the evidence in the form of reports, statements and transcribed oral evidence of the medical experts, of the parents and other family members, for the purpose of renewed police enquiries into the child's death. The statements and admissions of the parents could be used for the purpose of interviewing the parents although they were not admissible in criminal proceedings in respect of the alleged offence. The Court of Appeal set out the following criteria, to be applied by family courts when deciding whether evidence obtained in civil proceedings should be disclosed to the police:⁷³

- (1) the welfare and interest of the child concerned and of other children generally;

⁶⁷ Other than in proceedings for perjury.

⁶⁸ [1995] Fam 161.

⁶⁹ [1995] 1 WLR 785.

⁷⁰ [1996] 1 WLR 1407.

⁷¹ [1999] 1 WLR 205.

⁷² [1997] Fam 76.

⁷³ *Ibid*, at p 85–6.

- (2) the maintenance of confidentiality in children's cases and the importance of encouraging frankness;
- (3) the public interest in the administration of justice and the prosecution of serious crime;
- (4) the gravity of the alleged offence and the relevance of the evidence to it;
- (5) the desirability of co-operation between the various agencies concerned with the welfare of children;
- (6) fairness to the person who had incriminated himself and any others affected by the incriminating statement;
- (7) any other material disclosure which had taken place.

3.48 Swinton Thomas LJ drew attention to a matter which the judge should have considered when balancing whether or not the evidence should be disclosed – that is whether any benefit would accrue to the child concerned and other children as a result of the evidence not being disclosed, and whether any harm would be caused by disclosure. He continued:

Confidentiality and the importance of frankness militate against disclosure. In coming to his conclusion, the judge placed great emphasis on the importance of encouraging frankness. He was right to do so.

He emphasised the importance of the public interest in the administration of justice in ensuring that serious crimes are investigated and prosecuted, and went on to add:

The judge conducting a criminal trial will exercise his discretion as to whether to admit in evidence any further admissions to the police at interview resulting from the admissions made in the care proceedings and would obviously bear in mind when doing so in provisions of section 98 and the warning given to the accused person in the care proceedings.

3.49 In *Re M (Care Proceedings: Disclosure: Human Rights)*⁷⁴ Elizabeth Lawson QC, sitting as a deputy judge in the High Court, whilst recognising that she may have a different perspective on this issue from that of permanent members of the judiciary, stated that she believed that the impact of cases in which disclosure is regularly ordered to the police “has greatly discouraged the frankness which is so necessary to the resolution of children’s cases and which Parliament sought to protect”.⁷⁵ She highlighted the conflicting currents – on the one hand “full and frank disclosure” is mandatory in children’s cases, whereas on the other the effect for a parent is a strong likelihood that information disclosed will be disclosed to

⁷⁴ [2001] 2 FCR 1316.

⁷⁵ *Ibid*, at p 1324.

the prosecution authorities. She noted that the police role in investigating this type of case has increased and pointed out that in practice the parents who make admissions as to how the child came about his or her injuries are prosecuted, whereas those who remain silent are not. Emphasis was placed on the detrimental effect which consequential delay in resolving this type of case can have on the child involved. She continued:

The reluctance to speak because confidentiality cannot be ensured or guaranteed is highlighted in cases such as *Cleveland CC v F*⁷⁶ and *Re G (Social Worker: Disclosure)*.⁷⁷ In both of those cases the parents were expressing a reluctance to speak to those concerned with the child care proceedings unless they were guaranteed confidentiality because of the fear of the consequences. A fear that there would be criminal consequences was certainly a significant factor which influenced the parents' behaviour in this case.

- 3.50 The case of *Re M* itself demonstrated how important frank disclosure is. The mother had made an admission as to how the child's injuries were caused, and Elizabeth Lawson QC noted that, without this admission, she might have wrongly concluded that the father had inflicted the child's injuries. She stated "An inability to decide which of them was the perpetrator would have left him under a cloud of suspicion which would have had an impact on his being allowed to look after any other children in the future".⁷⁸
- 3.51 We recognise the difficulties faced by judges in the family courts when balancing the competing considerations for and against disclosure of evidence obtained in family proceedings for the purposes of a criminal investigation. It is not within our remit in this project to express any view on what rules or guidelines, beyond those already discussed, might improve the quality of decisions on such difficult issues nor would we wish to do so. It is of interest to us that the law already imposes a duty on all those who may have something to reveal in connection with care proceedings to give an account. Thus, a statement that those responsible for the welfare of a child have a responsibility to provide what explanation they can would not cut across what already exists in the family jurisdiction.

CONCLUSION

- 3.52 As noted at the outset of this Part, a number of respondents expressed concern that the proposals for reform of the criminal law should not adversely affect the civil protection available for children. Although some of them expressed concerns about certain of the proposals of the Team, none of them did so on the basis that they would operate to make the task of the civil courts more difficult.⁷⁹

⁷⁶ [1995] 1 FLR 797.

⁷⁷ [1996] 1 FLR 276.

⁷⁸ [2001] 2 FCR 1316, at p 1325.

⁷⁹ The arguments of all the respondents, including the Criminal Bar Association and Professor Ormerod, have been taken into account in later Parts.

- 3.53 Whilst we do not underestimate the difficulties faced by professionals within the family justice system dealing with cases of unexplained non-accidental injuries, it is the case that the current interpretation of the Children Act 1989 allows the family courts to make care orders or supervision orders to protect children from a risk of harm, even though the court may be unable to establish who is responsible for the child's injury. In civil proceedings, the risk of unfairness to an innocent parent whose child may be taken into local authority care is thought to be outweighed by the overriding importance of the child's welfare, and the need to protect children from further abuse.
- 3.54 On the other hand, in criminal proceedings, it would be unacceptable to convict a person of a serious criminal offence unless it can be proved that he or she is criminally responsible for a non-accidental death or injury. Concern that this distinction be recognised was expressed by a number of respondents to the informal consultation paper. Under the current law it appears that it will frequently be impossible to convict such a person. This remains a great concern, notwithstanding the knowledge that civil proceedings may be available to protect the child, or other children, who are at risk of similar abuse. In the remainder of this paper, therefore, we will consider whether the rules of criminal law, evidence and procedure should be reformed.

PART IV

OUR APPROACH TO REFORM

- 4.1 In this Part, we describe our approach to reform. As was pointed out to us in the informal consultation exercise, there are two approaches to addressing the problem we have identified, each of which needs to be considered. The first concerns the question: “can the substantive law and/or the rules of evidence and/or procedure be altered so as to facilitate an accurate but fair way of convicting of an offence of homicide or of serious assault the person or persons who killed or seriously injured the child?”. The other approach addresses the question: “can the substantive law and/or the law on sentencing be changed so as to attach an appropriate label and level of sanction to a person who may not be guilty of an offence of killing or seriously injuring the child but who was in some way responsible for the child?”. We do not see these approaches as mutually exclusive but we recognise the importance of giving each of them separate consideration.
- 4.2 The former question addresses the nub of the problem. A serious offence against a child has been committed by one or more of a known group of suspects, at least one of whom has responsibility for the welfare of the child. The law has, thus far, too often proved incapable of providing a means of accurately identifying who is guilty of the homicide or assault in the event that the suspects maintain their silence and/or do not cooperate.
- 4.3 The latter addresses wider concerns which are worthy of consideration but the addressing of which ought not to be seen as a surrogate for dealing with the main question.

THE DUTY TO PROTECT CHILDREN FROM HARM

- 4.4 Apart from the fact that children may be the victims of offences of general application, certain criminal offences specifically protect children, and some of them do so by the technique of imposing special culpability on those who are responsible for their well being.¹
- 4.5 Children have particular vulnerabilities which not only make them likely to be victims of crime but also make it particularly difficult to prosecute these crimes effectively. The criminal justice system has been obliged to respond to some of these difficulties. Techniques have been introduced to make it easier for children to give evidence, particularly where they are victims of sexual or violent crime.² Such provisions are valuable where a child is able to give an account of events. Other approaches may be required where a child victim is unable to testify, either because of age, or because he or she has been killed.

¹ For example section 1 of the Children and Young Persons Act 1933.

² In particular the provisions of the Youth Justice and Criminal Evidence Act 1999.

- 4.6 We have, in Part III, considered the special obligations which the civil law places on witnesses in care proceedings to give evidence, even where to do so might incriminate them or their spouse. We consider in this report whether a foundation for other changes of the law and procedure might be laid by a statutory statement: that the responsibility which a person bears for the welfare of a child at or during the relevant time when he or she was killed or seriously injured includes a responsibility to provide such account as he or she can to those properly responsible for investigating, or adjudicating upon, the offence committed against the child.

THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OTHER INTERNATIONAL OBLIGATIONS

- 4.7 Of central concern to us have been the ways in which, and the extent to which, our thinking ought to be informed by the ECHR.

Our initial approach - focusing on Article 6

- 4.8 As the matters we are considering concern the conduct of the criminal trials of those charged with the death of or serious injury to young children, our initial approach was to focus almost exclusively on the impact of Article 6.

- 4.9 It states:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...

- 4.10 The right to a fair trial applies to both civil and criminal proceedings but there are certain special obligations under Article 6(2) and (3) which apply only to criminal proceedings. As a result, a judge in care proceedings may be able to hear evidence which could not be admitted in criminal proceedings without causing unfairness to the defendant. These issues were considered in Part III.
- 4.11 Although the right to a fair trial under Article 6 is unqualified, this right attaches to the fairness of the trial overall and not to each and every manifestation of it. Thus the question is always whether, looking at the proceedings as a whole, the defendant has had a fair trial. This approach may be exemplified by the way in which the European Court of Human Rights has approached questions of evidence. It has stated that Article 6 requires that:

In principle all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. ...

As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.³

- 4.12 On this basis, the Court has held that there had been a breach of a defendant's human rights where a criminal court relied upon out of court statements by anonymous witnesses, or by family members who were not available for cross-examination. However, the Court has also recognised that it is legitimate for the interests of victims and witnesses to be taken into account when considering the defendant's right to a fair trial. In *Doorson v Netherlands*,⁴ the European Court of Human Rights said:

It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention ... Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.⁵

- 4.13 The Court has accepted that the interest of a defendant in being present during the questioning of witnesses could be outweighed by the need to ensure the safety of the witnesses. In *SN v Sweden*,⁶ the European Court of Human Rights

³ *Kostovski v Netherlands*, (1990) 12 EHRR 434, para 41.

⁴ (1996) 22 EHRR 330.

⁵ *Ibid*, at para 70.

⁶ Application number 00034209/96, ECtHR, 2 July 2002.

considered the application of Article 6 in the context of a prosecution for sexual abuse of a child. The Court stated:

The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence. ... In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours⁷

- 4.14 The Court accepted that the rights of the defendant had not been infringed. It stressed, however, that “evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care...”.⁸
- 4.15 It appears, therefore, that the particular vulnerabilities of witnesses in child abuse cases have been recognised both in domestic legislation and case law, and in the decisions of the European Court of Human Rights. Of course, arguments which are focused particularly upon the need to protect children who are vulnerable witnesses are unlikely directly to be applicable to cases in which the child has been killed, or is too young or badly injured to appear as a witness (even with the availability of ‘special measures’ under the Youth Justice and Criminal Evidence Act 1999).⁹ Nonetheless the fact that the need to protect children as victims has been recognised as relevant, in some cases, in determining whether the defendant has had a fair trial is of significance in this project.

A more comprehensive, better-balanced approach

- 4.16 We are now persuaded, by virtue of some powerful contributions to our informal consultation exercise, that focusing to the extent that we did on Article 6 was an unbalanced approach and that it failed to give sufficient weight to other, even more fundamental, human rights which are in play. Indeed one eminent respondent urged upon us the submission that, in view of the lack of clarity in the jurisprudence of the European Court of Human Rights on Article 6:

if there is a respectable body of opinion which recommends that a given proposal will not be incompatible with the Convention, that

⁷ *Ibid*, at para 47.

⁸ *Ibid*, at para 53.

⁹ Youth Justice and Criminal Evidence Act 1999, Part II, Chapter I.

should be sufficient for the Commission to recommend that proposal. The ambiguity of the ECHR law ought not to inhibit law reform, particularly where that proposal will better protect the right to life under the Convention.

4.17 Although proposed reforms to rules of evidence and procedure should be such that any conviction is the result of a fair trial complying with Article 6, the right of the defendant to a fair trial is not the only human right which is directly in play in this kind of case. The rights of the dead or seriously injured child under Articles 2 or 3 of the ECHR will have already been grossly infringed by the guilty person.

4.18 The ECHR states:

Article 2:

Everyone's right to life shall be protected by law. ...

Article 3:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

These obligations under the ECHR are now part of domestic law, as a result of the Human Rights Act 1998.

4.19 These Articles place upon the State onerous obligations particularly where the person affected is a child or other vulnerable person. The European Court of Human Rights has made it clear in repeated judgments that Articles 2 and 3 enshrine:

the most fundamental values of democratic society. ... The obligation on High Contracting parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article[s 2 or] 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to [treatment in contravention of these Articles] including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular of children and other vulnerable persons... .¹⁰

[In addition] where a right with as fundamental an importance as the right to life or the prohibition against torture, inhuman and degrading treatment is at stake, [and where the State undertakes the task of investigating the matter] Article 13 requires ... a thorough

¹⁰ *Z v UK* (2002) 34 EHRR 3, at para 73.

and effective investigation capable of leading to the identification and punishment of those responsible...¹¹

- 4.20 Furthermore the European Court of Human Rights, in a case concerning ill-treatment of a child by his stepfather, has impacted on the substantive criminal law of England and Wales in holding that substantive domestic law at the time, which allowed a defence of “reasonable chastisement” which the prosecution had to disprove to the criminal standard, failed to provide adequate protection to the child against treatment which was contrary to Article 3.¹²
- 4.21 These are strong and very pointed decisions which impose obligations on contracting States to protect children from attack by, amongst other things, requiring that the legal processes provide an effective means of identifying and punishing those responsible. At the moment there must be a concern whether the rules of evidence and procedure, as currently applied in this kind of case, provide such effective protection.
- 4.22 These obligations to protect children do not simply exist under the ECHR. The United Nations Convention on the Rights of the Child provides:

Article 19:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

- 4.23 It is significant that Article 19(2) of the UN Convention focuses, amongst other things, on obligations in respect of investigation and for judicial involvement.

Does Article 8 of the ECHR have an impact on these issues?

- 4.24 Article 8 of the ECHR states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

¹¹ *Ibid*, at para 109. See also *DP & JC v UK* (2003) 36 EHRR 14 at paras 109 and 135, and *E v UK* (2003) 36 EHRR 31.

¹² *A v UK* (1999) 27 EHRR 611.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4.25 The text of paragraph 2 of Article 8 makes it clear that the right to family life is not absolute. In *Johansen v. Norway*,¹³ the European Court of Human Rights stated:

[A] fair balance has to be struck between the interests of the child ... and those of the parent ... In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, ... the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development.¹⁴

4.26 Article 8 protection is not absolute. It may be interfered with but such interference with family life must be “in accordance with law” and “necessary in a democratic society”. Therefore, a court may be required to consider whether interference is “proportionate”. Assessments of these competing claims often take place within civil proceedings (see Part III). In the context of criminal proceedings, where a child has been the victim of a crime, Article 8 does not, in our view, present a major obstacle to the investigation and prosecution of members of the child’s family.

CONCLUSIONS ON THE IMPACT OF THE ECHR

4.27 We must always bear in mind that the European Court of Human Rights has stressed that the seriousness of the alleged criminal conduct cannot justify unfairness. In *Heaney and McGuinness v Ireland*,¹⁵ the Irish Government argued that the legislation in question, which made it an offence punishable by a maximum of six months imprisonment for a person detained on suspicion of a defined terrorist offence to refuse to give a full account to the police of his actions and movements during a specified period, was a “proportionate response to the subsisting terrorist and security threat given the need to ensure the proper administration of justice and the maintenance of public order and peace”.¹⁶ The Court took judicial notice of these concerns. It stated, however, that the general requirements of fairness contained in Article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most

¹³ (1997) 23 EHRR 33.

¹⁴ *Ibid*, at para 78.

¹⁵ (2001) 33 EHRR 12; [2001] Crim LR 481.

¹⁶ *Ibid*, at para 86.

complex.¹⁷ The Court concluded that the legitimate security and public order concerns of the Government could not justify a provision which “extinguishes the very essence of the applicants’ rights to silence and against self-incrimination”.¹⁸

4.28 It is clear from that case and many others, however, that where the issues are the admission of particular evidence, or the drawing of inferences from silence, or permitting a case to go beyond the end of the prosecution case, the courts, both here and in Europe, will focus on the overall fairness of the trial. In our view it is of the highest importance to bear in mind the very strong duty which the European Court of Human Rights has recognised is placed upon the State to secure an effective investigation and adjudicative process for the purpose of protecting the fundamental Convention rights of children by securing the conviction of those guilty of breaching these rights.

4.29 We are, therefore, firmly of the view that where:

- (1) the fundamental rights of a child have been infringed by killing or inflicting serious injury;
- (2) it is clear that one or other or all of a limited group of people must be responsible for that infringement; and
- (3) at least one of that group has or had parental or care responsibilities for the child

it is legitimate to question whether overall fairness in a trial may be achieved notwithstanding some adjustments to the normal rules of procedure and evidence with a view to making it possible to convict the guilty in circumstances where the application of the present rules make a conviction of the guilty impossible.

4.30 We consider in Parts V and VI of this report how the obligations on the State, pursuant to Articles 2 and 3, might be discharged without a breach of the defendant’s right to a fair trial under Article 6. We consider a raft of possible measures. We reject some and are minded to recommend others. They address a range of issues:

- (1) whether there is a principled way in which a decision to withdraw the case from the jury might be postponed until all the evidence has been called;
- (2) whether there is a sustainable argument, in this kind of case, for imposing on certain defendants a legal or evidential burden to rebut a presumption of guilt;

¹⁷ *Ibid*, at para 57.

¹⁸ *Ibid*, at para 58.

- (3) whether evidence of one defendant's pre-trial statement may be adduced as evidence against a co-accused without that defendant having given evidence;
- (4) whether a duty imposed on a person responsible for the child to give an account of how the child came about his or her death or injury should carry a direct criminal sanction;
- (5) whether the failure of a person, who has responsibility for the welfare of the child, to give an account to the police and/or to give evidence might be permitted potentially to give rise to an inference upon which a jury might convict.

4.31 Even where we indicate that we are minded to recommend certain changes, we are aware that there are contrary arguments, which we endeavour to articulate. We believe that the recommendations we are minded to make are, whether taken singly or together, such as will assist in tackling this problem in a way which would not infringe Article 6. Of course, as these are matters affecting human rights, they cannot be finally determined by legislation but are, pursuant to the Human Rights Act 1998, susceptible to judicial scrutiny, to the outcome of which the Government and Parliament would have to be sensitive. We believe that, having consulted widely on the matter, the recommendations we are minded to make are a principled and proportionate response to a serious and intractable problem.

OUR PROPOSED APPROACH TO THE SUBSTANTIVE LAW

4.32 The person who is directly responsible for the child's death or injury should be convicted of the substantive offence of murder or manslaughter, whichever reflects the seriousness of his or her conduct. If another person is also responsible for the child's death or injury under the ordinary rules of accessory liability or joint enterprise, then that person should also be convicted for that offence which reflects the seriousness of his or her conduct.

4.33 Where, however, a person, such as a parent, who has a duty to prevent harm to the child, fails to prevent the death or injury and yet neither directly causes it nor is guilty as an accessory, the law already reflects, to some extent, the policy that such a person should be convicted of an offence reflecting the extent of their involvement in the events leading up to the child's death or serious injury.¹⁹ In Part VII we consider whether there is a need for any change in the substantive law, in order better to mark and reflect the different levels of culpable involvement of such a person in the lead up to the death of or serious injury to a child.

¹⁹ The offence of wilful neglect or cruelty under section 1 of the Children and Young Persons Act 1933.

THE RANGE OF APPLICATION OF OUR SCHEME

Which children?

- 4.34 Before we consider the options for reform in detail, it is necessary to consider the scope of our proposals. Our current project is concerned with offences against children. This reflects the background to the project, as described in Part I. Childhood ends at 18 years of age. There are, however, various legal provisions which distinguish between children on the basis of their age. For example, the Youth Justice and Criminal Evidence Act 1999 recognises the special vulnerability of children under the age of 17. The Children Act 1989 section 31(3) provides that a care order may not be made in relation to a child once he or she has reached the age of 17.²⁰ Other offences against children attract enhanced levels of maximum sentence where the child is under 13.²¹ Some of the respondents to the Team's informal paper suggested that the age of 16 was too high a threshold. One judicial respondent suggested the age of 14 or under where the child survived. Another suggested that the age should be under 13. It was pointed out to us by a member of the NSPCC Working Group that the children they had identified as being particularly vulnerable were those under the age of 2. We have considered the merits of each of these possible alternative thresholds. We are, however, particularly influenced by the fact that the offence of cruelty or wilful neglect under section 1 of the Children and Young Persons Act 1933 may be committed against a child under the age of 16. This is an important offence in the context of our proposals in this consultative report. It is often charged as an alternative count where the main count is one of homicide or serious assault. It also figures in one of our main recommendations. In our view it is important that there should be consistency between the range of operation, respectively, of this offence and the special rules and procedures we recommend. **We are minded to recommend that the recommendations in this report should apply in cases of death or serious injury to children under the age of 16.**

Should our scheme extend to vulnerable adults?

- 4.35 We are aware that the abuse or neglect of vulnerable adults is perceived as a possibly widespread problem. Similar difficulties may arise in identifying the person responsible for the abuse of a vulnerable adult to those which we are considering in relation to offences against children. Indeed, as we point out above, the strictures of the European Court of Human Rights on the duties of the State to protect children are explicitly said to apply to vulnerable adults as well. Under the current law, there are specific offences relating to the ill-treatment or neglect of certain categories of adults who are particularly vulnerable.²² There are also situations in which a person who has accepted responsibility for the care of a vulnerable adult may be liable for manslaughter if

²⁰ Or sixteen in the case of a child who is married.

²¹ For example section 5 of the Sexual Offences Act 1956.

²² For example, section 127 of the Mental Health Act 1983.

that person dies as a result of their gross negligence.²³ It may, therefore, be thought to be desirable to have a scheme of special evidential rules and/or procedures applicable in cases of serious assault or homicide where the victim is a vulnerable adult, which is parallel to that which we are minded to recommend where the victim is a child. Our work in this area has been focused on children because it has been informed by the exposure by the NSPCC of the scale of the problem concerning children. Further, there already is a mass of legislation catering for the particular vulnerability of children to abuse and death upon which we have been able to build our recommendations. We do not presently feel able to make similarly fully informed judgments about vulnerable adults. Were we asked to do so we would investigate.

To which offences should our recommendations apply?

“Death of or serious injury to a child”

4.36 Throughout this report we refer, as a matter of convenient shorthand, to being concerned with “non-accidental death of or serious injury to a child”. We are, of course, aware that this is not a phrase carrying any legal precision. Our recommendations for changes in the law of evidence and procedure will apply to trials of certain defendants for certain crimes. We are minded to recommend that they would be included in a Schedule to a Bill. Those offences which are encompassed by the above shorthand description would be:

- (1) cruelty or neglect under section 1 of the Children and Young Person Act 1933 (whether the existing offence or the aggravated offence which we are minded to recommend in Part VII);
- (2) murder;
- (3) manslaughter;
- (4) assaults under sections 18 and 20 of the Offences Against the Persons Act 1861;
- (5) rape;
- (6) indecent assault and;
- (7) the offence we are provisionally proposing under Part VII²⁴ of failing, so far as is reasonably practicable, to prevent a child for whom the defendant is responsible from suffering serious harm deriving from ill treatment.

4.37 We do not propose that offences under section 47 of the 1861 Act, of assault occasioning actual bodily harm, should be encompassed in these proposals. We wish to emphasise the seriousness of the cases with which we are dealing. We

²³ For example, *Stone and Dobinson* [1977] QB 354.

²⁴ See paragraphs 7.28–9.

believe that section 20 provides a convenient dividing line to mark this. We believe that rape and indecent assault should be covered by our recommendations. In many cases with which we are dealing, the child is too young to make a complaint or give evidence and the facts render it obscure as to who is the culpable adult. In our view, the offences of rape and indecent assault should be dealt with in the same way as the other offences which we propose should be covered. They are offences of great seriousness and are likely to result in injuries to the child. Indeed it will be the discovery of those injuries by medical practitioners which, in cases involving very young children, will often be what triggers the prosecution and will be amongst the primary evidence available to the court.

4.38 We are also aware that there are other types of offence in which it will be difficult, or impossible, to identify the perpetrator from amongst a small group of main suspects, but which do not possess the special features of the type of case with which this report is concerned and are therefore excluded from the scope of this report. For example, there may be driving offences in which it is unclear which of two people were driving the vehicle, or drugs offences where it is unclear which of the occupants of a house are responsible for the drugs found in the house. Society has a special responsibility for the protection of children and those who have the care of children have a special responsibility for their well being. We consider that these are factors which justify making special provision for cases which involve serious child abuse.

4.39 **We are minded to recommend that the changes to the rules of procedure and evidence which we recommend in this report shall apply, where the other conditions are satisfied, to trials for the following offences:**

- (1) cruelty or neglect under section 1 of the Children and Young Person Act 1933 (whether the existing offence or the aggravated offence which we are minded to recommend in Part VII);**
- (2) murder;**
- (3) manslaughter;**
- (4) assaults under sections 18 and 20 of the Offences Against the Persons Act 1861;**
- (5) rape;**
- (6) indecent assault and;**
- (7) the offence we are provisionally proposing under Part VII²⁵ of failing, so far as is reasonably practicable, to prevent a child for whom the defendant is responsible from suffering serious harm deriving from ill treatment.**

²⁵ See paragraphs 7.28–9.

To which categories of person should our proposals apply?

Who has “responsibility” in this context?

- 4.40 As we have already indicated, the offence of child cruelty under section 1 of the Children and Young Persons Act 1933 is of central importance to our recommendations. One of the requirements for that offence is that the defendant has responsibility for a child. One of the changes in the substantive law which we are minded to recommend is the creation of an aggravated version of that offence. The offence under section 1 is often included as a count on the indictment in trials where the other counts are for the murder or manslaughter of, or serious assault upon, a child and where the problems which we are addressing arise. We are minded to recommend changes in the rules of evidence and procedure in those cases and some of the changes will apply only to a defendant who has responsibility for the welfare of a child.
- 4.41 For these reasons, we are of the view that there should be a single requirement that each of our recommendations should apply to those who have responsibility for a child and that the definition of who has responsibility should be the same for each of these purposes.
- 4.42 The starting point must be the existing law. The approach adopted under section 1 of the 1933 Act²⁶ is that it is a question of fact whether a particular person has responsibility for a child, whether on the basis of a family relationship, a contractual assumption of responsibility, or a voluntary or implicit assumption of responsibility. This approach, robustly applied, has allowed step-fathers or boyfriends who live with the child’s mother to be recognised as having ‘responsibility’ for the child in appropriate cases.²⁷
- 4.43 The 1933 Act does not contain an exclusive definition of “responsibility”. Instead, section 17 provides as follows:
- (1) For the purposes of this Act, the following shall be presumed to have responsibility for a child or young person-
 - (a) any person who-
 - (i) has parental responsibility for him (within the meaning of the Children Act 1989), or
 - (ii) is otherwise legally liable to maintain him; and
 - (b) any person who has care of him.
 - (2) A person who is presumed to be responsible for a child or young person by virtue of section (1)(a) shall not be taken to have ceased to be responsible for him by reason only that he does not have care of him.

²⁶ See paras 1.32 – 1.34 above.

²⁷ Eg, *S and M* [1995] Crim LR 486, considered at para 1.33 above.

- 4.44 'Parental responsibility' under section 3 of the Children Act 1989, depends upon issues such as the marital status of the parents. For our current purposes, this would be unduly narrow. In many of the cases in which a child is injured, or killed, the only suspects may be the two parents of the child. Under section 3 of the 1989 Act, a father who is not married to the child's mother will not necessarily have 'parental responsibility'. Our view is that for the purposes of criminal law, the responsibility of a father for the welfare of the child should be the same whether or not he is married to the child's mother.
- 4.45 Modern family life is, of course, complex and varied and there is a range of situations in which someone other than a parent may have the opportunity of seriously injuring or killing the child. The mother may be living in the same household as someone who is not the child's father. He may be a boyfriend, or a platonic friend, or a member of the extended family. We do not believe that the nature of the relationship a person has with the mother of the child should automatically determine whether that person should bear responsibility for the child for the purpose of any special procedural or other rules.
- 4.46 These examples demonstrate the complicated permutations which can arise when attempting to define the members of a modern family household. One senior family court judge expressed the view during consultation that the criteria for responsibility should extend to those living as part of the same household. Concern was expressed that if, for example, the mother of the child was living with a series of partners, the partner should not be able to claim that he did not have responsibility for the child since he was not actively involved in the care of the child. Although we share these concerns and we recognise that it can be extremely difficult to ascertain who should be considered to be a member of the family in the circumstances which we are considering, we do not consider that it is necessary or would be advisable to extend the definition of responsibility beyond that expressed in section 17 of the 1933 Act.
- 4.47 There are a number of reasons for this. First, we are unaware of problems arising in the operation of section 1 of the 1933 Act due to the presumptions of responsibility in section 17 being insufficiently wide in encompassing those who might have been deemed to have responsibility for the child.
- 4.48 Second, we do not wish to introduce inconsistencies within the statutory framework, whereby different definitions of responsibility would operate in relation to different offences. Nor do we wish to interfere with what is, apparently, a successful piece of legislation.
- 4.49 Third, we are concerned that there are a significant number of potential situations which would fall on the margins of the definition of "member of the same household" for example: boarders; lodgers; employees; or tenants. It is highly questionable whether such individuals should be presumed to have responsibility for the child, solely by virtue of the fact that they may be living as part of the same household, having regard to the way in which the household operates and the extent to which they contribute in practical ways. Such a

provision has the potential for diverting the course of the trial on to unnecessary and time consuming side issues.

- 4.50 Fourth, section 17(1)(b) provides a “sweep up” mechanism which enables the court to focus on the issue which is directly relevant, namely: whether, in fact, the defendant had care of the child. As we have indicated we have not been made aware of any problem of over, or under, inclusiveness arising from the application of this provision and we are reluctant to interfere with its successful operation.
- 4.51 Finally, although society may accept that some people, such as neighbours or lodgers, have some moral or social obligation to assist the police in their investigations, that is a very different matter from imposing on them a positive duty of responsibility for the child.
- 4.52 We also wish to make clear that we understand, and agree, that the concept of “care” in section 17 is not apt, without more, to include employees of a social services authority with whom the child is “in care”, who may have contact with the child for that purpose. This does not seem to have been a problem to date. We are, however, proposing the creation of an offence which will be based on negligence and we are concerned that such an offence should not apply to social workers merely on that basis.
- 4.53 **We are minded to recommend that there should be a single concept of ‘responsibility’ for the purpose of our recommendations. ‘Responsibility’ should have the same meaning as for the offence of child cruelty or neglect under section 1 of the Children and Young Persons Act 1933.**
- 4.54 **We are also minded to recommend that the categories of those presumed to have assumed responsibility for a child should be the same as currently encompassed within section 17 of the Children and Young Persons Act 1933.**
- 4.55 **We are minded to recommend that it be made clear that a person is not to be presumed to have care for a child for the purposes of section 17 of the 1933 Act merely by reason of being engaged by a social services authority to deal with the child who is the subject of a care order made in favour of that authority.**

To which categories of defendant should special rules apply?

- 4.56 We are concerned with cases where the offence against the child may have been committed by a person who has responsibility for the child and/ or a person who has no responsibility for the child. For example, a person with responsibility for the child might allege that the injury to the child has been inflicted by a visitor to the home, or by another child in the household. A babysitter, who has responsibility, might be “in the frame” together with her boyfriend who does not have responsibility. In none of these cases would the other party have any responsibility for the child. We believe that the effectiveness of our scheme would be undermined if it were not to apply in cases where one, though not all, of the defendants is a person who is not responsible for the child’s care. We believe that

our scheme should apply to cases in which the offence must have been committed by one of a small group of individuals, *at least one of whom* has responsibility for the child's care.

4.57 That does not mean that each and every element in the scheme should apply equally to those who have and those who do not have "responsibility" for the welfare of the child. There may be certain elements of the scheme which are founded on the fact that a person who has "responsibility" for the child has a particular responsibility, for example to provide an account for the events. When, in Part VI, we consider the detailed provisions of our scheme we address the question of precisely to which type of defendant each element should apply.

4.58 **We are minded to recommend that the scheme set out in this report should apply in cases in which the offence must have been committed by one of a small group of individuals, at least one of whom has responsibility for the child's care.**

PART V

OPTIONS WHICH WE REJECT

INTRODUCTION

- 5.1 In this Part we summarise the options for reform which the Team considered, which were the subject of informal consultation, and which we have decided to reject. Those are:
- (1) That a legal burden should be imposed upon the defendant to provide an explanation for a child's death or injury, failing the discharge of which he or she will be guilty of murder or manslaughter. On consultation there was little support for this option though there were some consultees who did argue for this approach. We summarise their approach and why we have declined to accept their view in paragraphs 5.3 to 5.19 below;
 - (2) That an evidential burden should be imposed upon the defendant to provide an explanation for a child's death or injury, failing the discharge of which he or she will be guilty of murder or manslaughter. On consultation there was some important support for this approach. We consider this support. Some of it, upon analysis, appears in fact, to amount to support for permitting the jury to draw an inference of guilt from a failure to give evidence. This is an option which we are minded to recommend and we explain our reasoning in Chapter VI. We explain in paragraphs 5.20 to 5.27 below why we have decided not to go so far as to recommend an evidential burden;
 - (3) That it should be an offence punishable by a criminal penalty for a defendant to fail to provide an explanation for the child's death or serious injury. There was no support for this as an option. In paragraphs 5.28 to 5.40 below we summarise the Team's reasoning with which the respondents to the informal consultation paper substantially agreed;
 - (4) That the offence of manslaughter should be extended beyond its present scope to enable convictions for manslaughter in this type of case. We summarise in paragraphs 5.55 to 5.64 below our reasoning and address such points as were raised by respondents. We consider changes to the substantive law which we are minded to recommend in Part VII.
- 5.2 We have also decided not to recommend an option for which the Team indicated its support, namely: that a pre-trial statement made by one defendant should be admissible as evidence against the other in order to determine whether there is a case to answer. This suggestion was subject to widespread criticism, whether as a tool to permit the case to get beyond the close of the prosecution case or, if the case got beyond that stage, as a source of evidence for the jury to consider where that defendant did not give evidence. We explain in paragraphs 5.41 to 5.54 below why we have concluded that the criticisms were correct and why we do not intend to recommend this change.

REVERSE BURDENS OF PROOF

Placing a legal burden on the defendant

- 5.3 Placing a legal burden on the defendant means that the defendant must, as a matter of law, be presumed guilty if the prosecution can prove that a child has suffered non-accidental death or injury and that the defendant was within the limited group of persons one, or more, or all of whom must have committed the offence. This statutory presumption would provide that a person is criminally responsible for non-accidental injuries suffered by a child in such circumstances, unless he or she can *prove* that the injuries had occurred without his or her knowledge or involvement. A legal burden would be placed on the defendant to provide an innocent explanation for the apparently incriminating circumstances.
- 5.4 If the defendant bears a legal burden, then the defendant must prove his innocence on the balance of probabilities. This is a lower standard of proof than the prosecution must achieve to prove guilt. That standard is proof beyond reasonable doubt. Nonetheless, if a defendant fails to satisfy this requirement, he or she would have to be convicted even though the jury were left in reasonable doubt upon the issue.
- 5.5 The ECHR compatibility of provisions such as this has been considered in a number of recent cases. Placing a legal burden upon the defendant is not necessarily incompatible with the ECHR. In *Salabiaku v France*¹ the European Court of Human Rights stated:

Presumptions of fact or law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does, however, require the contracting States to remain within certain limits in this respect as regards criminal law. ... [T]he object and purpose of Article 6 (art. 6), which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to exercise the fundamental principle of the rule of law. ... Article 6(2) (art. 6-2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to define them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.²

- 5.6 Summarising this approach, in *R v Director of Public Prosecutions, ex parte Kebilene*³ Lord Hope concluded that “a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental

¹ (1991) 13 EHRR 379.

² *Ibid*, at para 28.

³ [2000] 2 AC 326. These questions (originally proposed by David Pannick QC in *Kebilene*), were also referred to as a ‘useful starting point’ by Auld LJ in the Court of Appeal in *Daniel (Anthony Lala)* [2003] Cr App R 6, at para 29.

rights of the individual”⁴ and that, in considering where the balance lies, the following questions may be useful:

(1) what does the prosecution have to prove in order to transfer the onus to the defence? (2) what is the burden on the accused--does it relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within his knowledge or (I would add) to which he readily has access? (3) what is the nature of the threat faced by society which the provision is designed to combat?⁵

- 5.7 In the present context, the answers to those questions would be that: (1) the prosecution would have to prove that a child for whose care a defendant was responsible had suffered non-accidental death or injury and the defendant was within a small group of persons, one or more or all of whom must be guilty of the offence; (2) the accused would be expected to provide evidence that the injury occurred without his or her knowledge or involvement, or in a situation where he or she was powerless to intervene; (3) the threat faced by society is the problem of a failure of the law to convict anyone for killing or seriously injuring a child where the death or injury occurs in a situation where the crown can prove that the guilty person must be within a known group of defined people.
- 5.8 The threat referred to in question (3) is obviously very serious. There is guidance from speeches in the House of Lords in *Lambert*⁶ where the threat posed by one of the offences in question, drug dealing, was itself very serious. In that case, the seriousness of the threat was said not to be a sufficient justification for imposing a legal burden upon a defendant. Lord Steyn stated that the principle of proportionality in human rights law required the court to consider “whether there was a pressing necessity to impose a legal rather than an evidential burden on the accused”.⁷ Applying this test, the majority in the House of Lords in *Lambert* stated that it would not be consistent with Article 6(2) to convict a person of a very serious offence (with a maximum sentence of life imprisonment), where the defendant might be able to raise reasonable doubts about the issue, but was unable to establish the defence on the balance of probabilities. Therefore, the House of Lords decided that the statutory provision should be interpreted as imposing an evidential burden only. Lord Steyn referred to the “far-reaching consequence”⁸ of convicting the accused who has adduced sufficient evidence to raise a doubt about his guilt, because the jury is not convinced on a balance of probabilities that his account is true:

[A] guilty verdict may be returned in respect of an offence punishable by life imprisonment even though the jury may consider

⁴ [2000] 2 AC 326, at p 384.

⁵ *Ibid*, at p 386.

⁶ [2001] UKHL 37; [2001] 3 All ER 577.

⁷ *Ibid*, at para 38.

⁸ *Ibid*.

that it is reasonably possible that the accused had been duped. It would be unprincipled to brush aside such possibilities as unlikely to happen in practice. Moreover, as Justice has pointed out in its valuable intervention, there may be real difficulties in determining the real facts upon which the sentencer must act in such cases. In any event, the burden of showing that only a reverse legal burden can overcome the difficulties of the prosecution in drugs cases is a heavy one.⁹

- 5.9 Similar reasoning could be applied to an attempt to place a legal burden upon the defendant to provide an explanation for the death or injury of a child where the defendant was one of a small number who must have caused that death or serious injury. It would be wrong to convict a person of such a serious offence if the jury were satisfied that there is a reasonable possibility that the offence might have been committed by another defendant acting alone. It is, in our judgment, highly likely that a statutory provision requiring the defendant to ‘prove’ his or her non-involvement in these circumstances would either under the Human Rights Act 1998 be ‘read down’ as imposing only an evidential burden upon the defendant (as in *Lambert* and more recently by the Court of Appeal in *Carass*¹⁰) or declared incompatible with Convention Rights.¹¹ A declaration of incompatibility would be particularly likely if the legislation were drafted in a way which demonstrated a clear Parliamentary intention to impose a legal rather than merely an evidential burden.
- 5.10 The law in this area is still developing, but some indications have emerged as to the types of case in which it will be permissible to impose a legal burden upon the defendant. For example, in *Lambert*,¹² Lord Clyde stated:

A strict responsibility may be acceptable in the case of statutory offences which are concerned to regulate the conduct of some particular activity in the public interest. The requirement to have a licence in order to carry on certain kinds of activity is an obvious example. The promotion of health and safety and the avoidance of pollution are among the purposes to be served by such controls. These kinds of cases may properly be seen as not truly criminal. Many may be relatively trivial and only involve a monetary penalty. Many may carry with them no real social disgrace or infamy.¹³

⁹ *Ibid.*

¹⁰ [2002] Crim LR 316.

¹¹ Recently in *Daniel (Anthony Lala)* [2003] 1 Cr App R 6, Auld LJ expressed concern about the use of the ‘reading down’ technique. He stated that “where there is plain incompatibility between the ordinary and natural meaning of statutory words *whatever the context*, and Article 6(2), the courts should take care not to strive for compatibility by so changing the meaning of those words as to give them a sense that they cannot, in the sense intended by section 3(1), *possibly bear*”.

¹² [2001] UKHL 37; [2001] 3 All ER 577.

¹³ *Ibid.*, at para 154.

5.11 Clearly offences against children would not fall into this category. However, there may be cases in which it is justifiable to impose a legal burden upon the defendant in relation to a serious offence. For example, in *L v DPP*¹⁴ Pill LJ considered a statutory provision requiring the defendant to prove that he had good reason or lawful authority for possession in a public place of a lock-knife. He distinguished *Lambert* on a number of grounds, including:

(1) ...The present situation is different in that it is for the prosecution to prove that the defendant knows he had the relevant article in his possession.

(2) There is a strong public interest in bladed articles not being carried in public without good reason....

(3) The defendant is proving something within his own knowledge...¹⁵

5.12 In his judgment in *L v DPP*, Poole J considered that there was an important difference between the provision in question, and the provision in *Lambert* :

... the essential point is that an accused who carries a knife (or other bladed or sharply pointed article) knows at the time he commits the act in question, that his conduct amounts to a criminal offence unless he can bring himself within the exemption specified within the section: contrast the accused in the prosecution under section 5(3) whose defence is that he did not know he was carrying drugs at all.¹⁶

5.13 In our view the cases with which we are concerned are much more similar to *Lambert* than they are to *Lynch*. A parent whose child is killed or injured while he or she is out of the room may not be aware at the time that any crime was being committed or was even likely. He or she would have no idea, therefore, that his or her conduct might require justification. *Lynch* is not, therefore, a persuasive precedent for current purposes.

5.14 Imposing a legal burden upon the defendant in relation to the partial defence on a murder charge of diminished responsibility was approved by the Court of Appeal in *Lambert, Ali and Jordan*.¹⁷ This involves a very serious offence, with the possibility of life imprisonment. However, as in *Lynch*, the prosecution bears the legal burden of proving that the essential elements of the offence were committed by the defendant before any question arises of the defendant proving a justification or excuse for *prima facie* 'wrongful' conduct. This reasoning would be difficult to apply in the context of offences against children.

¹⁴ [2003] QB 137.

¹⁵ *Ibid*, at p 148, para 27.

¹⁶ *Ibid*, at p 149, para 30.

¹⁷ [2001] 1 All ER 1014.

- 5.15 Placing a legal burden upon the defendant was also held to be acceptable in an offence of drink driving in *Drummond (Andrew)*.¹⁸ In the Court of Appeal Longmore LJ stated:

We agree with the Crown that not all apparently persuasive burdens have to be ‘read down’ to be evidential burdens; we think it necessary to look at the legislation as a whole in order to determine whether Parliament intended to impose a persuasive burden and whether such burden is justifiable.

The present case is, in our view, different from both *Lambert* and *Carass* in material respects. ...

...

...features of the case make the defence of post-incident drinking not unlike the defence of diminished responsibility which also depends on material to be furnished by the defendant. On authority presently binding on this court (see *R v Lambert, Ali and Jordan*¹⁹ in the Court of Appeal) the requirement that a defendant has the burden of proving diminished responsibility in a murder case, if he wishes to raise it, does not infringe Article 6(2) of the Convention. Drink-driving and causing death by careless driving while over the limit are both much less serious charges than murder. Mr Turner relied on the fact that the maximum sentence for causing death by careless driving under section 3A is 10 years but was constrained to accept that the nature of the burden on the defendant could not be different for a section 3A offence from what it is for a section 5 offence for which the maximum term of imprisonment is six months.²⁰

- 5.16 As we have indicated, a small number of respondents indicated some support for imposing a legal burden. One, a circuit judge, felt that concern over such a measure reflected an unjustified lack of faith in the good sense and fairness of juries. The other, a Lord Justice of Appeal, expressed the view that nothing short of imposing a legal burden would succeed in addressing the failure to protect the fundamental human rights of the children under Articles 2 and 3 because all of the suggested alternatives “continue to permit both accused to put the prosecution to proof as to which of them actually committed the offence”. He advocated the imposition of a legal burden as “the only practicable solution, because it provides a proper way of convicting the guilty whilst giving a proper opportunity for the innocent to exculpate themselves”.
- 5.17 Having stressed the importance of decisions of the European Court of Human Rights concerning the duty of the State to protect the fundamental rights of

¹⁸ [2002] 2 Cr App R 25.

¹⁹ [2001] 1 All ER 1014.

²⁰ [2002] 2 Cr App R 25 at paras 31–34.

children,²¹ he expressed the view that, in that context, the Team's expressed view that such an approach would be incompatible with *Kebilene*²² and *Lambert*²³ was "overdone".

5.18 We invited this respondent to provide us with his answer to the concern that imposing a legal burden would have the effect that a jury in such a case would have to be directed that they must convict the defendant even though they may not be sure that he or she committed the offence because the defendant had failed to persuade them on the balance of probabilities that he or she had not committed it. He agreed that it was a theoretical possibility that a defendant would be convicted where the jury was only 51% sure that he or she did it but thought it more theoretical than real for a number of reasons. He emphasised the fact that in such a case the jury would have far more information about the family dynamics and family history which would enable them to make an informed and sophisticated judgment on the veracity of each defendant. He stated that agonising about percentages of probability was not likely to feature in that enquiry. He concluded that the jury could be trusted to reach a rational conclusion.

5.19 We do not doubt that juries should be assumed to be reasonable, fair and sensible and we are sure that, were there to be a legal burden, the jury would receive much more evidence. Nonetheless, the suggestion that there be a legal burden imposed on the defendant has embedded within it that the jury *must* as a matter of law convict even though they are not sure of the person's guilt where that person does not discharge the burden of persuading the jury that it is more likely than not that he or she did not commit the offence. That is not just a theoretical possibility but is of the essence of the imposition of a legal burden of proof. There is a keen distinction between the imposition of a legal and an evidential burden. It would be an extreme measure to place a legal burden on the defendant to prove that he or she did not kill a child. We are worried that the ostensibly reassuring assumption we are invited to make that juries can be trusted only to convict those whom they believe are guilty in truth really amounts to assuming that juries will have the good sense and fairness to ignore the strict letter of any direction they are given by the judge and will do what they believe to be right regardless. We do not believe that this is a viable basis for a proposed reform of the law.

Imposing an evidential burden

5.20 Our consultation process revealed that there are different understandings of what is meant by the imposition of an evidential burden. A significant number of respondents to the informal consultation paper, many of whom are senior members of the judiciary, appeared to be in favour of imposing an evidential

²¹ To which we have referred in Part IV and for which we are grateful to him for emphasising.

²² [2000] 2 AC 326.

²³ [2001] UKHL 37; [2001] 3 All ER 577.

burden. However, upon close examination, it became apparent to us that their reasoning flowed from a concern that there should be some means of marking the expectation of society that a person, who has responsibility for the care of a child who suffers non-accidental injury, ought to provide such account as they can for how it came about and of giving effect to the implications of their not having done so. We have great sympathy with the need to address this concern and we return to it in Part VI. It was not apparent, however, that these respondents were necessarily advocating all the consequences which would flow from imposing an evidential burden upon a defendant.

- 5.21 At the outset, therefore, it is important to define what we mean by an evidential burden. It is accurately described by Professor Tapper in this way:

The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue...²⁴

Whether sufficient evidence has been adduced to raise such an issue is a question of law for the judge. If he concludes that there has not been sufficient evidence presented, then it is for him to withdraw the issue from the jury.

- 5.22 In *L v DPP*²⁵ Pill LJ said:

Moreover, the so-called [evidential] burden may not in substance be a burden on the defendant at all. Evidence raising the issue will often emerge from the evidence, direct and circumstantial, called by the prosecution. A defendant is entitled, if the hearing is to be a fair hearing under Article 6, to have that evidence scrutinised by the court.²⁶

- 5.23 An evidential burden would not necessarily result in the defendant giving evidence to provide an innocent explanation for the child's injuries, since the possibility of an innocent explanation may arise from the prosecution case.
- 5.24 The Team did not consider the imposition of an evidential burden to be a promising avenue for reform, and we remain of this view for two linked reasons.
- 5.25 The first concerns the structure of the law. The imposition of an evidential burden would be fundamentally different in this kind of case from those cases where presently an evidential burden is placed on the defendant. In all of those cases the prosecution has to prove the essential elements of the case before any question of an evidential burden arises. In a case of murder or manslaughter whether the defendant killed the deceased is, by the very nature of the offence, bound to be a fact in issue, unless admitted by the defence. Thus in cases of self defence or duress the prosecution has to prove that the conduct and the mental

²⁴ C. Tapper, *Cross and Tapper on Evidence* (10th ed. 1999), at pages 109 – 110.

²⁵ [2003] QB 137.

²⁶ *Ibid*, at para 23.

elements of the offence were committed by the defendant. If it does, then it is for the defendant to raise the exculpatory defence by adducing evidence. If he or she does not do so, the jury can convict, as the prosecution will already have proved all the elements of the offence to the necessary standard. All the evidential burden does is to reflect the fact that if the prosecution proves all the elements of the offence it does not, in addition, have to disprove each and every exculpatory defence which might, theoretically, arise. If, however, there were to be an evidential burden in *this* type of case, it would be triggered by the prosecution proving, to the criminal standard, that a child had died non-accidentally and that the defendants were within the group of known people, one or some or all of whom must have committed the offence. If the defendant failed to discharge the evidential burden then, as a matter of law, the jury would have to convict even though the prosecution had not already proved each and every element of the offence against the defendant. In this type of case, therefore, the concept of an evidential burden is intrinsically flawed, unless it is a label which is used to mean something different, for example permitting the jury to draw inferences from the defendant's failure to give evidence.

- 5.26 The second reason flows from the first. The difference between imposing an evidential burden and enabling a jury to draw an inference of guilt from a failure to give evidence is fundamental. In the former case a conviction flows automatically from a failure to discharge the evidential burden. This would either be on the basis that the jury has to find the person guilty, even though all the elements have not been proved against him or her, or the conviction illustrates the fact that such a person is deemed to be guilty by reason of their failure to adduce evidence. In the latter case the jury only convicts if it is sure of the person's guilt. There is nothing automatic about the conviction. The jury is permitted, but not obliged, in considering whether it is sure of guilt, to decide whether to draw an adverse inference from a failure to give evidence.
- 5.27 The offences with which we are concerned are very serious. We are not persuaded that to go so far as to impose an evidential burden, with the above consequences, would be a proportionate response by the State for the purpose of discharging its duty to protect the fundamental human rights of the children whose Articles 2 and 3 rights have been abused.

COMPULSORY QUESTIONING

- 5.28 Another option for reform considered in the informal consultation paper involved placing a direct obligation upon the defendants to provide an explanation of the child's death or injury, with punishment for a failure to provide an explanation. There are numerous statutory obligations of this sort. The use of information obtained in this way as evidence in a criminal trial against the maker of the statement would, however, cause considerable problems of compatibility with the ECHR. In *Saunders v UK*,²⁷ the applicant had been required to co-operate with a Department of Trade and Industry investigation,

²⁷ (1997) 23 EHRR 313.

under threat of punishment for contempt of court (including the possibility of imprisonment for up to two years). In a subsequent criminal trial, evidence obtained by the DTI inspectors was used as part of the prosecution case. The applicant argued that this was incompatible with the right to a fair trial, guaranteed by Article 6 of the ECHR. The European Court of Human Rights stated:

[The Court] does not accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. Like the Commission, it considers that the general requirements of fairness contained in Article 6 (art. 6), including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.²⁸

5.29 The Court concluded that there had been an infringement of the defendant's right not to incriminate himself. As a result of *Saunders*, a number of statutory provisions were amended by the Youth Justice and Criminal Evidence Act 1999, section 59, and Schedule 3, to provide that answers obtained under compulsion should not be admissible in a subsequent criminal prosecution of the maker of the statement. Although child abuse is a very different type of social problem from corporate fraud, it is noteworthy that a similar strategy was adopted in section 98 of the Children Act 1989²⁹.

5.30 We believe that reversing this approach, so that statements made under compulsion in *civil* child protection proceedings would be admissible in subsequent *criminal* proceedings, would be deeply problematic. Apart from the human rights issues, the present provision reflects a public policy that a court hearing civil child protection proceedings should be able to obtain the fullest possible information to allow an assessment of future risks to the safety of the child concerned. If statements obtained in this way were admissible in subsequent criminal proceedings, there would be a danger that this would reduce the civil court's ability to protect children. Several respondents to the informal consultation paper stressed, and we agree, that reforms of the criminal

²⁸ *Ibid*, para 74.

²⁹ See paragraph 3.40 above.

law should not compromise the effectiveness of child protection in the civil courts. On the other hand, where information has been obtained in civil proceedings without compulsion, this may be made available to the criminal courts. It also appears that statements obtained under compulsion may be used as the basis for a police investigation, even if they are not directly admissible as evidence in criminal proceedings.³⁰

- 5.31 *Saunders* was distinguished by the Privy Council in *Brown v Stott*.³¹ Lord Bingham of Cornhill, considering statutory provisions which were alleged to offend against Article 6 by removing the privilege against self-incrimination, stated:

The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly within Article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history.³²

- 5.32 In the same case, Lord Hope of Craighead stated the test to be applied when considering whether a statutory provision is incompatible with a right under Article 6:

The question whether a legitimate aim is being pursued enables account to be taken of the public interest in the rule of law. The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community in the realisation of that aim and the protection of the fundamental rights of the individual.³³

- 5.33 It may be significant that in *Brown v Stott* Lord Bingham concluded that Article 6 of the ECHR was not infringed because section 172 of the Road Traffic Act 1988 “provided for the putting of a single, simple question” regarding the identity of the driver at the relevant time, rather than “prolonged questioning about the facts alleged to give rise to criminal offences”³⁴ which was objectionable in *Saunders*.³⁵ In cases involving non-accidental injuries to children, an

³⁰ See Part III above.

³¹ [2001] 2 WLR 817.

³² *Ibid*, at p 836.

³³ *Ibid*, at p 836-837.

³⁴ *Ibid*, at p 836.

³⁵ *Ibid*, at p 837.

explanation of the child's injury will often require detailed questioning about the surrounding circumstances.

- 5.34 In *Brown v Stott*, Lord Bingham stated that “all who own or drive motor cars know that by doing so they subject themselves to a regulatory regime”, and that section 172 of the Road Traffic Act 1988³⁶ struck a balance between the interests of the community and the interests of the individual in a manner that was not unduly prejudicial to the individual.³⁷ It might be argued that taking responsibility for a child also involves subjecting oneself to a regulatory regime, which is justified by the special vulnerability of children. However, Lord Bingham noted that “the penalty for declining to answer under the section is moderate and non-custodial”, so that there is “no suggestion of improper coercion or oppression”.³⁸
- 5.35 *Saunders* was a case in which the use, in a subsequent criminal trial, of the product of compulsory questioning, undertaken in the course of a statutory investigation process, was held by the European Court of Human Rights to be in breach of the Convention. *Heaney and McGuinness v Ireland*,³⁹ was a case in which the Court considered a provision of Irish law, by which a person suspected of certain offences might be required to account for his movements at a particular time. In that case, therefore, compulsory questioning was being used to obtain evidence to support charges which had been laid against the defendants. Failure to submit to the questioning was an offence, punishable by up to six months imprisonment. There are clear similarities between this approach, and the option currently under consideration. The complainants were suspected of involvement in killings carried out by members of a paramilitary organisation. They refused to provide information about their whereabouts at the time of the offence. They were acquitted on other charges, but were found guilty of the offence of failing to account for their whereabouts and were sentenced to six months imprisonment. The European Court of Human Rights concluded that:

[T]he “degree of compulsion”, imposed on the applicants ... with a view to compelling them to provide information relating to charges against them under that Act, in effect, destroyed the very essence of their privilege against self-incrimination and their right to remain silent.⁴⁰

³⁶ Section 172 provides that it is an offence for the keeper of a motor vehicle to fail to give information to the police when required to do so under subsection (2) as to the identity of the driver of a motor vehicle when that driver is alleged to have committed an offence which section 172 applies.

³⁷ [2001] 2 WLR 817, at p 837.

³⁸ *Ibid.*

³⁹ [2001] 33 EHRR 12.

⁴⁰ *Ibid.*, at para 55.

5.36 The Court refused to accept that the provision was a proportionate or justifiable response to threats to public order and security. Some of those who responded to the informal consultation paper suggested that offences against children should be treated differently from crimes against the State, such as terrorist crimes. We are doubtful, however, whether the rights of children to protection under Articles 2 and 3 of the ECHR can justify compulsory questioning of suspects if the same rights of the victims of terrorism are insufficient to justify such measures.

5.37 It is important to realise that there are other ways in which an explanation can be obtained, without the need to impose a direct threat of imprisonment for failure to explain. In *Heaney and McGuinness*, the European Court of Human Rights referred to the following argument:

The applicants further considered the Government's reliance on matters of public security and proportionality to have been misplaced, noting that the Court in the above-mentioned *Saunders* case pointed out that the public interest could not be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during later trial proceedings. In any event, the public policy and security concerns could have been addressed otherwise. Accordingly, if the purpose of the section 52 request was to prosecute the person to whom the request was made, certain negative inferences could have been drawn from that accused's silence ... or if the objective of the section 52 request was to investigate a crime committed by others, the request could have been coupled with a clear immunity from prosecution in favour of the addressee of the request in respect of and based upon answers so provided.⁴¹

5.38 We believe that these issues are relevant to the issue of offences against children. We have already considered the possibility that a prosecution might be brought against one person who is accused of injuring the child, relying upon the evidence of the other person who might have inflicted the injury.⁴² Granting immunity from prosecution might be a useful approach where the prosecution forms the view that the other suspect bears primary responsibility for the offence. However, this will not always be possible or appropriate. For example, in some cases, the prosecution will have insufficient information to determine relative culpability. The possibility of drawing adverse inferences from a failure to explain is an important issue which we will consider in Part VI of this report.

5.39 The overwhelming majority of those who responded to the informal consultation paper agreed with the Criminal Law Team's provisional conclusion that there should not be a criminal penalty for failure to provide an explanation for a child's death or injury. A small number of respondents did believe that such a measure would be justifiable, although in some cases they also agreed that this approach was unlikely to survive human rights challenges.

⁴¹ *Ibid* at para 37.

⁴² See para 1.23 above.

- 5.40 We do not recommend that there should be a criminal penalty for a defendant who fails to provide an explanation for the child's death or injury.

ADMITTING INCRIMINATING STATEMENTS MADE BY ONE DEFENDANT AGAINST THE OTHER

- 5.41 Under the current law, a pre-trial statement which is incriminating, or partially incriminating, may be admitted as a confession under section 76 of the Police and Criminal Evidence Act 1984, as evidence against the defendant who made the statement. A confession by one defendant is not, however, admissible as evidence against a co-defendant. Furthermore, a purely exculpatory (non-incriminating) statement is usually not admissible (though in practice such a statement is frequently led by the prosecution). Therefore, where one parent makes a pre-trial statement incriminating him or herself and also incriminating the other parent (for example, a statement admitting neglect, but accusing the other parent of deliberately inflicting injuries), this will be admissible against the parent who makes the statement but not against the other parent who is being accused. If the parent makes a pre-trial statement denying responsibility for the child's death or injuries and blaming the other parent (either explicitly, or by necessary implication), this will not usually be admissible as evidence against the other parent who is on trial. For example, in *Strudwick*,⁴³ the Court of Appeal stated:

During her long interview with the police [the mother] blamed Sophie's injuries on [the mother's boyfriend]. She made particular reference to the events of the Friday afternoon when she described how he had pulled Sophie from her chair and swung her around by the arms, injuring her in the confined space. She claimed that the first appellant was so big and strong that she was unable to protect Sophie as she wished.

...

The allegations made by the [mother] against the [mother's boyfriend] in the police interviews were of course not evidence against him, and it seems to this Court there was no real evidence which identified him as the one who delivered the two fatal blows to Sophie or that he was supporting the child's mother in an attack by her.⁴⁴

- 5.42 If the defendant chooses to give evidence and repeats the statement in court, or adopts it as true, then this will be evidence against the co-defendant who is incriminated by the statement. The jury will usually be directed to give more weight to the parts of the testimony which incriminate the person giving the evidence than those parts which incriminate the other defendant. If the defendant gives evidence in a way which is inconsistent with a pre-trial statement

⁴³ (1994) 99 Cr App R 326.

⁴⁴ *Ibid*, at p 331.

then, at the moment, the pre-trial statement may be admitted for the limited purpose of assessing the credibility of the evidence. It does not become admissible for any other purpose. Therefore, for example, if the mother has made a pre-trial statement which accuses the father of deliberately inflicting injuries but gives evidence that neither she nor the father was responsible, it may be possible to use the existence of the pre-trial statement to reduce the credibility of her evidence. The statement may not, however, be used as evidence against the father, unless the mother changes her evidence when questioned about her previous statement.

- 5.43 Of course, where one parent makes a plausible pre-trial statement incriminating the other parent, it is possible that she will not be charged with any offence (or will plead guilty to a lesser offence) and may be called as a prosecution witness in the trial of the other parent.⁴⁵ If she is a witness who is unable or unwilling to give evidence, then her statement may be admitted under one of the exceptions to the hearsay rule.
- 5.44 Where both of the possible perpetrators are on trial then, unless the statement implicating the co-defendant is admissible as part of the prosecution case, it cannot be used to allow the case against that co-defendant to proceed past the 'no case to answer' stage. The opportunity for either defendant to testify will not arise unless there is some other admissible evidence which establishes a case to answer. In the informal consultation paper, the Criminal Law Team put forward the possibility of reforming the law to allow a pre-trial statement by one of the defendants to be used as part of the prosecution case for the limited purpose of establishing a case to answer against the other defendant.
- 5.45 The informal consultation paper noted that the admissibility of statements of a co-accused was recommended by a majority of the Criminal Law Revision Committee, in its *Eleventh Report*.⁴⁶ The Committee explained the provision as follows:

The provision involves a question of policy, and our decision to recommend it is a majority one. The majority think it right to make the provision on the ground that there are many cases where the interests of justice require that what any of the accused have said out of court about the part played by the others in the events in question should be before the court. For example, it often happens that, when A and B are jointly charged with an offence, A has made a statement implicating them both and B has made no statement; or again each may have made a statement seeking to throw the blame on the other. In the latter kind of case there may be much truth in both their statements, and their stories may be changed by the time of the trial. If there are discrepancies of this kind, it seems to the majority particularly desirable that the out-of-court statements should be

⁴⁵ See paras 1.35-1.36 above.

⁴⁶ Eleventh Report (1972) Cmnd 4991; see also clause 31(2) of their draft Bill.

admissible in evidence in order that they may be compared with the makers' evidence at the trial.⁴⁷

- 5.46 When the Law Commission considered this issue in the context of the reform of the hearsay rule, we did not recommend such a change. In our report, *Evidence in Criminal Proceedings: Hearsay and Related Topics*,⁴⁸ we said:

Where a confession is admitted against one accused on behalf of a co-accused, the fact-finders may consider the admission as exonerating the defendant who did not make it, but may not take it as evidence against the defendant who made it. A hearsay admission is still evidence only against the person who made it, and a jury must be warned accordingly. A number of our respondents thought it extremely important that this principle be retained, and we agree.⁴⁹

- 5.47 In that report we were not, however, considering the special problems which occur where a child has been injured by one or more of the people who are responsible for him or her. In the informal consultation paper, the Criminal Law Team suggested that, in such cases, it might be in the interests of justice for the court to be able to consider what one accused has said about the involvement of the other as part of the prosecution case. Nevertheless, the informal consultation paper acknowledged that there might be human rights difficulties with this approach. In *Lucà v Italy*,⁵⁰ the European Court of Human Rights considered an Italian law which allowed admission of a statement made by a person "accused in connected proceedings".⁵¹ The Italian law gave the accused the right to examine prosecution witnesses. It was not possible, however, to cross-examine a person accused in connected proceedings without violating the privilege against self-incrimination. Nevertheless, in order to establish the facts of the case, the trial court was permitted in certain circumstances, and subject to complying with the statutory conditions, to rely in reaching its decision on evidence obtained during the preliminary investigation.

- 5.48 The European Court of Human Rights confirmed that the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Therefore, the Court said, the domestic authorities had had no alternative but to accept the decision of the co-accused not to give evidence, since requiring him to repeat his statements at the trial would have entailed a violation of his fundamental rights. The Court noted the arguments of the Italian Government that "three interests had been at stake: the right of the co-accused to remain silent, the right of the accused to examine a co-accused witness and the right of the judicial authority not to be deprived of evidence obtained during the

⁴⁷ *Ibid*, at para 251.

⁴⁸ (1997) Law Com No 245.

⁴⁹ *Ibid*, at para 8.96 (footnotes omitted).

⁵⁰ Application No. 00033354/96, ECtHR, 27 February 2001

⁵¹ *Ibid*, at para 13.

investigation”.⁵² The Court concluded, however, that there had been a violation of the defendant’s right to a fair trial in the following terms:

As the Court has stated on a number of occasions ..., it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 paragraphs 1 and 3(d). The corollary of that, however, is that where a conviction is based *solely or to a decisive degree* [emphasis added] on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 ...

In the instant case, the Court notes that the domestic courts convicted the applicant solely on the basis of statements made by N. before the trial and that neither the applicant nor his lawyer was given an opportunity at any stage of the proceedings to question him.

In those circumstances, the Court is not satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based.

The applicant was, therefore, denied a fair trial. Accordingly, there has been a violation of Article 6 paragraphs 1 and 3(d).⁵³

- 5.49 This case presents considerable difficulties in relation to the admissibility against a defendant of a pre-trial statement made by another defendant. If such a statement is presented as part of the prosecution case and a conviction is based “solely or to a decisive degree”⁵⁴ upon it, then there is likely to be a breach of the right to a fair trial, unless it has been possible to cross-examine the defendant who made the statement.
- 5.50 The Team acknowledged these difficulties in the informal consultation paper but nonetheless put forward a proposal that, subject to safeguards, a pre-trial statement made by one defendant should be admissible as evidence against the other defendant for the purpose of determining whether there is a case to answer. The Team acknowledged that such a statement may not be used as the sole or decisive basis for a conviction.

⁵² *Ibid*, at para 34.

⁵³ *Ibid*, at paras 40–45.

⁵⁴ *Ibid*, at para 40.

- 5.51 The great majority of those who responded to the informal consultation paper were opposed to this option for reform. Some respondents had difficulty with the logic that evidence should be taken into account by the judge in order to decide whether there is a case to answer but that the same evidence should not be considered by the jury when it decides whether the prosecution has proved its case beyond reasonable doubt. We see the force of this and we address it in the wider context in Part VI of this report.
- 5.52 Many more respondents, however, were opposed on substantive grounds. They emphasised the limited evidential value of such a self-serving statement casting blame upon the other defendant. Several respondents supported the reform of the law to allow wider use of statements made by one co-accused against another but did not consider that it would be justifiable to limit such a reform to cases involving the death or injury of a child.⁵⁵ Having considered these responses, we have decided not to recommend any further change in the law on co-defendant's statements.
- 5.53 Some respondents suggested that the clause of the Criminal Justice Bill currently before Parliament, which gives effect to the Law Commission's recommendation in its report on *Evidence in Criminal Proceedings: Hearsay and Related Topics*⁵⁶ that there be a discretion to admit hearsay if the court is satisfied that, despite the difficulties there may be in challenging the statement, its probative value is such that the interests of justice require it to be admissible, would enable a defendant's pre-trial statement to be admitted as part of the prosecution case against a co-defendant. We can see that in theory this may be so. It was clear to us, however, from the terms of the responses from practitioners and the judiciary, that it would be rare that a judge would be persuaded to exercise his or her discretion to admit a self serving statement of one defendant as evidence against a co defendant where that defendant had not given evidence.
- 5.54 We do not recommend that the law should be changed so that a pre-trial statement made by one defendant may be admissible as evidence against the other defendant in order to determine whether there is a case to answer.

REFORMING THE SUBSTANTIVE OFFENCE OF MANSLAUGHTER

- 5.55 In Part VII we consider the possibility of introducing new criminal offences to deal with situations where a child has suffered non-accidental death or serious injury.⁵⁷ These proposed offences are intended to supplement the existing offences of child cruelty or neglect⁵⁸ and manslaughter. Some of those who

⁵⁵ At least one respondent suggested that the reforms of the hearsay rule which are contained in the Criminal Justice Bill currently before Parliament might introduce a judicial discretion to admit such statements. We have some doubts about this, but even if such a discretion existed, we do not believe that judges would consider that such statements should be admitted except in exceptional circumstances.

⁵⁶ (1997) Law Com No. 245.

⁵⁷ See Part VII below.

⁵⁸ See paras 1.32 – 1.34 above.

responded to the informal consultation paper argued, however, that the offence of manslaughter might be developed in order to achieve some of our objectives, without the need for a new criminal offence.

5.56 Presently a person may be guilty of involuntary manslaughter on two bases which are relevant to this kind of case: unlawful act manslaughter and gross negligence manslaughter.

5.57 'Unlawful act' manslaughter requires the following to be proved:⁵⁹

- (1) the killing must be the result of the accused's unlawful act (though not his unlawful omission);
- (2) the unlawful act must be one, such as an assault, which all sober and reasonable people would inevitably realise must subject the victim to, at least, the risk of some harm resulting therefrom, albeit not serious harm;
- (3) it is immaterial whether the accused knew the act to be unlawful and dangerous, and whether he intended harm; the *mens rea* required is that appropriate to the unlawful act in question;
- (4) 'harm' means physical harm.

5.58 The commission of an offence of child cruelty or neglect under section 1 of the Children and Young Persons Act 1933 does not necessarily constitute an unlawful act for these purposes, since the offence may be committed by omission. There is Court of Appeal authority on this basis that unlawful act manslaughter may not be available to convert an offence of child cruelty under section 1 into an offence of manslaughter.⁶⁰ Whilst one of our respondents, Peter Glazebrook, was highly critical of that authority, he was content that the gap in the law could be addressed by a well drafted, aggravated wilful neglect offence. We agree that this provides a clearer way forward and we consider the need for such an offence in Part VII below.

5.59 The elements of 'gross negligence' manslaughter are:

- (1) a breach of a duty of care;
- (2) that the breach caused the death of the victim;
- (3) that the breach amounts to 'gross negligence'.

5.60 Whether the breach should be characterised as gross negligence and therefore a crime, is a question for the jury to determine. The test is whether, having regard to the risk of death involved, the defendant's conduct was so bad in all the

⁵⁹ Archbold, 2003 para 19-99.

⁶⁰ *R v. Lowe* [1973] QB 702.

circumstances as to amount to a criminal act or omission.⁶¹ This test might be satisfied where a parent is aware of an obvious risk to the child and disregards it, for example, where a parent is aware that the child is being abused by another person in the household and fails to act to prevent further abuse. In order to obtain a conviction, however, it would be necessary, in addition, to show that the parent's breach of duty had *caused* the child's death. It will be possible to show causation where the death is the direct consequence of the parent's actions (for example, a parent who allows a child to play on a railway line). It will be more difficult where the wrongful act of another person is the direct cause of the death and it cannot be shown that the parent is responsible for the actions of the other person under the ordinary rules of accomplice liability and joint enterprise. In the informal consultation paper, the Criminal Law Team argued that, although the other person might never have had the opportunity to kill the child but for the actions or inaction of the parent, it would be strongly argued that the wrongful actions of the parent (failing to remove the child from the risk) merely provide the setting in which the killing takes place. The actions of the other person are a '*novus actus interveniens*', breaking the chain of causation between the wrongful act of the parent and the death of the child.

- 5.61 The informal consultation paper noted that this issue had been the subject of an apparent disagreement between Professor J.C. Smith and Professor Glanville Williams. Professor J.C. Smith⁶² had suggested that a jury could convict a parent for "failing to intervene when, as he knew, he could by taking reasonable steps prevent the harm from occurring".⁶³ Professor Glanville Williams⁶⁴ disagreed with this argument:

Professor J.C. Smith seems to be of opinion that a person's failure to protect his child against attack can be taken as an encouragement of the attacker, but I know of no judicial authority for this, and there are strong arguments against it. Three stand out.

(1) The mere fact that the defendant knew what was happening, and was under a duty to stop it and culpably failed to do so, should not make him liable on the basis of encouragement unless he committed an act of encouragement and directly intended to encourage the offence. Mere knowledge that he was encouraging (oblique intention) should not suffice.

(2) It would be altogether too severe to hold the spouse or parent guilty as accessory to the very serious offence of inflicting grievous bodily harm on the child, or rape, or murder, merely because he/she did not try to prevent attack. He or she can perhaps be convicted of manslaughter if the child dies, but, if so, this will be as perpetrator of a crime of omission, in failing to perform his or her own duty of

⁶¹ *Adomako* (1995) 1 AC 171.

⁶² Comment on *Gibson* [1984] Crim LR 615.

⁶³ *Ibid.*

⁶⁴ "Which of you did it?" (1989) 52 MLR 179.

preventing the attack upon the victim to whom the duty of protection is owed, not as a party to the act of aggression. In fact there is no English authority for saying that a parent's failure to ward off an attack on his child can amount to manslaughter. A parent is under an undoubted legal duty to protect his child against starvation, disease and ill-health generally; but I know of no English authority for saying that the duty extends to protecting the child against human attack. The general doctrine of the criminal law is that responsibility for an attack lies with the attacker and his confederates, not with other people like failed defenders. This is the essence of the doctrine of *novus actus interveniens*.

(3) If failure to prevent a crime makes one a constructive accomplice of the criminal, how far is this to go? It is supposed to be the duty of the police to do what is reasonably possible to protect members of the public from attack, but would this make an inactive police officer an accomplice in, say, assault, riot, criminal damage or murder? The idea is absurd.

...

There is a well-known Australian authority⁶⁵ for convicting a father of manslaughter on the ground that he failed to save his children from being murdered by his wife; but, once more, where is such a kind of liability to stop? Would a policeman be guilty of manslaughter because he culpably fails to prevent a criminal homicide?⁶⁶

5.62 Having considered these issues in the informal consultation paper, the Criminal Law Team provisionally concluded that extending the offence of manslaughter beyond its current scope would not be an appropriate way to meet the specific problems under consideration. The majority of respondents to the informal consultation paper agreed. There were, however, several respondents who argued that the paper had over-stated the difficulties in establishing causation in these circumstances. In particular, the Crown Prosecution Service argued that, although there was no legal authority which supported the use of gross negligence manslaughter in these circumstances, there was also no authority which was inconsistent with this approach. We are aware, as was pointed out by the CPS, that there is some authority that, in connection with certain statutory offences which are aimed at controlling certain commercial activities, a defendant may be guilty of causing a result where the defendant produced the situation in which there was the potential for the prohibited result to occur but its actual occurrence depended on the act of a third party.⁶⁷ That is a situation in

⁶⁵ *Russell* [1933] VLR 59.

⁶⁶ *Ibid*, at p 197–198 (some footnotes omitted).

⁶⁷ *Environment Agency v. Empress Car Company (Abertillery) Ltd.* [1999] 2 AC 22 HL. In that case the appellant had been convicted of causing polluting matter to enter controlled waters contrary to section 85(1) of the Water Resources Act 1991. The appellant had been storing diesel in a tank, in a yard which drained into a river. The appellant had overridden the protection from spillage by fitting a tap, which did not have a lock. The tap was opened by an unknown third party, and the diesel drained into the river. With regard to the

which the primary power and duty to control potentially dangerous activities is placed in the hands of a commercial organisation which has control over a system which, if not properly exercised, enables a third party to cause that harm. In our view that is a long way removed from the case of a carer who may well be under a duty to look after the welfare of her child but is relatively powerless to control the conduct of third parties with whom she comes into contact. There may be cases in which a manslaughter conviction may be appropriate and obtainable, and, no doubt, the CPS will wish to consider whether there may be cases in which gross negligence manslaughter would be an appropriate charge. That has not thus far been an approach which the CPS has adopted in the main run of cases. We are not persuaded, therefore, that gross negligence manslaughter will provide a means of obtaining appropriate convictions in any other than the occasional, highly unusual case.

- 5.63 Having said that, we certainly have no wish to stand in the way of the judicial development in an appropriate case of manslaughter based upon gross negligence. Nor do we intend to cast any doubt on the appropriateness of manslaughter charges in which a defendant has caused the death of the child by his or her own act or omission, such as a failure to seek medical assistance after a child has been injured (whether accidentally or by some other person), or where the defendant is guilty of manslaughter as an accomplice under the existing law. We do not, however, consider that it is appropriate in the context of this project to recommend any legislative reform to the offence of manslaughter. Any legislative reform of the scope of the offence, or the principles of legal causation, would have far-reaching consequences which are outwith the scope of this project.
- 5.64 We do not recommend that the offence of manslaughter should be extended by legislation beyond its current scope.

fact that the harm was caused by a third party the House of Lords held that the justices should consider whether the act or event done or caused by the third party should be regarded as a matter of ordinary occurrence, or whether it should be regarded as something extraordinary, which would allow for a finding that the defendant did not cause the pollution. The distinction between what is ordinary and extraordinary is a question of fact and degree for the justices to decide on the basis of common sense and their knowledge of the locality.

PART VI

EVIDENTIAL AND PROCEDURAL CHANGES

INTRODUCTION

- 6.1 In Part V we identified the possible reforms which we reject and the reasons for our having done so. In this Part, we set out the recommendations we are minded to make for changes in the rules of evidence and procedure which, in our view, will help tackle the problem of how a court may accurately and fairly convict a person who is guilty of this type of offence where presently they cannot be convicted.
- 6.2 In Part IV we set out our approach. In particular we identified as fundamental a recognition that the State has a positive duty to secure a thorough and effective investigation capable of leading to the identification and punishment of those responsible for a serious breach of the fundamental human rights of a child. We accept that the discharge of this duty should be consistent with providing the defendant with a trial which is fair pursuant to the obligations upon the State under Article 6.
- 6.3 To that end, we are minded to recommend a package of changes, respectively, to the substantive law, the rules of procedure and the law of evidence. We set out our conclusions on the former in Part VII. The changes to the rules of evidence and procedure comprise:
- (1) Statutory recognition
 - (a) that the State is entitled, as an incident of its discharge of its duty towards the child pursuant to Articles 2 and 3 of the ECHR, to call for an account from a person, who is responsible for the welfare of a child who has suffered non-accidental death or serious injury, of how the death or injury came about;
 - (b) that such a person has a correlative responsibility, if called upon to do so, to give such an account if he or she can; but
 - (c) that this responsibility does not require the person to act contrary to their privilege against self incrimination;
 - (2) A change to the rules of procedure so that in a case where the prosecution can prove to the criminal standard:
 - (a) that a child has suffered non-accidental death or serious injury;
 - (b) that the defendants are within a defined group, one, some, or all of whom must be guilty; and

- (c) that at least one of them is a person who has responsibility for the welfare of the child;

the decision whether the judge should withdraw the case from the jury on the basis that a conviction would be unsafe must be postponed until the close of the defence case;

- (3) In a case to which (2) applies, a change to the ways in which sections 34 and 35 of the Criminal Justice and Public Order Act 1994 are applied. Where a defendant, who has not given an account to police and/or evidence at the trial, is a person who, at the material time, had responsibility for the welfare of the child, the jury may, in determining pursuant to sections 34 or 35 whether that person is guilty of the offence charged, draw such adverse inference from his/her failure to give an account or evidence as they see fit; but
- (4) In a case to which (3) applies, the jury should not be concerned with whether, independently from the failure to give an account or give evidence, the prosecution has established a prima facie case against that person but should consider only whether they are sure of that defendant's guilt having regard to all the evidence and any inference they see fit to draw;
- (5) The judge must withdraw the case from the jury at the end of the defence case where, having regard to the evidence and any inference which it would be proper for the jury to draw, a conviction would be unsafe or the trial would otherwise be unfair.

RECOGNISING A RESPONSIBILITY TO GIVE AN ACCOUNT

- 6.4 We have noted in Part III that one of the ways in which the State seeks to safeguard the fundamental rights of children under Articles 2 and 3 is to impose an obligation upon *any* witness in civil care proceedings to give evidence and to answer questions even if to do so might incriminate him or his spouse of any offence.¹ This is a powerful obligation which appears to make the witnesses compellable, thereby exposing them to a penalty for contempt of court if they fail to comply. The *quid pro quo* is that such a statement is not admissible in evidence against the maker of the statement (or his spouse) in proceedings for an offence, save for perjury.
- 6.5 We have already noted that the root of the apparent failure of our present procedures to protect children from fundamental breaches of their human rights is, as one of our respondents put it

(that they) continue to permit both accused to put the prosecution to proof as to which of them actually committed the offence. It is the

¹ Children Act 1989, section 98.

inability of the prosecution to achieve that goal when both accused are advised not to co-operate that is at the root of the present difficulty.

In our view it is legitimate to consider whether we may fairly address each of these aspects of the root of the problem.

- 6.6 In our view, in furtherance of the discharge of the State's obligations towards children under the United Nations Convention on the Rights of the Child and the ECHR, our domestic law should expressly recognise that the State is entitled to call on persons who have had responsibility for a child during a time when the child suffers non-accidental death or serious injury to provide such account as they can to assist those properly responsible for investigating what happened to the child (such as a coroner's court, a family court, a criminal court or the police). The giving of such an account should be recognised as an incident of their responsibility for the welfare of the child. Express recognition, respectively, of the State's entitlement and the person's responsibility, in our view, falls well within the scope both of Articles 2 and 3 of the ECHR and of Article 19 of the UN Convention on the Rights of the Child. It would be an important statement of rights and responsibilities which will inform the decisions, respectively: of those with responsibility for a child whether to give an account; and of those who may be entitled to draw an inference from the fact that no account has been given by such a person.
- 6.7 We do not intend that the person's responsibility to provide an account should override his or her privilege against self-incrimination. Any statutory provision would have to make this clear. On the other hand, it will be the case that an unexplained omission to give an account when properly called upon to do so might properly lead to an inference that the reason for the silence is the wish to avoid self-incrimination. Furthermore, a jury, in considering the credibility of any explanation which is given for not having provided an account when asked for one, will be entitled to have regard to the fact that the person has a statutory responsibility, if innocent, to give an account.
- 6.8 We see no conflict between the recognition of such a responsibility and the specific provisions of section 98 of the Children Act 1989. That section overrides the right against self-incrimination in certain circumstances, but limits the use of an answer which may be given. Our recommendation does not cut across either of these elements of section 98.
- 6.9 Statutory recognition of such a responsibility is, we believe, necessary to address one constituent element of the present failure of the law to provide an effective procedure to identify and punish those who are guilty of gross human rights violations to children. It is likely to be effective in providing more evidence for the fact finding tribunal to consider, or in providing a means by which the fact finding tribunal may draw accurate inferences. We believe that, in the light of the safeguards to which we refer below, it would be a proportionate response to the present difficulty in obtaining accurate convictions of those who are guilty of such serious offences. As we explain below, we are not proposing to recommend alterations to the terms of sections 34 and 35 of the Criminal Justice and Public

Order Act 1994. The creation of a statutory recognition of the right to call for, and the responsibility to give, an account would, however, have potential effects on their application which may call for consequential amendment.

Safeguards

- 6.10 The responsibility to give an account will only arise where the child's fundamental human rights have been grossly infringed and will only arise in the course of a police interview, or a trial, where the existing panoply of safeguards is in place.
- 6.11 We are, however, conscious that at the stage of police interview an innocent carer may be in a very confused state and possibly suffering from a turmoil of emotions: grief, anger, bewilderment, fear, and so on. We think it would, therefore, be in the interests of justice that the Codes which already operate to regulate interviews conducted by the police should make specific provision for the interviewing of a person who is believed to be the carer of a child who, in turn, is believed to have suffered non-accidental death or serious injury. In particular, the caution given to such a person about to be interviewed under caution should incorporate an appropriate explanation in simple terms about his or her statutory responsibility, as a carer of the child, if innocent, to give such account as he or she can about the circumstances in which the child suffered injury and that this responsibility should override any loyalty to any other person.
- 6.12 Without necessarily suggesting that these should be separately and specifically contained in the Codes, there are certain matters which, as a matter of common sense and practice, should be addressed in such cases. Where the carer claims to be fearful of another suspect, it would be desirable for some consideration to be given to what could be done to allay such possible fears and to emphasise the importance of the responsibility to give an account despite these fears. It would be advisable to consider whether it might be sensible to have and, if so, to have available to the police or the court the findings of a mental state examination by a medical practitioner. It would also be important that the account of the evidence provided to the carer's legal adviser should include an account of the content of relevant medical statements concerning the death of or injury to the child so that the carer may be given, from the earliest practicable stage, the opportunity to explain the medical evidence before any further questioning.
- 6.13 **We are minded to recommend that:**
- (1) There should be a statutory statement that the State is entitled to call for a person, who has responsibility for a child during a time when the child suffers non-accidental death or serious injury, to give such account as he or she can for the death or injury to a police officer or court investigating or adjudicating upon criminal liability;**

(2) The responsibility of a person for the welfare of a child shall include the responsibility to give such account as they can when properly called upon to do so pursuant to (1);

(3) The responsibility of a person pursuant to (2) does not require that he or she answer any question if to do so would expose him or her to proceedings for an offence.

6.14 The Codes which currently regulate the conduct of interviews by the police shall be amended to include such further provisions as may be necessary to give effect fairly to the above.

ESTABLISHING ‘A CASE TO ANSWER’

6.15 In criminal cases there is a rule of procedure that if, at the close of the case for the prosecution, the judge concludes that the evidence, as it stands, is such that a properly directed jury could not properly convict on it, it is his duty, on a submission being made, to stop the case.² We have already referred to the effect of this ruling in cases like *Lane and Lane*³ which requires the judge to withdraw the case from the jury at the close of the prosecution case. The application of this rule is a principal cause of the inability of the courts to convict those who are guilty of these offences.

6.16 In the informal consultation paper, the Criminal Law Team considered whether there should be some form of “statutory reversal of the rule in *Lane and Lane*” in circumstances where the prosecution could establish a prima facie case that a child had suffered non-accidental death or serious injury, that at least one of the defendants had responsibility for the child and that the defendants were within a small group of persons of whom one, some, or all were responsible for the offence.

6.17 In the paper the Team pointed out that permitting more cases to proceed past ‘half time’ in the way suggested would not necessarily result in more successful prosecutions. In order to convict a defendant the jury would still have to be sure that he or she either inflicted the injury or was secondarily liable. In some cases one or both of the defendants might give evidence and this might strengthen the prosecution case against one or both of them. This might then lead to the case being left to the jury and, on some occasions, a verdict of guilty.

6.18 In other cases the defendants might all be advised not to give evidence. The position at the end of the defence case would remain the same as at the conclusion of the prosecution case and the case would be bound to be withdrawn from the jury. Defendants in these circumstances would be unlikely to feel under any pressure to give or to call evidence. They would be likely to be advised that they have nothing to gain and everything to lose by doing so.

² *Galbraith* [1981] 1 WLR 1039.

³ (1986) 82 Cr App R 5. See paras 1.20 – 1.22, above.

- 6.19 In the light of this reasoning, the Criminal Law Team concluded that altering the present procedure in this regard would be insufficient, in itself, to address the problem under consideration. Those who responded to the informal consultation paper largely agreed.
- 6.20 Some respondents suggested a different approach. They argued that it was a mistake to accept as a “given” that there had, in every case, to be a procedure whereby at the end of the prosecution case the court considered whether, at that stage, the jury could properly convict. They pointed out that in some trials it was illogical to withdraw a case from the jury at the close of the prosecution case, before hearing any defence evidence. In circumstances where the only persons present when the crime was committed were those who are accused of committing it and the victim, who is not available to give evidence (because he or she is dead, or too young to give evidence), the only persons who are available to give direct evidence to the court of what happened could not by that stage have done so. The present rule of procedure forces the court, in that situation, to come to a decision when the most significant evidence in the case cannot yet have been given. We found these observations very helpful. We have been persuaded that it was a mistake to focus on changing the law of evidence in order to enable the court to find an artificial ‘case to answer’ at the close of the prosecution case. Stephen Mitchell J suggested:

It seems to me that a tidier way of proceeding would be to abolish, as an issue for judicial consideration at the end of the prosecution’s case, whether there is a case for the defendant(s) to answer and substitute for it the question whether there is a case, in respect of each defendant, fit to go to the jury. This last issue will fall for determination at the end of the evidence (prosecution and (if any) defence) and, as a matter of law, no issue of whether there is a case to answer will arise at the end of the prosecution’s case.

- 6.21 We agree with this approach. If our proposed recommendation about the responsibility of carers to give an account is accepted, there is logic and justice in postponing consideration of whether the case is fit to be left to the jury until they have had the opportunity to give evidence. It would not in any way undermine either the right to silence or the presumption of innocence. The defence will still have the right to decide not to give evidence and the case will still only go to the jury if the judge is satisfied that a jury could properly convict applying the presumption of innocence. The change would remove from the defence a tactical advantage but we do not believe that it would do injustice. We do not consider that the proposed change would engage Article 6 of ECHR which is concerned with the overall fairness of the trial process. It would remove a present hindrance to the effective discharge of the State’s duty to protect the fundamental human rights of the child.
- 6.22 **We are minded to recommend that in a trial where, at the end of the prosecution case, the court is satisfied beyond reasonable doubt that:**
- (i) a child has suffered non-accidental death or serious injury;**

(ii) the defendants form the whole of, or are within, a defined group of individuals, one or other or all of whom must have caused the death or the serious injury; and

(iii) at least one defendant had responsibility for the child during the time within which the death or serious injury occurred;

the judge must not rule upon whether there is a case to go to the jury until the close of the defence case.

6.23 We do not intend, by this recommendation, to allow purely speculative prosecutions to be brought where there is no reasonable prospect of conviction. In their response to the informal consultation paper, the Crown Prosecution Service was concerned that the trial should not become a means of investigation. Under the approach which we recommend, prosecutors must be expected to consider the likelihood of conviction bearing in mind the evidence which they intend to present and any evidence which they anticipate may be presented as part of the defence. As part of this exercise, the prosecuting authorities will also have to consider the impact of any adverse inferences which might be drawn against a defendant, either under the current law, or under the further recommendations which we are minded to make and which we set out later in this Part. It will, however, require them to focus somewhat differently upon the evidence they can present to the court. They will focus on whether they will be able to satisfy the court on the issues which will lead to the case proceeding to the end of the defence case.

THE DRAWING OF INFERENCES FROM SILENCE

The historical context

6.24 The law prior to 1994 reflected a world in which there was not only no drawing of inferences from silence but in which the defendant's right to remain silent and have the prosecution prove its case was emphasised. For example in *Marsh and Marsh v Hodgson*,⁴ Ashworth J was able to say:

In my judgement there was, I would say, abundant evidence to support the prosecution case, and calling for an answer. In the first place there was strong evidence which the justices accepted to show that the injuries to this child were inflicted by human agency. Secondly, there was evidence to show that in all probability those injuries were inflicted on or about June 3. Thirdly, there was evidence, accepted by the justices, to the effect that both the defendants admitted that they had been in charge, and joint charge, of this child during June 3 and 4. ... Fourthly, they put up, when challenged or questioned about the injuries, an explanation which could not hold water for a moment in the light of the medical

⁴ [1974] Crim LR 35.

evidence, to the effect that the child had sustained her injuries through cot banging, and they could offer no other explanation.⁵

- 6.25 His fourth point, concerned with the parents not offering a credible explanation for the injuries, was criticised in *Lane and Lane*.⁶ Croom-Johnson LJ stated that, while it was undoubtedly correct on the facts of that case, it is a point that may not apply to every such case, because it may be that a defendant “does not know the true explanation or has no means of knowing the facts which require explaining”.⁷ He stated:

... lack of explanation, to have any cogency, must happen in circumstances which point to guilt; it must point to a necessary knowledge and realisation of that person’s own fault. To begin with, one can only expect an explanation from someone who is proved to have been present. Otherwise it is no more consistent with that person either not knowing what happened or not knowing the facts from which what happened can be inferred, or with a wish to cover up for someone else suspected of being the criminal. There may be other reasons.⁸

- 6.26 As we noted in Part I of this paper, the *Report of the Royal Commission on Criminal Justice*⁹ referred to the difficulties which may arise where one of two parents is suspected of injuring or murdering a child but it is impossible to say which one. The Royal Commission did not, however, consider that it would be appropriate to draw adverse inferences from a defendant’s silence in such cases:

It must not, however, be supposed that removing the right of silence would be the solution in such cases. It would not enable the prosecution to establish which of them had committed the offence if both nevertheless insisted on remaining silent. Nor would the possibility of adverse comment at the trial enable a court or a jury to determine in respect of which of them the silence should be taken as corroboration.¹⁰

The Criminal Justice and Public Order Act 1994

- 6.27 Contrary to the recommendations of the Royal Commission, the Criminal Justice and Public Order Act 1994 introduced a number of provisions to allow the drawing of ‘adverse inferences’ against a defendant in a number of situations. Section 34 of the Act provides, in summary, that where a defendant gives evidence and relies on some fact which he or she failed to mention on being

⁵ Cited in *Lane and Lane* (1986) Cr App R 5 at pp 11–12 (page 5 of the original transcript of *Marsh and Marsh v Hodgson* [1974] Crim LR 35).

⁶ (1986) 82 Cr App R 5.

⁷ *Ibid*, at p 12.

⁸ *Ibid*, at p 14.

⁹ (1993) Cmnd 2263.

¹⁰ *Ibid*, at para 25.

questioned by the police and could reasonably have been expected to mention, the court or the jury, in deciding whether there is a case to answer or whether the defendant is guilty, may draw such inferences from the failure as appear proper.

- 6.28 Section 35 provides, in summary, that if a defendant chooses not to give evidence, or gives evidence but without good cause refuses to answer a question, the court or jury, may draw such inferences as appear proper from his or her failure to give evidence or refusal without good cause to answer.
- 6.29 Section 38(3) provides that a person cannot be convicted of an offence solely on the basis of such an inference (nor on the basis of an inference drawn pursuant to the other companion sections). As we will see below, this mirrors the approach of the European Court of Human Rights.
- 6.30 These sections have received a good deal of consideration by the Court of Appeal and by the European Court of Human Rights.
- 6.31 In *Murray v UK*¹¹ the European Court of Human Rights considered similar provisions under Northern Irish law. The trial judge had said in his reasons for convicting the applicant that he had drawn adverse inferences from the fact that the applicant had not answered police questions and had not given evidence at his trial. The Court stated:

Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of Article 6.

The Court does not consider that it is called upon to give an abstract analysis of the scope of these immunities and, in particular, of what constitutes in this context 'improper compulsion' ...

On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution ...

¹¹ (1996) 22 EHRR 29.

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.¹²

- 6.32 In *Condrón v UK*¹³ the European Court of Human Rights followed *Murray*. In that case the applicants gave evidence at the trial and put forward an explanation for their failure to mention certain matters during their police interviews. The judge directed the jury in terms which left the jury at liberty to draw adverse inferences even if satisfied as to the plausibility of the explanation. It was therefore held that there had been a violation of Article 6.
- 6.33 There is a considerable body of domestic case law on sections 34 and 35. The leading authorities on section 34 are *Argent*¹⁴ and *Condrón*.¹⁵

Consequences of our recommendations for the operation of the Criminal Justice and Public Order Act 1994

- 6.34 The recommendation we are minded to make for statutory recognition of a responsibility on the part of a carer to give such account as he or she can for how an apparently non-accidental death or serious injury of a child occurred would, of necessity, have consequences for the drawing of inferences pursuant to the Criminal Justice and Public Order Act 1994. In relation to section 34 they would be:
- (1) that in considering whether a defendant could reasonably have been expected to mention some fact relied on in their defence at the interview stage, the jury would be made aware of the defendant's statutory responsibility to give an account and that he or she had been warned about it in the course of the interview; and
 - (2) the jury would be entitled to take this into account in assessing the genuineness of the account given, for the first time, subsequent to the interview or at the trial.
- 6.35 This will have the practical effect that "no comment" interviews by defendants with responsibility for the care of children who have suffered non-accidental death or serious injury will become riskier for the defendants. We do not regard that prospect as unjust, so long as:

¹² *Ibid*, at pages 60–61, paras 45–48.

¹³ (2001) 31 EHRR 1.

¹⁴ [1997] 2 Cr App R 27.

¹⁵ [1997] 1 Cr App R 185.

- (1) there are proper safeguards for a defendant at the interview stage (a subject to which we have referred above); and
- (2) the jury has been given proper directions about the matters of which they must be sure before they can convict a defendant.

6.36 In relation to section 35, the essential ingredients of the directions required to be given to the jury were laid down in *Cowan*¹⁶ by Lord Taylor CJ, giving the judgment of the Court of Appeal, as follows:

- (1) The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the required standard is.
- (2) It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice. The right of silence remains.
- (3) An inference from failure to give evidence cannot on its own prove guilt. This is expressly stated in section 38(3) of the Act.
- (4) Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence.
- (5) If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference.¹⁷

6.37 Read literally, the last requirement might suggest that the jury must be sure of the defendant's guilt before they can draw any adverse inference from his silence, but that would be to reduce the direction to absurdity. The important point is that the significance of the defendant's silence has to be evaluated in the context of and in conjunction with the evidence in the case and any explanation relied on to explain the silence.

6.38 The fourth point was emphasised by Lord Bingham CJ giving the judgment of the Court of Appeal in *Birchall*:¹⁸

¹⁶ [1996] QB 373.

¹⁷ *Ibid*, at p 381C-E.

¹⁸ [1999] Crim LR 311.

Inescapable logic demands that a jury should not start to consider whether they should draw inferences from a defendant's failure to give oral evidence at his trial until they have concluded that the Crown's case against him is sufficiently compelling to call for an answer by him. What was called the 'fourth essential' in *Cowan* was correctly described as such. There is a clear risk of an injustice if the requirements of logic and fairness in this respect are not observed.¹⁹²⁰

- 6.39 If the procedural changes which we envisage are adopted, the judge will not have considered whether there was a case to answer at the close of the prosecution case. He or she will have considered whether there is a case to answer at the conclusion of the defence case and before the jury retires to consider its verdict. At that stage the judge will have considered, in the light of all the evidence and any inference which the jury may properly draw from silence, whether a conviction would or would not be unsafe or unfair.
- 6.40 How should the silence of a carer defendant at trial fit into that envisaged scheme of things? Although the jury must, of course, be directed to consider the whole of the evidence, we do not think it necessary in justice or in logic that the jury should be given a direction that, before making a decision whether to draw an inference from silence, it must first consider whether the strength of the case against the defendant was such as to call for an answer in the technical sense as reflected in *Galbraith*.²¹ If the recommendations we are minded to make are in effect, there will already be statutory recognition, as an aspect of the proper discharge by the State of its duties to the child pursuant to Articles 2 and 3 of the ECHR, that the circumstance of being responsible for a child who has suffered non-accidental death or serious injury calls for such account as can be given. This would reflect, in statutory form, the discharge of the fundamental obligation of the State to provide for the protection of children and the special responsibility undertaken by parents or carers.

¹⁹ *Ibid.* Cited from transcript, case no 9808076W2, p 19.

²⁰ In *Doldur* [2000] Crim LR 178, a case which concerned section 34, Auld LJ stated:

Acceptance by a jury of the truth and accuracy of all or part of the prosecution evidence may or may not amount to sureness of guilt. Something more may be required, which may be provided by an adverse inference from silence if they think it proper to draw one. What is plain is that it is not for the jury to repeat the threshold test of the Judge in ruling whether there is a case to answer on the prosecution evidence, if accepted by them. The direction approved in *Cowan* has a different object. It is to remind the jury that they cannot convict on adverse inferences alone. It is to remind them that they must have evidence, which, in the sense of section 34 inferences, may include defence evidence where called and which, when considered together with any such adverse inference as they think proper to draw, enables them to be sure both of the truth and accuracy of that evidence and, in consequence, guilt.

This case may be a straw in the wind that the strict approach which *Cowan* appears to require is not always necessary. The JSB specimen direction does not however reflect *Doldur* and the decision was not followed in *R v. Milford* [2001] Crim. L.R. 330.

²¹ See n 3, above.

- 6.41 Thus, in circumstances where the prosecution can prove that:
- (1) the child has suffered a non-accidental death or serious injury;
 - (2) the defendant is one of a defined group who must have done it;
 - (3) the defendant is a person who is responsible for the welfare of the child;
 - (4) the defendant has a responsibility (if innocent) to give an account for how the child died or was seriously injured;
 - (5) but has not done so,

we do not think there need be any further precondition to the ability of a jury to draw an inference under section 35.

- 6.42 Of course, a defendant who has given an explanation for his or her silence must be entitled to have the jury consider it when deciding whether to draw an adverse inference. If some explanation for silence is given, either to the police during investigation, or during the course of the trial, or there is other evidence from which such an explanation may be inferred, then this must be considered by the jury in deciding whether or not to draw an adverse inference in determining guilt or innocence. Conversely, so too should the absence of any explanation for silence.
- 6.43 In any event, before there could be a conviction, the jury would still have to consider the totality of the evidence, any inference it was entitled to draw from silence and, in the light of all that, only convict if sure of the defendant's guilt.

Compliance with Article 6 of the ECHR

- 6.44 In a closely reasoned response to the informal consultation paper, the Criminal Bar Association has reviewed the authorities and submitted that a conviction which was “decisively influenced” by the defendant’s silence would be bound to be a violation of Article 6.
- 6.45 The European Court of Human Rights has refrained from attempting to lay down hard-edged rules in this area. Furthermore its decisions are not entirely consistent as exemplified by the cases of *Asch v Austria*,²² and *Telfner v Austria*.²³ In the light of the conflicting authorities the Criminal Law Team concluded, in the informal consultation paper, that it could not be stated with confidence that a conviction based solely or mainly upon an inference from a failure to give evidence would be compatible with the ECHR. It did, however, express the view that, given the seriousness of the injustice involved to the dead or injured child and the intractable nature of the problems which have led to this state of affairs, the courts might be persuaded that a person convicted on that basis did have a

²² (1993) 15 EHRR 597.

²³ (2002) 34 EHRR 7.

fair trial notwithstanding the fact that their conviction was based on a case which included inferences from a failure to give an account.

- 6.46 Although there was a division of opinion on this issue amongst those who responded to the informal consultation paper, we were encouraged by the number of eminent respondents, including a number of senior judges, who considered that a conviction in these circumstances would not be unfair and that juries should be permitted to draw adverse inferences. We have also been persuaded, as we stated in Part IV, that Articles 2 and 3 loom much larger in the assessment of what constitutes a fair trial than we allowed for in that paper.
- 6.47 Taking all these factors into account, we are now of the firm view that a conviction in the circumstances which we are considering would not be based “solely”²⁴ or mainly”²⁵ on an inference drawn from silence. The prosecution must prove: (i) that the child has suffered a non-accidental death or serious injury; (ii) the defendant is one of a defined group who must have done it; (iii) the defendant is a person who was responsible for the welfare of the child and accordingly (iv) he or she has a responsibility, subject to the privilege against self incrimination, to give an account for how it died or was seriously injured; but (v) has not done so. The significance of the silence will vary according to the circumstances. That would be a matter for the jury's evaluation.
- 6.48 Even if it were the case that such a conviction could be described as “solely or mainly” based on such an inference, ECHR law is, as we have pointed out, by no means clear and very recent decisions of the European Court of Human Rights have emphasised that there are even more fundamental countervailing Article 2 and 3 rights which, in this type of case, have to be balanced against the specific requirements of Article 6. We are confident that, in the light of these decisions, a conviction in such a case would be eminently defensible as being fair. The following factors, in our judgment, weigh heavily in favour of that conclusion: the fundamental importance of the duty owed to the child by the State; the unsatisfactory state of the current law; the battery of safeguards we have described which must be satisfied before the jury may be permitted to draw such an inference; and the fact that the jury, before convicting, must be sure of the person's guilt.
- 6.49 We believe that the recommendations we are minded to make provide a reasonable balance between the State's obligations to the child under the UN Convention and the ECHR and its obligations to a defendant under Article 6 of the ECHR.

A full circle

- 6.50 Professor Glanville Williams addressed the problem of offences within the family, where all refused to assist the police, in an article entitled “Which of you did

²⁴ Criminal Justice and Public Order Act 1994, section 38(3).

²⁵ *Murray v UK* (1996) 22 EHRR 29 & *Condon v. UK* (2001) 31 EHRR 1.

it?”²⁶ He argued strongly against the introduction of special rules or procedures in such cases. He did, however, suggest that:

in a rational system of criminal law, the tribunal of fact (jury, or magistrates' court) should be entitled (and should be advised that it is entitled) to take into account the failure of the defendant to offer or to point to any reasonable evidence of innocence, when if he were innocent such evidence could reasonably be expected.²⁷

He also pointed out that an innocent parent may have motives to frustrate a prosecution case, for example, protection of a guilty partner.

6.51 This brings us back to the point at which the recommendations we are minded to make begin. We think that it is highly desirable for society, and may be incumbent on the State, to recognise that, in the special circumstances which we are considering, an innocent person who is responsible for the welfare of a child has a responsibility to give such account as he or she can for what has happened to the child. Furthermore, we are of the view that this responsibility should be recognised as overriding any loyalty to a partner.

6.52 At the end of a trial, a jury may be left thinking that it is reasonably possible that a silent defendant is innocent and has remained silent to protect another person. If so, the prosecution will not have proved its case and it would be right for that defendant to be acquitted. We also recognise that there would be the possibility that an innocent defendant might remain silent and be convicted. That would, of course, be undesirable. It would not follow, however, that there had not been a fair trial. The choice whether or not to give evidence would have been that of the defendant who would, at each stage in the process, have been made well aware of the importance which society places on a person living up to their responsibilities for the welfare of the child by giving such account as they can of what happened to that child.

6.53 **We are minded to recommend that where:**

- (1) a child has suffered non-accidental death or serious injury;**
- (2) the defendants are (or are within) a defined number of individuals one or more of whom must be guilty of causing the death or serious injury; and**
- (3) a defendant who has responsibility for the welfare of the child does not give evidence;**
- (4) the jury should, in the case of that defendant, be permitted to draw such inferences from this failure as they see fit, but must be directed to convict the defendant only if, having had regard to all**

²⁶ Glanville Williams, “Which of you did it?” (1989) 52 MLR 179, pages 191–199.

²⁷ *Ibid*, at p 185.

the evidence and to any inference to which they are permitted to draw having had regard to any explanation given for his or her silence, they are sure of the defendant's guilt.

THE TRIAL JUDGE'S DUTY TO ENSURE FAIRNESS

- 6.54 We have put forward a number of recommendations for evidential and procedural reforms. In order for these provisions to operate fairly and to withstand scrutiny under the Human Rights Act 1998 it is essential that there should be effective procedural safeguards to ensure the fairness of the trial as a whole. In particular, the trial judge has a duty to ensure the fairness of the trial. This will require the judge, if asked, to consider whether the case should be withdrawn from the jury at the conclusion of the defence case. This may be particularly important if an adverse inference from silence were likely to be an important factor in the jury's considerations.
- 6.55 In our view the judge should be under a duty in such a case to withdraw the case from the jury if, in his judgment, having regard to the evidence and to any permitted inference which may be drawn, a conviction would be unsafe or the trial would otherwise be unfair. In our view, although the level of congruence between what is unsafe and what results from an unfair trial is extremely high, a requirement in this form would make perfectly clear the importance of satisfying the requirement of fairness in any trial which resulted in a conviction.
- 6.56 **We are minded to recommend that a trial judge should be under a duty to withdraw the case from the jury at the conclusion of the defence case, where he considers that any conviction would be unsafe or the trial would otherwise be unfair.**

PART VII

NEW CRIMINAL OFFENCES?

- 7.1 In this Part we consider whether a change in the substantive law might provide a partial solution to the problem where a child is killed or seriously injured by one of the people responsible for the child's care but it is not possible to prove which person was responsible, or the existence of a joint enterprise. The purpose of this exercise is to respond to what we described earlier as the second approach to addressing this problem,¹ namely to see whether there is a form of offence which, without requiring the defendant directly to have caused the child's death or serious injury, would reflect a defendant's culpability in participating in, or permitting to arise, a situation out of which a child's death or serious injury has arisen. Were such an offence developed it may enable the court by its verdict and the sentence imposed to mark the seriousness of that outcome.
- 7.2 In the informal consultation paper, the Criminal Law Team considered three possible approaches: constructing an aggravated version of the offence of cruelty to children under 16 under section 1 of the Children and Young Persons Act 1933; extending the offence of manslaughter beyond its current scope; and creating a new offence of failing to take reasonable steps to prevent physical or mental cruelty. The Team's conclusion at that stage was to reject the latter two options and to propose the former. In this consultative report we have already rejected a legislative extension of the offence of manslaughter.² We now consider the other two approaches in turn.

AN AGGRAVATED FORM OF CHILD CRUELTY OR NEGLECT

The position of the informal consultation paper

- 7.3 In essence, the proposal in the informal consultation paper was that the offence of aggravated child cruelty would be committed when:
- (1) the defendant is guilty of cruelty or neglect to a child pursuant to section 1 of the Children and Young Persons Act 1933;
 - (2) the child has died from cruelty or neglect being part of the cruelty or neglect alleged against the defendant under (1);
 - (3) at the time of death and at the time of the events comprising the section 1 offence, the defendant was responsible for the child; but
 - (4) it would be a defence to the charge of aggravated cruelty that the abuse of the child from which he or she died was unconnected to the offence of cruelty of which the defendant was guilty; and

¹ See para 1.12 above.

² See paras 5.55 – 5.64 above.

- (5) it would be for the defendant to bear an evidential burden of raising that defence but, if he or she did, the prosecution would bear the burden of disproving it to the criminal standard.

7.4 It was proposed that the maximum sentence for this offence would be 14 years imprisonment as opposed to the present maximum for the section 1 offence of 10 years.

7.5 The reasoning of the team was dependant on the terms of Section 1(1) of the Children and Young Persons Act 1933 which provides that:

If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour...

7.6 The Team's reasoning was that the section 1 offence is wide enough to inculcate both the person who abuses the child and the person who is aware of the risk of abuse but fails to prevent it. For the aggravated form of the offence it would not be necessary to prove that the defendant was directly responsible for causing the death. The actual cause of death may have been an assault committed by another person. It would be sufficient to show: (i) that the defendant was 'wilful' in relation to the conduct or omission constituting the section 1 offence of which she was guilty; and (ii) that the defendant remained responsible for the child at the time of the child's death. The offence is aggravated due to the death of the child. It was stressed that the conduct or omission comprising the section 1 offence might amount to no more than neglect, abandonment, or exposure of the child *in a manner likely* to cause the child unnecessary suffering or injury. The informal consultation paper stressed that what was being proposed was not a new offence but an aggravated form of an existing offence which would carry a more serious label and a sentencing premium because of the fact of the child's death.

7.7 The Team foresaw that it might be thought unjust for the defendant to receive a greater sentence for aggravated neglect or cruelty where the abuse which killed the child was unconnected to the conduct or omission which made her guilty of child cruelty or neglect. For example, there might be a case where, although the mother remained nominally responsible, the child was killed when with his or her father on a prearranged visit and where the mother's neglect, comprising the section 1 offence of which she was guilty, had nothing to do with the visit to the father. The view was expressed that, whilst such a case might be exceptional it should, nonetheless, be catered for by, it was suggested, providing a defence to the aggravated form of the offence that the abuse from which the child died was unconnected to the cruelty or neglect which comprised the section 1 offence. It was proposed that the defendant should bear an evidential burden of raising that defence but that, once it was raised, the prosecution should have to disprove it to the criminal standard.

7.8 The Team expressed the view in the informal consultation paper that an aggravated section 1 offence would be useful in those cases in which the child had been killed by one or both parents or carers after a long period of abuse of which both parents must have been aware. Under the present law it might not be possible to prosecute either parent for murder or manslaughter if it could not be proved which parent was directly responsible for the death, or the existence of a joint enterprise. It *would* be possible to convict both parents of the section 1 cruelty or neglect offence in these circumstances. Such a conviction would reflect the fact that both parents had failed in their duty towards the child by abusing the child or by permitting or failing to prevent abuse. A conviction for the section 1 offence, as presently framed, would not overtly reflect the seriousness of the consequences of the parental failure. An offence of aggravated cruelty would reflect the fact that the parent had either caused the death of the child or had exposed the child to the risk of abuse and that the child had died from that abuse. In these circumstances a maximum sentence greater than the 10 years available for the section 1 offence would be justifiable. It was suggested that a maximum sentence of 14 years would reflect the defendant's culpability for the death, being a consequence of abuse for which the defendant bore responsibility and yet would stop short of a sentence of life which should, in this context, be reserved for cases where the defendant has caused the child's death.

The response leading to a development of the recommendation

- 7.9 This proposal attracted a very large and wide measure of support. Such respondents who did express concern, or reservations, focused on our proposal that there should be a separate defence to the aggravated form of the offence, which the defendant had to raise, that the death was unconnected to the cruelty of which the defendant was found guilty. Concerns were expressed both as to the burden which it was proposed be placed upon the defendant and the doubts which the existence of such a defence raised about the nature of the connection between the cruelty, of which the defendant was guilty, and the conduct which was the cause of the death of the child.
- 7.10 These expressions of concern have caused us to focus more clearly upon the structure of the existing offence and what we have in mind as an aggravated version of it. We are not proposing a new offence. We are taking as read the structure of the present section 1 offence. That offence contains a number of elements each of which must be satisfied before there can be a conviction. These are:
- (1) the defendant is at least 16 and had responsibility for a child under 16;
 - (2) the defendant, with a wilful state of mind, was guilty of any of a wide range of acts or omissions;
 - (3) that wide range of acts or omissions encompasses: assault, ill treatment, neglect, abandonment, or exposure; or causing or procuring the child to be: assaulted, ill treated, neglected, abandoned or exposed;

- (4) that any of the wide range of acts or omissions contained in (3) occurred in a manner likely to cause any one of a series of unnecessary consequences;
- (5) those consequences are: suffering, or injury to health, which latter expression includes injury to or loss of sight, or hearing, or limb, or organ of the body, or any mental derangement.

7.11 We are minded to recommend that where a person is guilty of the basic section 1 offence by reason of the prosecution proving each of the matters set out in (1) to (5), he or she will also be guilty of the aggravated form of the offence where,

in addition the prosecution can prove that the child has died as result of the occurrence of any of the consequences which they have proved under (5) above.

7.12 In this way, proving the aggravated section 1 offence is a matter simply of proving this sixth element in addition to proving the other five elements of the offence which will already have been proved. Because it will remain for the prosecution to prove each of the elements of the offence, in both its basic and aggravated form, there is no need, as the Team had initially proposed, for the complication of having a special defence which has to be raised by the defendant. Furthermore, the connection between the basic and the aggravated form of the offence is simple, easy to understand and grows naturally out of the basic offence. Once established it attaches the label of responsibility for the death of the child and attracts the enhanced potential sentence.

7.13 **We are minded to recommend that there be an aggravated form of the offence of cruelty under section 1 of the Children and Young Persons Act 1933 which will be committed by a person who is guilty of the offence of child cruelty where the child has died as a result of the occurrence of any suffering or injury to health which the cruelty of the defendant has made it likely would be caused. The offence will be established by the prosecution proving to the criminal standard each of the 6 elements set out in paragraphs 7.10 and 7.11 above. The aggravated form of the offence will attract a maximum penalty of 14 years imprisonment.**

CRUELTY OR NEGLECT LEADING TO SERIOUS INJURY

7.14 A few respondents argued that the approach described in the previous section should be extended to cases in which the child suffers serious injury. This was considered in the informal consultation document. The case was cited, by way of example, of the child who suffers serious permanent brain damage as a result of abuse. The Team was concerned, however, that if the consequence of the defendant's failure of duty were not death but serious injury, it would be necessary to consider the relationship between a proposed aggravated section 1 offence and the offences under sections 18 and 20 of the Offences Against the Person Act 1861. Under section 20, a person who unlawfully and maliciously inflicts grievous bodily harm is subject to a maximum sentence of five years. If

the aggravated offence under section 1 of the Children and Young Persons Act 1933 were to apply to cases where the child suffered serious injury, it might appear odd for a person who inflicts grievous bodily harm 'maliciously' (i.e. with intent or recklessness as to causing some harm) to be subject to a lesser maximum penalty than the person who fails to prevent the abuse which causes serious harm. The section 18 offence allows for a penalty of life imprisonment, but requires a specific intention to do grievous bodily harm, or prevent lawful apprehension. This is a level of blameworthiness on a higher plane than that which is required for the section 1 offence. The existing section 1 offence only requires there to be a likelihood of "unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb or organ of the body, and any mental derangement)". It is intended to apply to cases in which serious injury is likely, a level of blameworthiness which is commensurate with that which is required under section 20. In our view, therefore, it would be appropriate to retain the use of the unaggravated section 1 offence to deal with those cases in which abuse of the child causes serious injury, and to reserve the proposed new offence to those cases in which the child is killed.

AN OFFENCE OF FAILING TO TAKE REASONABLE STEPS TO PREVENT ABUSE

The approach in the informal consultation paper

- 7.15 In the informal consultation paper the Team considered the possibility of constructing an offence to place people who have a child in their care under an explicit statutory duty to take action to prevent the abuse of the child. There would be a criminal penalty for breach of that duty. One possible formulation of the duty was put forward:

It is the duty of a person who has a child in his or her care to take reasonable steps to prevent that child from physical or mental cruelty. This duty includes, for example, removal of a child from an abusive household, prevention of a child being alone with a person who has previously injured that or any child, including a duty to know that a child is suffering repeated injury or serious injury. Reasonable steps will include seeking medical/social service advice about preventing future abuse.

- 7.16 The paper expressed a number of reservations about such an approach. First, it was doubted whether it would be practical to specify in detail the types of action which would be required to fulfil the duty. Second, reservations were expressed about the scope of the proposed duty which would, in order to extend the scope of the criminal law, be broader than that imposed by section 1 of the Children and Young Persons Act 1933. If, as it appeared, the fault element of such an offence would be based upon negligence, the penalties available would, as a matter of principle, have to be considerably lower than the present 10 year maximum for the existing section 1 offence. The Team concluded that the criticism of the current law, that it fails to hold the culpable parent responsible for the death of the child by punishing them commensurately with that action, would not be addressed by the introduction of such an offence. The Team thought it better to give consideration to introducing the aggravated section 1 offence with

a higher maximum penalty, rather than introducing a weaker offence based upon negligence.

A different approach

- 7.17 This approach did not attract much criticism. One of the most fully developed of the responses, that of Judge Jeremy Roberts QC, however, took up a new strand of the argument. He suggested that an offence might be constructed along the lines of certain of the offences under the Health and Safety at Work Act 1974. He suggested that it should be an offence for a person, who has responsibility for a child, to fail, insofar as was reasonably practicable, to protect the child from serious harm deriving from ill-treatment. The main advantage of such an offence would be to give statutory expression to a duty to be imposed on those who are responsible for a child, to protect that child from serious harm which derives from ill treatment. We can see the force of this as a pointed and effective discharge of one element of the State's obligations under Articles 2 and 3 of the ECHR. We are at this stage provisionally proposing such an offence.
- 7.18 In arguing for the introduction of such an offence it was pointed out that there might well be two collateral benefits. The first was that such an offence might be the basis for an extension of the law of manslaughter to embrace crimes of omission. We are not persuaded that this would be desirable. It would potentially impose liability for manslaughter on the basis of mere negligence and so would represent a significant widening of the reach of manslaughter. In our view the aggravated offence of child cruelty which we are minded to recommend, based as it is on 'wilfulness', better reflects the legitimate reach of offences where the death of a child is involved and sits more comfortably with the generality of the law.
- 7.19 The second collateral benefit was posited on the basis of a secondary suggestion that, just as with offences under the Health and Safety at Work Act 1974, there should be an evidential burden on a defendant to raise the issue that it was not reasonably practicable for her to have protected the child from serious harm. It was argued that such a provision would have the advantage of encouraging the person who was responsible for the child to give her account of how the child died and would, thereby, serve to ensure that there was more evidence for the jury to consider. This evidence would be available for the jury to consider on any count of murder or manslaughter which the defendant and any co-defendant also faced.
- 7.20 We can understand the force of this argument. It accords with the pattern established by the Health and Safety at Work legislation. It would have the side effect of increasing the amount of evidence which is placed before the jury for consideration on counts of murder or manslaughter. On balance, however, we do not intend to recommend that there should be an evidential burden placed upon the defendant.
- 7.21 First, by entering a not guilty plea, the defendant would be saying that he or she was not in breach of the duty. In this kind of case there should be little problem

for the prosecution in establishing that the child suffered ‘serious harm deriving from ill treatment’ which, we assume, would be treated as a matter of fact for the jury to determine. We consider in paragraph 7.24 below what ‘serious harm deriving from ill treatment’ would encompass. On that basis, the issue upon which a not guilty plea would in most cases be entered would be that it was not reasonably practicable for the defendant to have protected the child from the serious harm which befell him. Establishing that it would have been reasonably practicable for the defendant would not, in our view, be likely to cause the prosecution any great difficulty. The evidence of circumstances surrounding the infliction of the serious harm and its discovery would lend itself easily to an invitation to the jury to draw appropriate inferences that reasonably practicable steps could have been taken by the defendant. Thus it would be by no means inappropriate for the prosecution to be required to prove each and every element of the offence.

7.22 Second, as we have indicated in Part I above, it is better if we consider substantive reform of the law free from considerations which go to easing the way to obtain convictions for other offences. Thus, the fact that imposing an evidential burden on a defendant on this offence might encourage her to give evidence where she and a co-defendant are also being tried for murder or manslaughter of the child, ought not to be a factor of any significance in constructing such an offence. Although the defendant being more willing to give evidence may be one beneficial effect of the new offence, such encouragement has not weighed greatly in our deliberation, and nor, we believe, should it have.

7.23 Third, we are minded to recommend that a person who is responsible for the welfare of a child should, as an incident of that responsibility and if called upon, give an account of how the child came to be killed or seriously injured, failing which an adverse inference may be drawn by the jury where they are considering the defendant’s guilt for the child’s murder or manslaughter, or serious assault. In such a case, having a differently expressed provision apply in an offence which is likely to be contained in the same indictment might prove distracting and confusing for all concerned, not least the jury. It is vitally important that the judge be able to make his summing up as clear and simple as possible. To have to explain to the jury that on the counts of murder or manslaughter they are entitled to draw an adverse inference from the defendant’s failure to give evidence but that, in relation to this offence an evidential burden applies, would lead to highly complicated and potentially confusing directions being given to the jury.

What would be “serious harm deriving from ill treatment”?

7.24 In Part IV³ we have considered the reach of special rules of evidence and procedure and have concluded that they should apply where the defendant is being tried for any of a range of offences which would be identified in a schedule. In our view it is important that the procedural and substantive changes

³ See Paragraph 4.36.

which we are minded to recommend should be capable of working together without unnecessary discrepancies. Thus we see every reason for this offence to apply in a similar range of circumstances. This means that it will apply only where the prosecution can prove that the child has been the victim of an offence contained in a schedule. Those offences would be: murder; manslaughter; assault under sections 18 or 20 of the Offences Against the Person Act 1861; rape; or indecent assault.

An illuminating example

- 7.25 It is worth noting that a similar offence to the one we are provisionally proposing has existed for over 90 years with respect to the protection of animals. The Protection of Animals Act 1911, section 1(1)(a) states:

If any person ... shall, by wantonly or unreasonably doing or omitting to do any act, or causing or procuring the commission or omission of any act, cause any unnecessary suffering, or, being the owner, permit any unnecessary suffering to be so caused to any animal

he shall be guilty of an offence of cruelty and liable on summary conviction to imprisonment not exceeding six months. In provisionally proposing this new offence we are proposing that similar protection be made available to children.

Conclusion

- 7.26 We are persuaded that the creation of such an offence would have utility in marking the duty to protect the child from serious harm which derives from ill-treatment by imposing criminal liability on those who fail negligently to comply with that duty even though their conduct cannot be described as 'wilful'. It would be an offence of lesser seriousness than the present section 1 offence. At the moment we are of the view that it should attract a maximum sentence of 7 years.
- 7.27 Because this offence was not put forward for consideration in the Team's informal consultation paper, we are less firm in our view on it than we are on the other issues with which we deal in this consultative report.
- 7.28 **We provisionally propose that a new offence should be created by which it would be an offence, punishable by a maximum of seven years imprisonment, for a person who has responsibility for a child to fail, so far as is reasonably practicable for him or her to do so, to prevent the child suffering serious harm deriving from ill treatment.**
- 7.29 **The offence will only have been committed if the child has suffered serious harm deriving from ill treatment which will only be the case where he child has been the victim of one or more of the following offences: murder; manslaughter; an assault under section 18 or 20 of the Offences Against the Person Act 1861; rape; or indecent assault.**
- 7.30 We have formulated this proposal in terms of what is reasonable for the particular defendant. We recognise that this might create difficulties in determining which of the defendant's characteristics should be taken into account for this purpose. For example, it would be unfortunate if the defendant were able to claim that it

was not reasonably practicable for him or her to take steps to prevent the ill-treatment on the grounds of voluntary drug addiction.⁴ On the other hand, we do not believe that it would be fair to hold a defendant to the standard of what would be reasonably practicable for the average parent, if he or she was mentally ill, disabled, or otherwise unable to meet this standard. We would welcome views on these issues.

⁴ Compare the difficulties which have arisen in relation to 'reasonableness' under the defence of provocation. See, for example, *R. v. Smith(Morgan)*[2001] 1 AC 146.

PART VIII

CONSULTATION ISSUES

In this Part we summarise our the recommendations we are minded to make to Government, and our provisional proposal. We invite comments on the recommendations we are minded to make, set out in paragraphs 1–12 below. We also invite comments on the new offence which we provisionally propose and which is set out in paragraphs 13 and 14 below. We are not inviting comments on the possible reforms which, for the reasons set out in Part V, we have decided not to recommend.

GENERAL ISSUES

1. **That the recommendations in this report should apply in cases of death or serious injury to children under the age of 16. (see paragraph 4.34)**
2. **That the changes to the rules of procedure and evidence which we recommend in this report shall apply, where the other conditions are satisfied, to trials for the following offences:**
 - (1) **cruelty or neglect under section 1 of the Children and Young Person Act 1933 (whether the existing offence or the aggravated offence which we are minded to recommend in Part VII);**
 - (2) **murder;**
 - (3) **manslaughter;**
 - (4) **assaults under sections 18 and 20 of the Offences Against the Persons Act 1861;**
 - (5) **rape;**
 - (6) **indecent assault and;**
 - (7) **the offence we are provisionally proposing under Part VII¹ of failing, so far as is reasonably practicable, to prevent a child for whom the defendant is responsible from suffering serious harm deriving from ill treatment. (see paragraph 4.39)**
3. **That there should be a single concept of ‘responsibility’ for the purpose of our recommendations. ‘Responsibility’ should have the same meaning as for the offence of child cruelty or neglect under section 1 of the Children and Young Persons Act 1933. (see paragraph 4.53)**

¹ See paragraphs 7.28 – 9.

4. **That the categories of those presumed to have assumed responsibility for a child should be the same as currently encompassed within section 17 of the Children and Young Persons Act 1933.(see paragraph 4.54)**
5. **That it be made clear that a person is not to be presumed to have care for a child for the purposes of section 17 of the 1933 Act merely by reason of being engaged by a social services authority to deal with the child who is the subject of a care order made in favour of that authority. (see paragraph 4.55)**
6. **That the scheme set out in this report should apply in cases in which the offence must have been committed by one of a small group of individuals, at least one of whom has responsibility for the child's care. (see paragraph 4.58)**

RULES OF EVIDENCE AND PROCEDURE

7. **That:**
 - (1) **there should be a statutory statement that the State is entitled to call for a person, who has responsibility for a child during a time when the child suffers non-accidental death or serious injury, to give such account as they can for the death or injury, to a police officer or court investigating or adjudicating upon criminal liability;**
 - (2) **the responsibility of a person for the welfare of a child shall include the responsibility to give such account as they can when properly called upon to do so pursuant to (1);**
 - (3) **that the responsibility of a person pursuant to (2) does not require that he or she answer any question if to do so would expose him or her to proceedings for an offence; (see paragraph 6.13)**
8. **The Codes which currently regulate the conduct of interviews by the police shall be amended to include such further provisions as may be necessary to give effect fairly to the above. (see paragraph 6.14)**
9. **That in a trial where, at the end of the prosecution case, the court is satisfied beyond reasonable doubt that:**
 - (i) **a child has suffered non-accidental death or serious injury;**
 - (ii) **the defendants form the whole of, or are within, a defined group of individuals, one or other or all of whom must have caused the death or the serious injury; and**
 - (iii) **at least one defendant had responsibility for the child during the time within which the death or serious injury occurred;**

the judge must not rule upon whether there is a case to go to the jury until the close of the defence case. (see paragraph 6.22)

10. **That where:**
 - (1) **a child has suffered non-accidental death or serious injury;**
 - (2) **the defendants are (or are within) a defined number of individuals one or more of whom must be guilty of causing the death or serious injury; and**
 - (3) **a defendant who has responsibility for the welfare of the child does not give evidence;**
 - (4) **the jury should, in the case of that defendant, be permitted to draw such inferences from this failure as they see fit, but must be directed to convict the defendant only if, having had regard to all the evidence and to any inference to which they are permitted to draw having had regard to any explanation given for his or her silence, they are sure of the defendant's guilt. (see paragraph 6.53)**
11. **That a trial judge should be under a duty to withdraw the case from the jury at the conclusion of the defence case, where he considers that any conviction would be unsafe or the trial would otherwise be unfair. (see paragraph 6.56)**

NEW OFFENCES

12. **That there be an aggravated form of the offence of cruelty under section 1 of the Children and Young Persons Act 1933 which will be committed by a person who is guilty of the offence of child cruelty where the child has died as a result of the occurrence of any suffering or injury to health which the cruelty of the defendant has made it likely would be caused. The offence will be established by the prosecution proving to the criminal standard each of the 6 elements set out in paragraphs 7.10 and 7.11 above. The aggravated form of the offence will attract a maximum penalty of 14 years imprisonment. (see paragraph 7.13)**
13. **That a new offence should be created by which it would be an offence, punishable by a maximum of seven years imprisonment, for a person who has responsibility for a child to fail, so far as is reasonably practicable for him or her to do so, to prevent the child suffering serious harm deriving from ill treatment. (see paragraph 7.28)**
14. **That the offence will only have been committed if the child has suffered serious harm deriving from ill treatment which will only be the case where the child has been the victim of one or more of the following offences: murder; manslaughter; an assault under section 18 or 20 of the Offences Against the Person Act 1861; rape; or indecent assault. (see paragraph 7.29)**

RESPONSES

15. **We would be grateful to receive responses to this consultative report by the end of May 2003.**

Please send responses to Judge Alan Wilkie QC or David Hughes, each at:

The Law Commission, Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

Responses may also be sent by email to:

alan.wilkie@lawcommission.gsi.gov.uk

or to

david.hughes@lawcommission.gsi.gov.uk

**Law Commission
April 2003**

APPENDIX

LIST OF RESPONDENTS TO THE INFORMAL CONSULTATION PAPER

Detective Inspector Malcolm Bacon

Judge Beaumont QC, The Common Serjeant

Lord Justice Brooke

Mr. Justice Buckley

Dame Elizabeth Butler-Sloss DBE, President of the Family Division

Lord Justice Buxton

Judge Clarke QC, Recorder of Liverpool

Mr. Justice Crane

Judge Crowther QC, Recorder of Bristol

Mr. Justice Curtis

Judge Darroch

Mr. Peter Glazebrook

Mr. Justice Grigson

Judge Hawkesworth

Ms. Laura Hoyano

Judge Hyam, Recorder of London

Mr. Justice Hughes

Professor Adrian Keane

Ms. Alison Kerr, Chief Crown Prosecutor

Mr. Christopher Kinch QC

Lord Justice Kennedy

Mr. Justice Leveson

Mr. Allan Levy QC

Lord Justice Mantell

Mr. Justice Mitchell

Professor David Ormerod

Ms. Sue Patten, Legal Secretariat to the Law Officers

Mr. Justice Penry-Davey

Judge Radford

Mrs. Justice Rafferty DBE

Mr. Edward Rees QC

Judge Jeremy Roberts QC

Professor Paul Roberts

Lord Justice Rose, Vice-President, Court of Appeal (Criminal Division)

Mr. Justice Sachs

Judge Samuels QC

Lady Justice Smith DBE

Professor John Spencer

Professor Colin Tapper

Judge Thorpe

Mr. Justice Treacy

Mr. Andrew Webb, Director of Social Services, Cheshire County Council

The Criminal Bar Association

The Crown Prosecution Service

The Law Society

Liberty¹

The National Society for the Prevention of Cruelty to Children

¹ We are aware that Liberty gave consideration to our informal consultation paper, but we have received no substantive response.