The Law Commission

(LAW COM No 282)

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

Item 5 of the Eighth Programme of Law Reform: Criminal Law

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

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CONTENTS

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To the Right Honourable the Lord Falconer of Thoroton, Lord High Chancellor of Great Britain

PART I
INTRODUCTION

BACKGROUND

1.1 This Report and draft Bill conclude work which the Law Commission has been conducting on this issue. The recommendations in this 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 a trial in such a case 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, as an accessory, 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 even this beyond reasonable doubt and therefore neither parent can be convicted.

1.3 This Report is designed to be read in conjunction with the Consultative Report[2] published earlier this year. That Report set out at some length: the nature and extent of the problem;[3] the approach adopted to reforming the law;[4] the options

1 (1986) 82 Cr App R 5.

2 Children: Their Non-accidental Death or Serious Injury (Criminal Trials) (2003) Law Com No 279: hereinafter referred to as Law Com No 279.

3 *Ibid*, Parts I and II.

which the Law Commission was minded to reject;[5] the recommendations it was minded to make for evidential and procedural changes;[6] and the recommendations it was minded to make, or was provisionally proposing, for new criminal offences.[7]

1.4 The focal point of this, final, Report is the draft Bill, contained in Appendix A, in which we set out our policy recommendations in a form in which they may be enacted. Part VI to this Report is a detailed commentary on the draft Bill. For ease of reference we have in that Part set out in order: the recommendations contained in the Consultative Report, which form the conceptual framework for the detailed provisions in the draft Bill; the terms of the particular clause which gives effect to that recommendation in statutory form; and a commentary on how that has been achieved and the changes which have occurred in the process.

1.5 The project was announced in the Law Commission's 36th Annual Report.[8] For reasons which were explained in the Consultative Report[9] the Commission's Criminal Law Team first produced, in December 2002, an informal consultation paper which was circulated to various members of the judiciary, academics and professional bodies. The Consultative Report was the outcome of consideration by the Commission of the issues in the light of the helpful responses to that paper.

1.6 In the Consultative Report the Commission indicated that it was minded to make certain recommendations to Government, which had been the subject of the informal consultation. It also presented, for consideration, provisional proposals on one aspect of the matter which had not been previously canvassed in the informal process undertaken by the Criminal Law Team. In this Report and draft Bill the Commission sets out its final recommendations together with the supporting reasoning.

1.7 We have been grateful to receive, and have found most helpful, the responses of those persons and bodies who are listed in Appendix B. They have been of assistance not only in enabling us to address the issues of principle but also to tease out the finer points of detail to assist drafting the Bill.

1.8 Our inspiration for undertaking this project was the work of the National Society for the Protection of Children ("NSPCC") "Which of you did it?" Working Group whose final report will be published at about the same time as this Report. We have benefited greatly from their efforts and the generosity with which they have shared their time and their thoughts. Their perspective has been different

4 *Ibid*, Part IV.

5 *Ibid*, Part V.

6 *Ibid*, Part VI.

7 *Ibid*, Part VII.

8 Paras 5.13 – 5.15 of Law Com No 275, published 26 March 2002.

9 Law Com No 279 at para 1.4.

from ours, focusing less on law reform and more on steps by which, in practice, the flow of evidence may be improved. We have always recognised that there is no single solution to this intractable problem but that it will involve a multi faceted approach which will include improvements, such as those identified by the NSPCC, which can be made in the practices and procedures of front line health and social work professionals and investigating police officers. By improving the amount and quality of direct evidence, a greater number of convictions of the guilty may be achieved. There are also, as the NSPCC and others have noted, legislative proposals to change the rules of evidence concerning the admissibility of evidence of previous conduct which may better enable the courts to build a picture and to determine criminal liability accurately. These are matters which are beyond the scope of our law reform project. We remain of the view, however, that the present substantive law and rules of procedure and evidence are not beyond criticism or improvement in ways which may make it more likely that these offences may be the subject of an accurate conviction by a jury after a fair trial.

AN OVERVIEW OF OUR PROPOSALS

1.9 The Consultative Report set out our approach to addressing this issue. We now propose a twofold approach. We propose changes to the rules of evidence and procedure which are applicable in trials of cases of this type. We also recommend changes in the substantive criminal law.

1.10 The evidential and procedural recommendations are threefold.

(1) We recommend that there should be a statutory statement of responsibility, applicable to those responsible for the child at the time when he or she sustained the injury or was killed, which requires that responsible person to give to the police or to the court such account as he or she can of how the death or injury came about. The statutory responsibility will not oblige the person to answer questions but the fact that he or she has this responsibility may be taken into account by a jury when considering what inference it may draw from a defendant's failure to give such account.[10]

(2) In certain cases, we recommend that the judge must not decide whether the case should be withdrawn from the jury until the close of the defence case.[11]

(3) If a defendant in such a case has the statutory responsibility but fails to give evidence,[12] then the jury should be permitted to draw such inferences as may be proper from such failure without first having to conclude that

[10] Clauses 4, 5 and 6 of the draft Bill.

[11] Clause 7 of the draft Bill.

[12] Or refuses without good cause to answer any question.

they could have convicted the defendant on the evidence alone and without drawing any such inference.[13]

In connection with the second and third recommendations we have provided that the judge must withdraw the case from the jury if he or she considers at the conclusion of the defence case that no jury properly directed could properly convict the defendant.[14]

1.11 The recommended changes to the substantive law are twofold.

1.12 We recommend the creation of a new and aggravated form of the existing offence of child cruelty under the Children and Young Persons Act 1933. The offence, which will be in section 1A of that Act, will be the offence of "cruelty contributing to death".[15] It will be committed where the offence under section 1 has been committed and its commission has contributed to the death of the child. This new offence would carry a maximum sentence of 14 years imprisonment.

1.13 We also recommend a new offence of "failure to protect a child".[16] This offence would be committed if three cumulative conditions are satisfied. They are that:

(1) a person, "R", who is responsible for and has a specified connection with a child, is aware, or ought to have been aware, that there is a real risk that one of a list of specified offences might be committed against the child;

(2) R fails to take such steps as it would be reasonable to expect him or her to take to prevent the commission of the offence; and

(3) an offence in that list is committed in circumstances of the kind that R anticipated or ought to have anticipated.

1.14 In clause 2 of the draft Bill we set out the nature of the connection which it is necessary that the person responsible must have with the child. In Part VI of the Report we elaborate our reasons for requiring such a connection.

SOME PRELIMINARY POINTS

A two track approach

1.15 One academic commentator[17] in his response to the informal consultation paper tellingly expressed the need throughout the project for us to recognise the two distinct aims which the project might have.

1.16 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

[13] Clause 8 of the draft Bill.

[14] Clause 7(8) of the draft Bill.

[15] Clause 1 of the draft Bill.

[16] Clause 2 of the draft Bill.

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

the emphasis being placed on the causative link). This aim would have in its sights the resolution of 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".[18] This would maintain the current focus of the law in seeking to establish who caused the physical harm to the child.

1.17 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* <u>all</u> those adult carers who had responsibility for the welfare of the child at the time of the injury/ death".[19] 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.[20]

1.18 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, 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 emphasise that a new offence must be justifiable on its own terms before we would recommend it.

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

1.19 A further issue upon which we should make our position clear at the start of this 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.

[18] *Ibid*.

[19] *Ibid*.

[20] *Ibid*.

1.20 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.[21] 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 injury or death.

THE FORMAT OF THIS REPORT

1.21 As is apparent from paragraphs 1.9 – 1.11 above, we have decided to confirm the broad thrust of policy and the recommendations which, in the Consultative Report, it was stated we were minded to make. We have also decided to make recommendations which give effect to the type of new offence upon which we consulted as a provisional proposal. For the most part, save for the recommendations for changes to the rules of procedure and evidence, there was widespread support for the policies which we stated we were minded to adopt. Apart from that area of controversy, such reservations as were expressed were either few in number or concerned points of detail.

1.22 In this Report we deal, relatively shortly, with: the nature and extent of the problem;[22] those options for reform which we rejected;[23] and certain matters, including our recommendations for changes to the substantive law, which were widely supported and which seem to be uncontroversial.[24]

1.23 The most contentious of our recommendations concerned matters of evidence and procedure. We were gratified to note that, in addition to the significant level of support which had been expressed for such an approach upon the informal consultation and in response to the Consultative Report, there were those who had previously expressed reservations who now responded that these had been sufficiently addressed so as to enable them to give their support.[25] It remains the case, however, that there is a significant body of opinion which remains unconvinced by these recommendations. In Part V of this Report we record their concerns and respond to them.

[21] 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.

[22] We reproduce, for ease of reference, in Part II of this Report a substantial portion of Parts I and II of Law Com No 279.

[23] Part III.

[24] Part IV.

[25] The Crown Prosecution Service and Judge David Radford.

1.24 The most important part of this Report is the draft Bill in which the Commission's policy is expressed in a form which can be given speedy statutory effect if the Government is so minded. As we have stated above, in order to enable readers to see how these draft provisions operate we have thought it wise, in Part VI, to provide a detailed, clause by clause, commentary on the draft Bill. In this commentary we explain how the responses to the Consultative Report have influenced the final form of the policy as expressed in the Bill.

PART II
THE NATURE AND EXTENT OF THE PROBLEM

THE CURRENT LAW

2.1 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.

2.2 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 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*:[1]

> 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. Finnemore 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.[2]

2.3 This approach was confirmed in *Bellman*:[3]

[1] [1955] 2 QB 497.

[2] *Ibid*, at p 503–4.

[3] [1989] AC 836.

> [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.[4]

2.4 In *Gibson and Gibson*[5] 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 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.[6]

2.5 In *Lane and Lane*,[7] 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.

2.6 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

[4] *Ibid*, at p 849.

[5] (1985) 80 Cr App R 24.

[6] *Ibid*, at p 30.

[7] (1986) 82 Cr App R 5.

> 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]

2.7 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".[9] This has been the outcome in several subsequent cases involving children. For example, in *Aston and Mason*[10] 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 ... .
>
> 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.[11]

2.8 Similarly, in *Strudwick*[12] 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.

2.9 In *S and C*[13] 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

8 *Ibid*, at p 14.

9 *Ibid*, at p 18.

10 (1992) 94 Cr App R 180.

11 *Ibid*, at p 185.

12 (1994) 99 Cr App R 326.

13 [1996] Crim LR 346.

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.[14]

2.10 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 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.[15]

PARTIAL SOLUTIONS AVAILABLE UNDER THE CURRENT LAW

2.11 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

2.12 In *Marsh and Marsh v. Hodgson*[16] 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

[14] *Ibid*, at p 346.

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

[16] [1974] Crim LR 35.

> that: we were both responsible for this child throughout June 3 and 4.[17]

2.13 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.

2.14 In *Lane and Lane*[18] Croom-Johnson LJ emphasised that the point of that case was that "in effect both parents were there all the time".[19] He described the case as "a straightforward application of the ordinary principles of proof in criminal law".[20]

2.15 In *Russell and Russell*[21] Lord Lane CJ stated:

> 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.[22]

In this case, the child had died as a result of an overdose of methadone. The Court of Appeal upheld the parents' convictions 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.

2.16 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?'.[23] He described the decision as a miscarriage of justice to all concerned[24] and considered the Court of Appeal's conclusions that both parents were present at the time to be "unconvincing".[25] In his view it constituted a

[17] 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).

[18] (1986) 82 Cr App R 5.

[19] *Ibid*, at p 12.

[20] *Ibid*.

[21] (1987) 85 Cr App R 388.

[22] *Ibid*, at p 393.

[23] (1989) 52 MLR 179.

[24] *Ibid*, at p 191.

[25] *Ibid*, at p 192.

"mighty leap in reasoning"[26] to infer from an admitted involvement in earlier administration of small quantities of a drug that there was a joint enterprise in the administration of the massive fatal dose. He considered that it was "extraordinary"[27] 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

2.17 In *Lane and Lane*,[28] 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*,[29] although the manslaughter convictions were quashed,[30] convictions for cruelty 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.

2.18 In *S and M*[31] 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 of recklessness as to whether the child might be in need of medical treatment or not.

2.19 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:

[26] *Ibid*, at p 193.

[27] *Ibid*.

[28] (1986) 82 Cr App R 5.

[29] (1994) 99 Cr App R 326.

[30] See Law Com No 279 para 1.23.

[31] [1995] Crim LR 486.

> 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.[32]

Using one suspect as a prosecution witness

2.20 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*.[33] 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 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*[34] and including *Aston and Mason*,[35] 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

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

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

34 [1955] 2 QB 497.

35 (1992) 94 Cr App R 180.

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.[36]

2.21 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 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

2.22 The problems considered in this paper were discussed by Professor Griew in his article 'It must have been one of them',[37] and by Professor Glanville Williams in his article 'Which of you did it?'.[38] Both articles were very critical of the decision in *Gibson and Gibson*,[39] and supportive of the decision in *Lane and Lane*.[40] 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

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

[37] [1989] Crim LR 129.

[38] (1989) 52 MLR 179.

[39] (1985) 80 Cr App R 24.

[40] (1986) 82 Cr App R 5.

> 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.[41]

2.23 Professor Griew did not suggest that the rule in *Lane and Lane*[42] 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.[43]

2.24 On the other hand, the *Report of the Royal Commission on Criminal Justice*[44] recognised the difficulties which arise where a crime may have been committed, 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".

2.25 The Royal Commission stated that it had "every sympathy with the public concern over such cases"[45] 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 which was considered by the NSPCC Working Group and upon which we make certain recommendations.

2.26 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.[46] 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.[47] 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.

[41] [1989] Crim LR 129 at p 132–3 (footnotes omitted).

[42] (1986) 82 Cr App R 5.

[43] (1989) 52 MLR 179 at p 199.

[44] (1993) Cm 2263, chapter 4, para 25.

[45] *Ibid*.

[46] Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273.

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

THE EXTENT OF THE PROBLEM

2.27 It was abundantly clear from the responses which we received to the informal consultation paper and to the Consultative Report 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 to the informal consultation paper 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.

The Criminal Bar Association, in its detailed response to the Consultative Report, began explicitly with the statement that "doing nothing is not an option".

2.28 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?".[48] The findings of the Working Group were summarised by the Chair of the Group, Her Honour Judge Isobel Plumstead.

2.29 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

[48] Judge Isobel Plumstead, Papers for the NSPCC "Which of you did it?" Conference in Cambridge, 2 November 2002, Introduction and Background, para 8.

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".[49] 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.

2.30 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.

2.31 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".[50] 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%).[51]

2.32 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.[52] 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.[53]

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

[49] 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.

[50] *Ibid*, para 13.

[51] *Ibid*, para 14.

[52] 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).

[53] *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.[54]

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.[55]

2.34 Research has also been undertaken by a multidisciplinary team from the Cardiff Family Studies Research Centre[56] 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".[57]

2.35 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*[58] 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".[59] 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".[60] We have, of course, acknowledged[61] that in some cases of shaken baby syndrome there is disagreement amongst the medical witnesses as to whether or not the child suffered non-accidental death or serious injury. However, the research found that the problem posed by *Lane and Lane*[62] is not uniquely associated with SBS.[63]

54 *Ibid*, at p 44.

55 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).

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

57 *Ibid*, at p 97.

58 (1986) 82 Cr App R 5.

59 [2003] Crim LR 93 at p 98.

60 *Ibid*.

61 Para 1.20 above.

62 (1986) 82 Cr App R 5.

63 The study referred to the Guardian, "Killing with impunity", September 24 2000, which made reference to the NSPCC research referred to earlier at paras 2.28 and 2.29.

2.36 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 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.

CONCLUSION

2.37 We conclude 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 labelling of the offence which attaches to the conduct or in the severity of the penalties available.

2.38 This is not a situation about which there can be any complacency. In the Consultative Report[64] we considered in detail 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 so that, whilst continuing to secure the right of a defendant to a fair trial, the State may better discharge its obligation 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.

[64] Law Com No 279 Part IV.

PART III
OPTIONS FOR REFORM WHICH WE REJECT

INTRODUCTION

3.1 A number of possible reforms were put forward for consideration by the Commission's Criminal Law Team in the informal consultation paper which was issued in December 2002. Those which are summarised in paragraphs 3.2 – 3.6 and 3.11 below were not supported by the Team but that which is summarised in paragraphs 3.7 – 3.10 was. As a result of the responses which were received to that paper, the Law Commission decided to reject each of them and did not in the Consultative Report seek further to consult on them. The Commission's reasoning was set out at some length in Part V of the Consultative Report. For the most part, respondents to the Consultative Report either did not refer to them, or indicated their agreement with our decisions to reject them. One or two respondents did, however, refer to them and we respond to these responses where we deal with those rejected options. Otherwise we do not repeat the detailed arguments here save to identify what the options were and very briefly to say why we rejected them.

IMPOSING A LEGAL BURDEN ON THE DEFENDANT

3.2 We do not 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 the serious offence which has been committed. The view had been expressed by a few 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 concluded, however, that it would be wrong to convict a person of an offence of such seriousness 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 were 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. We remain of that view.

3.3 This option had been strongly supported by a small number of respondents to the informal consultation document of the Criminal Law Team. In the course of our rejecting that option in the Consultative Report,[1] we had characterised the argument in favour of imposing a legal burden as only working in an acceptable way if, by implication, the jury were to ignore the directions of the judge. We have

[1] Law Com No 279 para 5.19.

been asked, by one of those who supported this option, to make it clear that this was not part of his reasoning. We are happy to do so. Nonetheless, we maintain our view that this is not a reform we should recommend. At its heart it still requires a jury to convict even though they are not sure of guilt, because the defendant has failed to discharge the legal burden upon him or her on the balance of probabilities. This is, in our view, not acceptable.

IMPOSING AN EVIDENTIAL BURDEN ON THE DEFENDANT

3.4 We do not 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. Although this appeared to have some support from those who responded to the informal consultation paper of the Criminal Law Team, upon analysis, that support was in truth support for drawing an inference from the silence of a person who had responsibility for such a child and who failed to give an account for how the child came by its injuries or death. That is an approach which informs our recommendations for evidential and procedural reform with which we deal in Part V below.

COMPULSION TO GIVE AN ACCOUNT

3.5 We did not 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 to providing evidence which could be used in a prosecution would not withstand challenges under the ECHR or the Human Rights Act 1998.[2]

3.6 Essentially our reasoning was that this would be wholly inappropriate for use against a person who might subsequently be a defendant on the footing that no answers from such questioning could be used against him. One respondent[3] suggested that such a measure could be so effective as a means of providing information which could be used by the police in their investigation of the responsibility of that person and others that it would remove the need for any special procedural or evidential rules such as we were minded to recommend. That respondent referred us, by analogy, to the special powers of the Serious Fraud Office (SFO).[4] We asked the SFO about their recent experience of using those special powers. We are grateful to them for having so helpfully responded to our request for information. They indicated that the powers are never, or seldom, used to question someone who is, or who might become, a suspect. Rather they

[2] See Law Com No 279 paras 5.28 – 5.40.

[3] The Criminal Bar Association.

[4] Under s 2 of the Criminal Justice Act 1987.

are only used to interview witnesses who, for whatever reason, might otherwise be unwilling to cooperate. Our conclusion, based on the outcome of that inquiry, is that such a power would be of no use, in this kind of case, as a means of obtaining information from those who were, or might become, suspects or defendants. It would not, therefore, address the problem with which we are contending.

ADMITTING PRE-TRIAL INCRIMINATING STATEMENTS MADE BY ONE DEFENDANT AGAINST ANOTHER

3.7 In its informal consultation paper, the Criminal Law Team had 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, for the purpose of determining 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.

3.8 In the Consultative Report[5] we acknowledged that there was a logical problem with using such a statement for a limited purpose only. Furthermore, our thinking on procedural reform has developed and in the Consultative Report and in this Report we recommend a new procedure in these types of cases, which is described in Part V. There is no place in that procedural reform for such a use of pre-trial statements.

3.9 We also acknowledged that there were serious ECHR difficulties with using a pre-trial statement as part of the prosecution case for the purposes of seeking a conviction in the absence of an opportunity to cross examine the maker of the statement.[6]

3.10 Furthermore, the response of practitioners and the judiciary was largely hostile so that, even were the court to have a discretion to admit a pre-trial statement of a co-defendant without the maker giving evidence, we concluded that it would be rare that it would be admitted.[7] We are not minded to recommend any further change to the law on co-defendants' statements.

REFORMING THE LAW OF MANSLAUGHTER

3.11 We did not recommend that there should be substantive proposals to amend the law of manslaughter to deal with this issue.[8] We gave our detailed reasons for coming to this conclusion and it was one with which the bulk of respondents agreed.

3.12 We are aware that the CPS remains of the view that, in appropriate cases, this common law offence might be further developed to enable a conviction to be achieved in a case in which no one can be convicted for murder, on the basis of

[5] Law Com No 279 para 5.51.

[6] Law Com No 279 paras 5.47 – 5.50.

[7] Law Com No 279 paras 5.52 – 5.54.

[8] Law Com No 279 paras 5.55 – 5.64.

the defendants' gross negligence. That may be so. There is nothing in this Report which would prevent it. It does not seem to us, however, that it is likely to provide a solution on a scale which would preclude the need for the reforms which we recommend in this Report.

PART IV
RECOMMENDATIONS ON PRELIMINARY ISSUES AND ON SUBSTANTIVE OFFENCES

RECOMMENDATIONS ON PRELIMINARY ISSUES

The age of the children to whom the reforms should apply

4.1 In the Consultative Report, we were minded to recommend that the reforms should apply in cases of death of or serious injury to children who are under the age of 16.[1] Our primary reason was to maintain consistency with section 1(1) of the Children and Young Persons Act 1933 ("the 1933 Act"). We acknowledged that the bulk of the children who were the victims of crimes in which the problem we were addressing arose would be substantially younger than that age. Furthermore, one respondent[2] pointed out that the recent changes to procedures for the giving of evidence had made it more possible for young children, who were available and who wished to, to give evidence. Another respondent[3] argued for the age of 18 which is consistent with section 2 of the Children Act 1989 and the UN Convention on the Rights of the Child. Other than these comments there was no opposition to our recommendation. In our view, the interests of internal consistency with section 1(1) of the 1933 Act, with which these provisions will work in tandem, should prevail. We therefore confirm this recommendation.

"Responsibility"

4.2 In the interests of consistency we indicated in the Consultative Report that we were minded to recommend that the reforms should apply to those who were responsible for the child in the same way as for the 1933 Act and, in particular, that the presumptions provided by section 17 of that Act should apply.[4] We were asked by two respondents[5] to confirm that it was our intention that two or more people could have responsibility for the child at one time. We are happy to do so. Other than this there was no adverse comment on this recommendation and we confirm it. For ease of reference we set out sections 1(1) and 17 of the 1933 Act in full in Appendix B.

4.3 In the Consultative Report[6] we had also indicated that we would seek to exclude social workers from criminal liability for our proposed new offence based on negligence, merely by virtue of their being employed by a local authority in whose

[1] Law Com No 279 para 4.34.

[2] The Criminal Sub-Committee of the Council of HM Circuit Judges.

[3] Allan Levy QC.

[4] Law Com No 279 paras 4.40 – 4.55.

[5] Professor Antony Honore, Ms B Anne Meade.

[6] Law Com No 279 para 4.52.

favour there was a care order. One respondent[7] pointed out that other care professionals such as teachers or health workers might also be in need of protection from a wholesale extension of criminal liability based on negligence. In the course of working out how to accommodate this point, we developed the form of offence which is contained in clause 2 of the draft Bill. We explain in detail in Part VI how we envisage it working.

To which offences should the special evidential and procedural rules apply?

4.4 In the Consultative Report we set out the list of offences in respect of which our recommended evidential and procedural reforms would apply.[8] We received very few comments upon this subject. We have, however, in response to one respondent's suggestion[9] added to the list of offences those of administering poison under sections 23 or 24 of the Offences against the Person Act 1861. In addition we have added to the list attempts to commit any of the other listed offences. The provision in the draft Bill is Schedule 2 and we deal with it further by way of commentary in Part VI.

SUBSTANTIVE OFFENCES

An offence of cruelty contributing to death

4.5 We indicated in the Consultative Report that we were minded to recommend a new offence which would operate as an aggravated instance of the present offence of child cruelty under section 1 of the 1933 Act.[10]

4.6 There was widespread support for this recommendation. There was only one respondent which was opposed in principle.[11] It took this view on the footing that the offence focused too much on the happenstance of the child's injuries or death rather than on the level of culpability of the defendant. We accept that the new offence does have this focus. Indeed it is the raison d'etre of the recommendation that where the basic offence has resulted in the death of the child that should be expressly marked both by a specific offence and by an enhanced level of possible sentence. No other respondent expressed this as a ground for objection.

4.7 Some respondents did raise matters of detail concerning the level of maximum sentence and the precise mechanism by which the cruelty of which the defendant was guilty was to be linked to the death of the child. In particular, a number of respondents raised the extent to which this offence might cover the same ground as manslaughter and so be subject to the same difficulties which the application of that offence to this kind of case has raised. We are grateful to these

7 The Criminal Sub-Committee of the Council of HM Circuit Judges.

8 Law Com No 279 paras 4.36 – 4.39.

9 Professor David Ormerod.

10 Law Com No 279 para 7.13.

11 The Criminal Bar Association.

respondents for encouraging us to look closely at these issues. We believe that by so doing they have enabled us to identify more clearly the mechanism of the offence adding to its robustness as expressed in clause 1 of the draft Bill. We explain in Part VI how we see this offence working.

4.8 One respondent[12] questioned whether our approach to the creation of new offences was too timid and proposed a very wide ranging offence. Although he was supported, as a matter of theory, by one other respondent, that other respondent accepted that for the present it represented an unrealistic aspiration. We give our reasons for rejecting this suggestion in Part VI.

A new negligence based offence.

4.9 We put this before respondents as a provisional proposal. It proved to be popular and attracted widespread support. Only one respondent was against it in principle,[13] expressing concern about the use of negligence as a fault basis in the criminal sphere.

4.10 Other respondents expressed concerns about matters of detail such as the maximum sentence, the range of offences against the child which might attract the commission of the offence, the precise configuration of the mental element, the extent to which it should be subjectively or objectively based, and the question whether there should be an evidential burden upon the defendant to raise the defence of "not reasonably practicable". One respondent[14] questioned the need for requiring there to have been an offence committed against the child. That respondent suggested that it should be sufficient that the child had suffered serious harm whether from the commission of a crime or otherwise. We explain in Part VI why we do not accept such an extension to the reach of this offence.

4.11 As with the other new offence we are grateful to respondents for focusing our attention on these elements of the offence. We believe that, as a result, the offence which is contained in clause 2 of the draft Bill is both workable and reasonable. We deal in Part VI with each of these issues.

[12] Mr P R Glazebrook. Mr Glazebrook's response was published in "Insufficient Child Protection" [2003] Crim LR 541.

[13] Allan Levy QC.

[14] The Criminal Bar Association.

PARTV
PROCEDURAL AND EVIDENTIAL REFORMS

INTRODUCTION

5.1 In the Consultative Report, we indicated that we were minded to make four linked recommendations upon which we were consulting. They were as follows.[1]

(1) That:

(a) 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;

(b) 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 (a);

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

(2) That in a trial where, at the end of the prosecution case, the court is satisfied beyond reasonable doubt that:

(a) a child has suffered non-accidental death or serious injury;

(b) 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

(c) 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.

(3) That where:

(a) a child has suffered non-accidental death or serious injury;

(b) 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

[1] Law Com No 279 Part VIII, issues 7, 9, 10 and 11.

(c) a defendant who has responsibility for the welfare of the child does not give evidence;

(d) 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.

(4) 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.

5.2 We have considered carefully the responses to these consultation issues. We have decided to confirm the broad thrust of policy which they reflected. They may be summarised in three propositions as follows:

(1) There should be a statutory recognition that society expects that a person who was responsible for a child when (s)he is the victim of a serious assault or homicide shall, if so requested, provide the police and/or the court with such information as he or she can;

(2) There should be a rule of procedure that where the prosecution can prove that:-

(a) a serious offence has been committed against a child;

(b) the guilty party or parties must be within a known group of persons;

(c) and at least one of the defendants is a person who was responsible for the child,

then the court must postpone the question whether the case is fit to be left to the jury until the end of the defence case;

(3) In such a case, if a defendant who was responsible for the child fails to give evidence[2] then the jury should be able to draw such inferences as appear proper from that failure. It should not be necessary for the jury, before drawing an inference, to be satisfied, that the defendant could be properly convicted on the basis of the other evidence against him, if no such inference were drawn.

[2] Or refuses, without good cause, to answer any question.

5.3 Whilst confirming the essence of what we had been minded to recommend, we have, nonetheless, refined our thinking in order to respond to comments we received. It is our view that this scheme would assist in bringing to justice persons who are guilty of such offences, who would presently be unlikely even to be charged and that convictions which followed the operation of this scheme would be capable of being the result of a fair trial.

5.4 In Part VI we consider in detail how the statutory scheme we propose would work. In the remainder of this Part we address certain of the wider issues which were raised in the course of the consultation.

5.5 These recommendations were the subject of an acute division amongst respondents. Those who opposed these recommendations were in the minority but are important voices in the debate[3] and they produced detailed and thoughtful criticisms which we have considered carefully. We focus on these contributions to the debate. Where we focus on the contribution of one respondent on a particular issue, but where others voiced the same concern, we trust that it will be understood that we are responding to all those who expressed that view even if we do not address their particular formulation of that concern.

THE USE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

5.6 In the Consultative Report we emphasised the extent to which our thinking had been influenced by recent decisions of the European Court of Human Rights. Those decisions appeared to us to indicate that where a child has been killed or seriously injured by a private individual, constituting a breach of the child's fundamental human rights under Articles 2 and 3, then Article 13 required the State to provide a thorough and effective investigation capable of leading to the identification and punishment of those responsible.[4] Furthermore, we were also influenced by the fact that, although the requirement for a fair trial was absolute and could not be affected by the seriousness of the offence involved, decisions of the European Court of Human Rights establish that the 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] Our conclusion was 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] The most detailed responses were from the Criminal Bar Association, Liberty, Justice and Professor David Feldman.

[4] Law Com No 279 paras 4.17 – 4.21 and 4.27 – 4.29.

[5] *Ibid*, paras 4.11 – 4.15.

> (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.[6]

5.7 Our approach to the ECHR was subject to criticism by some respondents.[7] We are grateful to each of these respondents for their careful analysis of the cases and principles to be derived from them. In some instances, however, we disagree with their conclusions. In some instances we believe that we were saying something different from that which they interpreted us as saying and we welcome the opportunity to clarify our position.

5.8 One line of argument was that Articles 2 and 3 are relevant to Article 6 in one way only: if a witness would be seriously at risk of death or really serious harm as a result of giving evidence and being cross examined in the usual way, that may prove a justification for restricting the defendant's right to have witnesses examined at a public hearing as long as adequate safeguards can be provided to ensure the overall fairness of the trial.

5.9 In the light of this, it was argued that our view that:

> [n]onetheless 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.[8]

was wrong in failing to recognise the strictly limited relevance of Articles 2 and 3 and 8 to Article 6. It was said that they are relevant only where *giving evidence* would *itself* endanger those rights. The criticism went on to suggest that what was contemplated by the Consultative Report was "watering down Article 6 protection precisely on the basis of the seriousness of the offence with which a person is charged".[9]

5.10 We believe that the view attributed to us has been overstated. We did not, nor do we, recommend "watering down Article 6 protection" if what is meant by that phrase is that a trial, which is unfair, may be acceptable. What we are recognising is that trials in a variety of different jurisdictions and in different contexts may be fair even though the rules of procedure and evidence may differ. The test is whether the overall trial is fair. We do not believe that to be a controversial proposition. We are satisfied that the proper application of our scheme would result in a fair trial.

6 Law Com No 279 para 4.29.

7 The Criminal Bar Association and Professor David Feldman.

8 Law Com No 279 para 4.15.

9 Professor David Feldman.

5.11 The suggestion, if such it is, that in determining which of one or more fair procedures to adopt the legislature cannot have regard to the secondary obligations of the State under Articles 2 and 3 to provide a thorough and effective investigation capable of leading to the identification and punishment of those responsible, is not one which we accept. The fact that new rules of procedure have been proposed in order to remove a present obstacle to the proper conviction of the guilty must be a legitimate matter for the legislature to consider if the procedure adopted can result in a fair trial.

5.12 Other critics appeared to believe that we were suggesting that the impact of the present rules of procedure and evidence, which prevents such cases being successfully prosecuted, necessarily involves a breach of the human rights of the children who have been killed or seriously injured. We did not go so far (though at least one of our respondents was of the view that we did). Nor did we say that, in such cases, the right of the defendant to a fair trial may be compromised in the interests of a person who is not being called as a witness.

5.13 Our position is that, in considering what rules of procedure and evidence may result in a fair trial, it is legitimate to have regard to the fact that part of the duty which the State owes to a child who has been killed or seriously injured is to establish "a thorough and effective investigation capable of leading to the identification and punishment of those responsible".[10] Thus, if rules of criminal evidence and procedure can be devised which provide the defendant with a fair trial but which, nevertheless, contribute to a more effective investigation leading to the identification and punishment of those responsible, then that is a positive reason to adopt them rather than to adhere to rules which presently constitute a significant bar in the preponderance of such cases either to there being any trial at all, or of the jury in such a trial being permitted to consider the guilt or innocence of those charged with committing serious criminal offences.

5.14 The evidential and procedural recommendations which we make are the outcome of such reasoning. We believe that they are consistent with the provision of a fair trial for the following reasons.

(1) A person may only be convicted by the jury if the jury are sure of his or her guilt.

(2) Such a conviction does not involve the operation of any presumption of guilt, whether legal or evidential.

(3) Further, it does not involve consideration of any evidence which the defendant has no opportunity to test.

(4) The court is under a duty to withdraw the case from the jury wherever, at the end of the evidence, no jury, properly directed, could be sure of guilt.

[10] Z v UK (2002) 34 EHRR 3 at para 109.

(5) Where a defendant, responsible for the child, is minded not to give evidence, the fact that the law expects such a person to provide an account, and the possible consequence of not doing so, will be explained to them before they make their final decision.

(6) That expectation which is expressed in the statutory responsibility is reasonable. The civil law already imposes[11] on witnesses to answer questions even if to do so would incriminate them or their spouse

(7) If the defendant has such a responsibility and is one of a known group one, or some, or all of whom, must have committed the offence or been complicit in it but remains silent a jury will be permitted by the court to draw an adverse inference from the failure of such a person to give evidence only if it would be "proper" to do so. In assessing the significance of the defendant's silence they would have to consider the evidence in the case as a whole and possible reasons for the defendant's silence other than guilt.

5.15 One respondent[12] took issue with what he took to be our stated approach to compliance with the ECHR as expressed in the Consultative Report.[13] He expressed the opinion that it was inappropriate for the Law Commission, as a responsible public body, to propose a change which constitutes a significant risk of incompatibility with a Convention right merely because it holds the view that it "is not thoroughly unreasonable" to describe the change as compatible with the ECHR. He reminded us of the guidance provided for those who have to make the statutory "statement of compatibility"[14] namely that it should only be made if the Minister is "clear that, at a minimum, the balance of argument supports the view that the provisions are compatible".[15] He suggested that we should be wary of recommending that the Government and Parliament "chance their arms" in relation to Convention compatibility without at least providing a balanced view of the degree of risk of incompatibility. He suggested that we adopt at least as demanding a test as that provided for by that guidance. We are mindful of the guidance and are grateful to him for highlighting it. We would not make any recommendation which did not in our view meet this standard.

[11] Section 98 of the Children Act 1989: witnesses are compellable in the civil courts and must answer even if it would incriminate them or a spouse We are grateful to Hale LJ for drawing our attention to the Court of Appeal decision in *Y & K (Children)*[2003] EWCA (Civ) 669 in which the compellability of civil witnesses in such cases was confirmed after some doubt had been previously expressed (Law Com No 279 para 3.41).

[12] Professor David Feldman.

[13] Our approach was, in fact, not that set out in para 4.16 of the Consultative Report, but rather at para 4.29. See para 5.6 above.

[14] Human Rights Act 1998 s 19(1)(a).

[15] Lord Chancellor's Department *Human Rights Act 1998 Guidance for Departments 2nd Ed* para 36.

THE DILEMMA

5.16 Before we turn to the arguments on the substance of our recommendations on evidence and procedure, we think it right to express the acute and perplexing dilemma which lies at the heart of this project and which has, we believe, informed the deeply divided, sincere and impassioned views which consultees have expressed.

5.17 The dilemma may be expressed at its most acute in the following two questions.

(1) Must it be the case that a fair legal system is helpless to convict a parent who has murdered his or her own infant child, where it is clear that one, or other, or both, parents has killed, or is complicit in the killing of the child, merely by the device of each parent refusing to respond to questions about the child's death?

(2) More particularly, must it be the case that recommendations for reforming the rules of procedure and evidence which seek effectively to resolve, or respond to, this conundrum are doomed to failure either because they will be ineffectual in that they do not address the problem of the silent defendant, or will inevitably and unduly impact on the fundamental requirement of a fair trial by bringing the consequences of such silence to bear upon the question of guilt?

5.18 No respondent declared satisfaction with the present state of affairs. Indeed one respondent,[16] which provided a detailed and persuasive critique of our evidential and procedural recommendations, expressed the view that "doing nothing is not an option" whilst rejecting each and every recommendation for change to the rules of procedure or evidence.

5.19 It may well be that the widespread support for the proposed new offences reflected relief on the part of respondents that there was something on offer which could be done to convict abusive or careless parents of an offence which reflected at least something of the underlying breach of the fundamental human rights of the child. We do not doubt that this is a legitimate response. On the other hand we are clear that it is very much a second best response in that it fails to provide an effective means to convict the person(s) of the gravamen of their criminal conduct that is killing the child, or being complicit in it.

5.20 We do not, for a minute, underestimate the difficulties in addressing the dilemma. However, as jurists brought up in the common law tradition, which prides itself on its flexibility in satisfying the requirements of justice, we are concerned that our legal system is currently doing a grave disservice to society and in particular its most vulnerable members. It is presently failing to provide an effective mechanism for bringing to justice those who are responsible for committing grave crimes against children, often their own. The simple expedient of determined silence is seemingly enough to render the system powerless where

[16] The Criminal Bar Association.

the victim is, for obvious reasons, unavailable to give evidence, even where it is known that one or more of a very limited number of suspects must have committed the offence. We think it incumbent on us to look most carefully at possible reforms which would address this dilemma, always recognising the fundamental requirement for a fair trial.

5.21 We are grateful to those who provided us with detailed criticisms of the broad recommendations we were minded to make. We believe that we have, in responding to them, provided a range of safeguards which have the effect that the scheme which is set out in clauses 4 to 8 of the draft Bill is one about which we can, with confidence, state that, in our considered view, the provisions we recommend are compatible with the ECHR.

The statutory responsibility to assist the police and courts

5.22 The first of three linked changes is to establish a statutory responsibility in persons who have responsibility for a child who has been the victim of a serious offence to assist the police and the courts by giving such information as they are able. On its own it attracted little adverse comment as a matter of principle.[17] There were some[18] who thought the concept unduly rarefied or an unnecessary statement of the obvious. The main thrusts of the critical comments we received were along the lines that it would have little effect because there was no criminal sanction attached,[19] or that it would make sections 34 and 35 of the Criminal Justice and Public Order Act 1994 (the 1994 Act) more complex,[20] or that there would be a need to change the Police and Criminal Evidence Act Codes of Practice,[21] or that it would operate unfairly in that it would put grossly unfair pressure on a person to answer and that it extends the concept of responsibility to "a disturbing extent".[22]

5.23 We have taken these comments into account in formulating the draft Bill.[23] We have adopted the policy of changing the 1994 Act scheme to no greater an extent than is necessary. The person's responsibility is limited to giving such information as he or she is able to give.[24] The suspect must be informed that the responsibility exists and be given an explanation of its implications as soon as the statutory conditions are satisfied.[25] It is explicitly provided that the statutory

[17] The exception was the response of JUSTICE.

[18] Such as the Association of Chief Police Officers and JUSTICE.

[19] The Criminal Bar Association.

[20] Allan Levy QC.

[21] The Criminal Bar Association and JUSTICE.

[22] JUSTICE

[23] Clause 4.

[24] Clause 4(4).

[25] Clause 5(1), (2) and (3), and new section 35A(3) of the 1994 Act inserted by clause 8(3) of the draft Bill.

responsibility of a person being interviewed by the police as a suspect does not, in itself, carry with it any obligation to answer questions but that a court or jury may take it into account in considering whether to draw any inference under section 34(2) of the 1994 Act.[26] In this way the operation of section 34 will be only tangentially affected and we now believe that the only changes which will need to be made to the Codes of Practice will be those necessary to give proper effect to the obligation to give the person being interviewed the information and explanation required by the statute.

Postponing the 'half time' submission until after the close of the defence case.

5.24 This is a crucial part of the scheme by which, in these cases, if the prosecution can prove certain matters, the court is prohibited from entertaining, at the close of the prosecution case, a defence application to withdraw the case from the jury. Any such application will be postponed until the close of the defence case. It is a response to the operation of the present rule which requires the court to consider, at the close of the prosecution case, whether there is a case which might be left to the jury where, at that stage, the only persons who could give direct evidence of what happened cannot yet have done so because the only persons who were present at the commission of the crime are those who were involved in its commission and the victim, who is dead or otherwise properly unavailable. Thus, in a case where the prosecution can prove at the conclusion of its case that: a crime was committed against the child; that the person(s) who must be guilty of the crime are within a number of known individuals; and at least one of the defendants had responsibility for the child, the question whether the case may be left to the jury must be postponed until after the conclusion of the defence case. The policy underpinning this recommendation is that, henceforth, in this type of case, the defence will have to decide whether or not to give or call evidence and will not be protected from having to take that decision by the present obligation on the court to consider a submission of no case to answer at the conclusion of the prosecution case.

5.25 We believe that we have identified three currents of criticism.

5.26 The first combines two practical criticisms. The main thrust is that the change would be ineffectual as the defence would either say nothing, thereby leaving the judge in the same position as now, or the defendants would give evidence and would claim to know nothing about the offence and/or blame each other. In that case it is argued that it might be difficult for the judge to conclude that a jury could properly convict, or it might make it highly unlikely that the jury would convict if given the opportunity. In either event there would be no conviction.

5.27 The converse of this argument was that, far from being ineffectual, the change would be dangerous. The judge would be unlikely to withdraw the case from the jury, either because there was conflicting defence evidence which should be

[26] Clause 5(5).

considered by the jury, or because it was permissible for the jury to draw an inference from silence. In such cases, it was argued, there would be a greatly enhanced risk of the jury convicting the innocent in the emotive atmosphere which often surrounds such trials.

5.28 We do not accept either of these criticisms. The changes would not, in our view, be ineffectual. Cases are presently properly left to juries where the defendants blame one another and convictions can and do occur where there is a 'cut throat' defence. In the light of the prospect of an adverse inference being drawn from silence at trial it will by no means be a uniform, or an easy, decision for a defendant to make to decline the opportunity to give evidence. Indeed we anticipate that many such defendants will give evidence and that they and their co-defendant(s) will be judged, inter alia, upon that evidence.

5.29 Nor do we accept that there would be any increase in the risk of wrongful convictions. It is not the aim of our recommendations that convictions *must* follow at all costs. If the jury is not sure of guilt in the light of all the evidence and any inference it may be proper to draw, then there would, rightly, be an acquittal. If the jury could not properly convict then the scheme requires the judge to withdraw the case. We are in no doubt that judges would discharge this function conscientiously. One respondent wrote that he did not consider that the judge's *discretionary* power to ensure fairness would be an adequate protection for strong Article 6 rights. We do not intend that the judge's role should involve discretion. As at present the judge will be under a *duty* to withdraw the case from the jury if a properly directed jury could not reasonably convict.

5.30 The second current of criticism was that, as this change in procedure and the reasoning supporting it is potentially applicable to types of case other than death or serious injury to children, it should be introduced as a general measure rather than as a response to a problem in a particular kind of case.

5.31 One respondent[27] identified the thinking underlying the recommendation as reflecting what may be a valid distinction to draw between:

(1) the majority of cases in which it is unreasonable and unfair to expect a defendant to provide an answer to a non existent prosecution case, and

(2) cases where the defendant(s) is/are the only person/people who may reasonably be expected to be in a position to say what really happened and where it is consequently not unreasonable to hear what they have to say before deciding whether the case should proceed further.

5.32 We are grateful to him for articulating so clearly what in part underlies this recommendation. Allied with it is our belief that a person with responsibility for a child who is the victim of serious non-accidental injury should be responsible for providing such information as he or she can about it. It may or may not be the

[27] Judge Jeremy Roberts QC.

case that the postponement of the consideration by the court whether a case is fit to be left to the jury would be equally appropriate in a wider range of cases. If, as we believe, it is sound in principle and is necessary, we remain of the view would make no sense to delay its implementation merely because it may have more general application.

5.33 The third current calls into question our characterisation of the half time submission as "procedural". This current of criticism is to the effect that one of the incidents of the accusatorial, as opposed to the inquisitorial, system is that the decision whether the case may be left to the jury has to be determined exclusively on the material placed before the court by the prosecution. So, the argument runs, the prosecution accuses the defendant. The defendant should not be obliged to do anything but can require the prosecution to prove its case. If it cannot then the case should fall without the defendant being troubled to decide whether or not to deploy any defence. Our recommendation, it is said, would be inconsistent with this template. It would force the defence to make its deployments without the prosecution first having established "a case to answer" as the concept has developed.

5.34 Our recommendation certainly represents a change in the balance of the trial. It means that the decision whether the case may be left to the jury is determined not only on the material placed before the court by the prosecution but also on the basis of the evidence given or called by the defendant(s) or on the basis of whatever adverse inference it may be proper to draw from the defendant's silence at trial. We contest, however, the additional contentions, which were made on the back of this reasoning, that our recommendation constitutes an infringement of the presumption of innocence contrary to Article 6, or that the focus of the trial has shifted from the question "are we sure that you did it?" to the question "who did it?". We reject the notion that there is a single model of a fair trial any departure from which must inevitably result in an unfair trial.

5.35 As to the first, the position remains that a jury may only convict where it is sure of the defendant's guilt. The defendant does not have to prove or disprove anything. Furthermore, the court is under a duty to withdraw the case from the jury unless a reasonable jury properly directed could convict the defendant. In our view, the presumption of innocence remains intact.

5.36 As to the second, the only question which the jury has to answer is in respect of a specific defendant, and is "are we sure that this defendant is guilty of the offence with which he has been charged?".

5.37 In summary, we remain of the view that postponing the decision whether the case may be left to the jury until after the end of the defence case does not affect substantive rights of the defendant, or the overall fairness of the trial. Insofar as it places upon defendants the burden of taking a decision which otherwise might be spared them, it does no more than remove a tactical advantage which, in these particular cases, operates adventitiously and illogically to their advantage. Insofar as it requires the prosecution to undertake a somewhat different stance at the outset of the trial than is traditional, that is something with which we are confident the prosecution will be able to cope. Most importantly, it will not affect the fairness of the trial.

Drawing an adverse inference from a failure to give evidence at trial

5.38 This is the instrumental recommendation which enables the other two changes to have an effect. It provides for circumstances in which a jury may be permitted to draw an adverse inference against a defendant who had responsibility for the child but who does not give evidence at trial even though the prosecution evidence is not, on its own, such that a jury properly directed could convict that defendant. The statutory statement of responsibility to provide information and the postponement of the decision whether to leave the case to the jury would be ineffectual if the defendants could, at trial, maintain their silence without the possibility of adverse inferences. Were that to be so, the well advised defendant would say nothing and rely on the judge discharging his inevitable duty to withdraw the case from the jury. This would render nugatory the postponement of that decision and would empty of any consequence the statutory responsibility.

5.39 The key issues may be put in this way. If the prosecution can prove that the child was the victim of a serious offence committed by one or more or all of a known group, which includes the defendant who had responsibility for the child, but, omitting any adverse inference from the defendant's failure to give evidence, the jury could not be sure that the defendant was guilty, could the jury, consistently with fairness to that defendant, draw an adverse inference against him from his silence and conclude that he was guilty? If that were possible, what is there to prevent an unsafe conviction?

5.40 There is no dispute but that section 35 of the 1994 Act enables an adverse inference to be drawn from silence at trial in a proper case and that, as a matter of logic, such adverse inference must on occasions be decisive in securing a conviction.

5.41 We are grateful to certain respondents[28] for drawing attention in their response to the fact that, as expressed in the Consultative Report, it appeared that we were recommending that the jury should be free to draw any inference which they saw fit, rather than that they should only be free to draw such inference as it was proper for them to draw. We accept that criticism of the way we expressed ourselves and have sought to ensure in the draft Bill that the power to draw an adverse inference is couched in identical terms to those which appear in sections 34 and 35 of the 1994 Act. Thus, before directing the jury that it may draw such an inference, the judge must first conclude that it would be proper for the jury to do so. This means that the principles which have been developed by the courts in respect of the 1994 Act, save for the one to which we refer below, will also apply in this context.

[28] Liberty and Professor Feldman.

5.42 The only difference between what we recommend and the operation of the 1994 Act is that in our scheme we expressly remove one of the requirements set out in *Cowan*.[29] We recommend that it will not be necessary for the jury to be satisfied, before drawing an adverse inference, that the defendant could properly have been convicted on the basis of the other evidence if no such inference were drawn. We set out in Part VI why that requirement is, in our view, illogical and is unlikely to reflect a realistic view of how juries will approach decision taking in such cases.

5.43 Those who oppose this recommendation do so, principally, on the basis that it would, in their view, breach Article 6. We address that argument in paragraphs 5.46 – 5.49 below.

5.44 Some,[30] however, characterised our position as, on the one hand, acknowledging that the trial would be less than fair but nevertheless being content to accord the defendant a less than fair trial in such a case because of the obligations upon the State under Article 13 to provide an effective investigation of crimes which involved breaches of the child's fundamental human rights under Articles 2 and 3. They, correctly, pointed out that this would be an erroneous approach, in that it would not, as a rule, be a question of balancing the human rights of two participants in the trial - the defendant and child witness. They also correctly pointed out that the obligations under Article 13 are secondary rights, not as strong as the direct right to a fair trial, so that a diminution of the right to a fair trial could not be justified by the need to give effect to the secondary right. Finally they correctly pointed out that the severity of the offence allegedly committed could not be used as a reason to water down the content of the requirements of a fair trial.

5.45 It was not our intention to suggest that we could justify a less than fair trial by virtue either of the seriousness of the offence or by invoking the obligation to the dead or injured child under Article 13. We do, however, maintain that the ECHR is a "living instrument", the meaning of which is being constantly developed by the emerging case law.

Article 6

5.46 In assessing what may be a fair trial we must, of course, pay due regard to the jurisprudence of the European Court of Human Rights. In the Consultative Report we focused, we believe correctly, on the case of *Murray v UK*[31] as the starting point in exploring what might and what might not satisfy that requirement.

[29] [1996] QB 373.

[30] The Criminal Bar Association and Professor Feldman.

[31] (1996) 22 EHRR 29 (see Law Com No 279 para 6.31), followed in *Condron v UK* (2001) 31 EHRR 1 (see Law Com No 279 para 6.32), and later applied in *Beckles v UK* (2003) 36 EHRR 13.

5.47 It is not, we believe, controversial to state that such decisions are not to be closely construed as if they were terms of a statute but are to be approached on the basis that they reveal the principles which underpin the concept of fairness.

5.48 The European Court of Human Rights, in the crucial passage in *Murray* which we cited in the Consultative Report,[32] stressed that whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in all the circumstances of the case. It does not, therefore, seek to impose a "one size fits all" approach. It does, however, stress that the right to remain silent provides the accused with protection against improper compulsion by the authorities which contributes to avoiding miscarriages of justice and securing the aim of Article 6.

5.49 In our view our recommendation would neither constitute improper compulsion on a defendant to give evidence nor be conducive to miscarriages of justice. As to the former, our recommendation provides an incentive but not a compulsion for a defendant with a responsibility for the child to give evidence and the burden of proof remains firmly on the prosecution. We believe it is clear from the terms of the draft Bill[33] that our scheme would not, as was suggested by some respondents, illegitimately transform the State's duties, to investigate and bring offenders to justice, into duties placed on individuals to give an account so as to compromise their right not to incriminate themselves.

5.50 As to whether our recommendations would conduce to miscarriages of justice, it is necessary to consider the position on the one hand if the defendant chooses to give evidence and on the other hand if the defendant chooses not to give evidence.

5.51 If the defendant chooses to give evidence, our system of trial by jury is founded on the belief that juries can generally be relied upon to make a fair and just evaluation of the evidence adduced by the defence as well as by the prosecution. We do not consider that there is a solid basis for supposing that they would be less willing or able to do so in the type of case under consideration than otherwise.

5.52 If the defendant chooses not to give evidence, the questions are whether it could be fair for the jury to draw an adverse inference from his or her failure to do so and whether a jury could be relied upon to approach the matter fairly.

5.53 As to the fairness of permitting the jury to draw an inference, the hurdles which the prosecution must surmount before the scheme applies are onerous. They must establish that a crime has been committed, that the defendant from whose silence at trial an adverse inference may be drawn is a person with responsibility for the child and that they can narrow the field of suspects to a known group of

[32] At para 6.31.

[33] Particularly clauses 5(5) and (6).

individuals. In many cases this will involve narrowing it down to one or both of two.

5.54 We have noted above that the court will, no doubt, wish carefully to consider whether the evidence which narrows the field places the defendant so close to the offence that it is proper for an inference to be drawn and, if so, whether a jury could properly convict. We reject the contention that the court will permit this to occur almost routinely. We also reject, for the reasons upon which we expand in Part VI,[34] the suggestion that a conviction in which an inference plays a part must be "solely or mainly" based on an inference from silence. Equally we reject, as unduly technical and artificial, the contention that the only legitimate meaning of phrases such as "a case to answer" or "a situation which clearly calls for an explanation" is that on the evidence, without any inference being drawn, a jury could convict a particular defendant.

5.55 We consider that a person who is close to the commission of the offence and is responsible for the child, could be expected to give an explanation for their involvement or non involvement such that its absence may constitute an "eloquent silence" from which in the absence of any plausible innocent explanation an adverse inference could properly be drawn. We use the words "could" and "may" because the matter would have to be considered in the context of the evidence in the case.

5.56 Furthermore, and in response to a particular criticism,[35] we wish to make it clear that there is no suggestion that the jury should be required to take the existence of that responsibility into account in deciding whether or not to draw an inference. They will know that there is such a responsibility as they will be aware that the judge has advised the defendant in similar terms as presently under section 35. They may take it into account if they see fit.

5.57 The only significant change from the section 35 regime as it has been applied by the courts, is the removal of the highly technical and artificial approach in *Cowan*[36] to the question what is a situation "which clearly calls for an explanation from [the defendant]"[37] upon which we have already commented and upon which we comment in detail in Part VI.[38]

5.58 As to whether the jury could be relied upon to approach the matter fairly, the judge would have a vital role to perform. He must give the jury a proper direction. He will have to make it clear to the jury that, if they think the defendant may have remained silent for reasons other than guilt, they must acquit. They may only convict if they are sure that the only proper conclusion

34 At paras 6.61-2 and 6.86-7.

35 Of Professor David Feldman.

36 [1996] QB 373.

37 *Murray v UK* (1996) 22 EHRR 29 at para 47.

38 At paras 6.89 – 6.96.

from all the evidence and the defendant's lack of explanation is that the defendant is guilty.

5.59 In addition, the judge must, if asked, consider whether the case is fit to go to the jury. If he is not so persuaded, applying the familiar test, then he must withdraw the case from the jury. In so doing the judge will, no doubt, consider whether the field of suspects has been narrowed to the point that the jury could, properly directed, conclude from the evidence and the adverse inference from silence that they were sure the defendant either killed the child or was complicit in its death. These safeguards are substantial and important. We are gratified that they have been instrumental in persuading some respondents who previously had concerns or reservations to conclude that the scheme does comply with Article 6.[39]

CONCLUSION

5.60 As we indicated at the outset of this section, we are aware that this project has revealed an acute dilemma in these most serious cases. Having undertaken a careful examination of the underlying principles, we feel confident that the recommendations we are making are compatible with the European Convention on Human Rights, in particular Article 6(3).

[39] For example Judge David Radford, the CPS and Professor David Ormerod.

PART VI
COMMENTARY ON THE DRAFT BILL

INTRODUCTION

6.1 In this Part we provide a commentary on the detailed working out of our recommendations in the form of the draft Bill which is annexed to this Report.[1] For each of the main operative clauses, we identify the recommendation giving rise to the clause, then we set out the clause as it appears in the draft Bill and finally we explain, where that is required, the particular way in which the clause is structured or expressed. We are aware that some of the detailed provisions of the draft Bill may have to be changed in due course to mesh with any changes in the law resulting from the passage of the Sexual Offences Bill, the Criminal Justice Bill and the Courts Bill.

CLAUSE 1: CRUELTY CONTRIBUTING TO DEATH

The recommendation:

6.2 This derives from the interim recommendation, which we have confirmed, and which was consultation issue No. 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 (of the Consultative Report).[2] The aggravated form of the offence will attract a maximum penalty of 14 years imprisonment.**

6.3 As we have indicated in Part IV, this recommendation was widely welcomed. The only note of caution reflected a desire that the linkage between the commission of the basic offence of child cruelty and the commission of the aggravated offence be spelled out so as to make clear the distinction between the proposed new offence and that of "gross negligence" or "unlawful act" manslaughter, the use of which is often cited, but seldom tried, as a possible solution to this problem.

6.4 One academic commentator[3] has publicly advocated a wide-ranging offence not limited to those with responsibility for the child. He advocates that it should be

[1] Appendix A.

[2] Law Com No 279.

[3] Mr P R Glazebrook "Insufficient Child Protection" [2003] Crim LR 541.

"an offence for any adult, aware that a child is in danger of being harmed by injury or neglect, to fail to do what he reasonably could to protect her".[4] It appears that this is not intended to be suggested as an offence to be seriously enforced in any systematic way but rather as a tool "to change attitudes to what is, and is not, acceptable conduct"[5] by breaking what he describes as "in certain quarters a culture of silence, of indifference, of the fate of other people's children being 'none of my business'".[6] This is an interesting argument, with potentially far reaching consequences. It was not a proposition which, in principle, any other respondent, save one, voiced.[7] The one who did see merit in it did not view it as a presently realistic option. We do not recommend it. In paragraphs 6.12 – 6.14 below we indicate why it is that, in this limited project, we have not thought it right to address the wide ranging and complex question of whether the criminal law should play a part in making public officials, such as teachers, social workers or the police responsible for monitoring and protecting children from violence in the home. It would, in our view, be unrealistic to go far wider and impose criminal liability for non-intervention on members of the adult population at large. Furthermore, it does not necessarily follow that if criminal liability were to attach to the negligent teacher, social worker or policeman for failure adequately to follow up evidence of misconduct towards a child, liability should also attach to adult members of the public at large. It is unlikely that such a proposal would commend itself to the general public and it would certainly require a wide and specific consultation.

6.5 **Clause 1**

1 Cruelty contributing to death

In the Children and Young Persons Act 1933 (c.12), after section 1 (cruelty to persons under sixteen), insert –

"**1A Cruelty contributing to death**

(1) A person is guilty of an offence if –

(a) he commits an offence under section 1 against a child or young person ("C");

(b) suffering or injury to health of a kind which was likely to be caused to C by the commission of that offence occurs; and

(c) its occurrence results in, or contributes significantly to, C's death.

4 *Ibid*, at p 543.

5 *Ibid*.

6 *Ibid*, at p 542.

7 Professor John Spencer.

(2) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both."

Commentary

6.6 The intention of this draft clause is to state accurately the mechanism by which the basic culpability of the person who commits the offence under section 1 becomes aggravated by the death of the child, including those cases where the blow is struck by a third party. We believe that the clause achieves our aim of making it clear that it is not necessary for a conviction under the proposed new section that the person who is guilty of the basic section 1 offence *causes* the child's death in a sense sufficient to justify a conviction for manslaughter.

6.7 It is sufficient for a conviction under section 1 that the person has, by wilful cruelty or neglect, brought about a state of affairs which is *likely* to cause suffering or injury to health. Cases under section 1 indicate that a person may be liable where the likelihood is that a third party will injure the child. The aggravated offence will be committed where, in addition, such suffering or injury to health as was likely to happen has in fact occurred, and has resulted in or contributed significantly to the child's death. It is the establishment, by this mechanism, of a connection between the person's breach of section 1 and the death of the child which exposes the person to a possibly higher level of sentence and ensures that the label attached to their crime reflects that fatal outcome.

6.8 We have retained the maximum sentence at 14 years. There were a small number of respondents[8] who argued that a discretionary life sentence should be available. For the reasons we gave in the Consultative Report[9] we are of the view that a maximum of 14 years gives the judiciary sufficient "headroom" to reflect the full range of seriousness of the offence whilst differentiating it from manslaughter.

CLAUSES 2 AND 3 AND SCHEDULE 1: FAILURE TO PROTECT A CHILD AND EFFECT OF INTOXICATION

The provisional proposal

6.9 The clauses have arisen out of provisional proposals which we have confirmed and which were consultation issues Nos. 13 and 14:

> **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.**

[8] Judge Gareth Hawkesworth. Ms B Anne Meade expressed the view that the maximum sentence should be at least comparable to manslaughter.

[9] Law Com No 279 para 7.8.

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.

6.10 The arguments in favour of these proposals were developed in paragraphs 7.15 – 7.30 in the Consultative Report. We were pleased to note that they met with widespread approval. Unsurprisingly a number of different views were expressed on matters of detail and we are grateful to those who drew them to our attention. They principally focused on the following issues: the range of persons who should be at risk of liability;[10] whether the test of what was reasonably practicable should be subjective or objective;[11] whether there should be an evidential burden placed on the defendant;[12] what should be the ambit of the "serious harm" the occurrence of which would trigger potential liability for this offence;[13] and the level of maximum sentence.[14] In formulating the clauses we have considered each of these and we believe that we have accommodated as many points made to us as we could. Where there were conflicting voices, such as on level of sentence, we have indicated in the commentary our reasoning for what is in the draft Bill.

6.11 **Clause 2**

2 Failure to protect a child

(1) A person ("R") is guilty of an offence if –

(a) at a time when subsection (3) applies, R is aware or ought to be aware that there is a real risk that an offence specified in Schedule 1 might be committed against a child ("C");

(b) R fails to take such steps as it would be reasonable to expect R to take to prevent the commission of the offence;

(c) an offence specified in Schedule 1 is committed against C; and

(d) the offence is committed in circumstances of the kind that R anticipated or ought to have anticipated.

(2) A person guilty of an offence under this section is liable –

10 Professor David Ormerod.

11 Professor David Ormerod; Allan Levy QC; Office of the Judge Advocate General.

12 Judge Jeremy Roberts QC.

13 Criminal Bar Association.

14 Professor D W Elliott; Thames Valley University Faculty of Health; Mr Anthony Edwards of TV Edwards Solicitors; Criminal Bar Association; Ms B Anne Meade.

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both.

(3) This subsection applies if R –

(a) is at least 16 years old;

(b) has responsibility for C; and

(c) is connected with C.

(4) R is connected with C if –

(a) they live in the same household;

(b) they are related; or

(c) R looks after C under a child care arrangement.

(5) R and C are related if they are relatives within the meaning of Part 4 of the Family Law Act 1996 (c.27).

(6) R looks after C under a child care arrangement if R –

(a) looks after C (whether alone or with other children) under arrangements made with a person who lives in the same household as, or is related to, C; and

(b) does so wholly or mainly in C's home.

(7) It does not matter whether R looks after C for reward or on a regular or occasional basis.

SCHEDULE 1

SPECIFIED OFFENCES FOR PURPOSES OF SECTION 2

The following are the specified offences for the purposes of section 2 –

(a) murder,

(b) manslaughter,

(c) an offence under section 18 or 20 of the Offences against the Person Act 1861 (c.100) (wounding and causing grievous bodily harm),

(d) an offence under section 23 or 24 of that Act (administering poison),

(e) an offence under section 47 of that Act (assault occasioning actual bodily harm),

(f) an offence under section 1 of the Sexual Offences Act 1956 (c.69) (rape),

(g) an offence under section 14 or 15 of that Act (indecent assault),

(h) attempting to commit any such offence.

Commentary

The range of those potentially liable

6.12 In the Consultative Report we devoted a section within Part IV, which set out our overall approach, to the question: who has responsibility for the child in this context?[15] Our intended approach was to adopt the statutory formulation which is contained in section 17 of the Children and Young Person's Act 1933. This section sets out the circumstances which create a presumption that a person has responsibility for the child. One of those situations is that a person is presumed to be responsible for the child within the meaning of the Act if he or she "has care of him".[16] In putting forward for consultation an offence which would be based on negligence and which, prima facie, applied to all those who had care of the child, we were concerned that it might be apt to catch those who are employed by social services authorities in whose favour there was a care order concerning the child. We did not wish those who were so employed to be at risk merely because of that formal relationship. Thus we indicated that "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".[17]

6.13 There was no opposition to this approach.[18] On the contrary, one significant group of respondents[19] indicated that our concern to exclude persons from potential criminal liability merely by reason of a formal relationship of employment with a public service provider should be extended to those engaged in education and health care. We could see the good sense of this suggestion. We therefore began to try to construct a series of exemptions to protect persons performing such roles. We quickly came to the conclusion that, as an exercise in

15 Law Com No 279 paras 4.40 – 4.55.

16 Children and Young Person's Act 1933 s 17(1)(b).

17 Law Com No 279 para 4.55.

18 Save insofar as it was implicit in the views of Mr P R Glazebrook, see para 6.4 above.

19 The Criminal Sub-Committee of the Council of HM Circuit Judges.

drafting, this approach was complicated and cumbersome and we abandoned it as an unsatisfactory way forward.

6.14 This difficulty forced us to consider the matter from another angle. We tried to return to what it was that we were trying to achieve by this offence. We reminded ourselves that our project was to address the specific problem of how to make appropriate provision in the criminal law to identify and punish those who are guilty of, or complicit in, violence against children within the domestic context. This important, but limited, project is neither the occasion nor the vehicle for considering the far wider question of what role, if any, the criminal law may play in making public authorities and their employees properly responsible for monitoring children and protecting them from violence inflicted upon them within the domestic context. This is a major problem which has been the subject of many in-depth studies which have arisen out of specific cases and which have sought to draw lessons from them. It would be both arrogant and futile for us to be tempted, in this limited exercise, to venture into this wider area.

6.15 Accordingly, we concluded that a more fruitful approach would be to construct an offence which identified to whom it was to apply rather than to create a wide ranging offence with an elaborate and clumsy list of exceptions. We identified those whom we wished to expose to risk of liability for this offence as falling within the following categories. First, we require that the person be responsible for the child at the relevant time. We have expressly incorporated the 1933 Act approach to who has responsibility for the child.[20] Second, and additionally, we require the person to be *connected to* the child in any one of three ways: living in the same household, being a relative, or being responsible for the child under a child care arrangement.

6.16 The first possible form of connection, living in the same household, is a well known concept in other statutory contexts and, we believe, should cause no problem. We are aware that the concept of living in the same household is used in Part IV of the Family Law Act 1996[21] for the purpose of identifying who is to be an "associated person".[22] The phrase "living in the same household" is qualified in that statute by the proviso that it is "otherwise than merely by reason of one of

[20] In clause 10 (Interpretation), subsection (3) provides that section 17 of the 1933 Act (persons presumed to have responsibility for a child) applies for the purposes of this Act as it applies for the purposes of that Act and subsection (2) provides that "The 1933 Act" means the Children and Young Persons Act 1933.

[21] Based on Family Law: Domestic Violence and Occupation of the Family Home (1992) Law Com No 207.

[22] The Government proposes to amend the "associated person" criterion in the Family Law Act 1996 to provide same sex couples who are cohabiting with the same level of protection as cohabiting heterosexual couples and has indicated that it welcomes views on amending that concept to include relationships where the parties have never lived together. (Safety and Justice Cm 5847, June 2003 para 45). In our view it is unlikely that any such amendments would adversely affect our approach to defining who is "connected to" the child for the purpose of this offence.

them being the other's employee, tenant, lodger or boarder".[23] We wondered whether we might limit this concept in a similar way for the purposes of this offence. We concluded, however, that as the persons who may be subject to this provision must in any event be responsible for the child as defined by the 1933 Act, there is no need further to limit it. That additional requirement will exclude the vast majority of those who live in the same household as the child by virtue merely of falling within one of these categories. If a person within one of these categories *is* responsible for the child at the material time, as well as living in the same household, then we can see no good reason to exclude them from potential criminal liability.

6.17 The category of being related to the child is, in the draft Bill, to be determined in accordance with Part IV of the Family Law Act 1996.[24] This is a wide ranging definition and it applies to degrees of consanguinity based on non marital as well as on marital status. The apparent width of the category is mitigated by the requirement that the person was, at a material time, responsible for the child.

6.18 The third category of connection is designed to include those who, by arrangement with a person who falls within one of the other two categories, and whether or not for reward, care for the child, wholly or mainly in the child's own home. Children are cared for by others in a variety of settings and we considered several options before deciding on that contained in subsection (6). We have defined a child care arrangement in that subsection as one in which the defendant looks after the child, whether alone or with other children, under arrangements made with a person who lives in the same household as, or is related to, the child and does so wholly or mainly in the child's home. Our intention is that baby sitters and nannies who care for the child in the child's home should be potentially liable for the offence, but that other persons caring for children, for example, a childminder working in his or her own home or a nursery assistant should not. We did consider other possible definitions. They included drawing the dividing line, by following more closely the distinctions drawn in the Children Act 1989 between those who are and are not required to register as childminders. We also considered expanding the definition of child care arrangement so as to include childminders. Bearing in mind our wish to limit this new offence to the purely domestic context and to avoid straying into imposing criminal liability upon those who are involved in child care within the

[23] Family Law Act 1996 s 62(3)(c).

[24] Section 63 of the Family Law Act provides that 'relative' in relation to a person, means -

(a) the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson or granddaughter of that person or of that person's spouse or former spouse, or

(b) the brother, sister, uncle, aunt, niece, or nephew (whether of the full blood or the half blood or affinity) of that person or of that person's spouse or former spouse,

and includes, in relation to a person who is living or has lived with another person as husband and wife, any person who would fall within paragraph (a) or (b) if the parties were married to each other.

public domain we believe that subsection (6) draws the line in the correct place. It provides a test which is simple to express and to apply.

Does exposure to criminal liability cease with the cessation of responsibility or connection?

6.19 The clause fixes a person with liability for failing to protect the child even if the offence specified in Schedule 1 ("the specified offence") is committed at a time after that person's responsibility or connection has ceased, provided that the awareness of the risk that a specified offence might be committed against the child arose at a time when he or she had responsibility for the child. Thus, if a person has responsibility, is connected to the child, and is aware, or ought to be aware, that there is a real risk that a specified offence will be committed against the child after he or she ceases to have responsibility by handing over the child to others, then that person may, nonetheless, be guilty of the offence in clause 2 if he or she fails to take the steps he or she reasonably could to prevent the commission of the specified offence. Of course, the more remote in time or circumstances the commission of the specified offence from the termination of the person's responsibility the less likely the chance of a prosecution let alone a conviction. Subsection (1)(d) specifically requires the offence to be committed in circumstances of the kind that the person anticipated or ought to have anticipated and affords a further safeguard against an inappropriate prosecution or conviction. Nonetheless we see great importance in making it clear that a person who has responsibility and has a connection with the child should not be able, with impunity, to expose the child to an anticipated abusive situation simply because the arrangement or the visit has come to an end. We believe that it is proper that such a person should be under an obligation to take reasonable steps to avoid further abuse. Depending on the circumstances, this may amount to no more than alerting the social services or the police or the health services to what they have observed or been told.

The circumstances in which liability might arise

6.20 There is a fundamentally important distinction which we are acutely aware we must identify and provide for. It is between those who are careless with the safety of the child for whom they are responsible to the point that they deserve to be punished when that child is harmed by the commission of an offence and those whom, though perhaps not as careful as a counsel of perfection might require, it would be utterly wrong to make subject to criminal culpability on top of the personal catastrophe which they have suffered.

6.21 We have, therefore, sought to establish a relatively high level of risk which must arise before the person responsible is exposed to criminal liability if they fail to have due regard to the protection of the child.

6.22 First we require that there must be "a real risk". It will not be sufficient that there is a mere possibility that the child may be the victim of a serious offence. It would be grotesque were grieving parents even to be at notional risk of a criminal prosecution where their child has been abducted and killed, or raped, by a stranger (a thankfully still remote possibility) merely because they had allowed the child to play out of their sight. The requirement of "real risk" would, we believe, safeguard against that. We are fortified in this belief by the way section 31 has been interpreted. The section states that one of the conditions for the making of a care or supervision order is that the child is "likely" to suffer significant harm.[25] In the leading case on section 31 the speech delivering the majority opinion equated "likely" with "real risk" and equated "real risk" with one "that ought not to be ignored".[26] It is right to point out that in that case the statutory threshold was described as being "comparatively low".[27] We have given the matter anxious consideration. Other formulations which we considered such as "serious likelihood" or "serious risk" might be thought to import a higher threshold. In our view, however, a test which reflects a possibility "that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case"[28] meets the requirement of the case.

6.23 Second, the risk must be one of which the person is either aware or ought to be aware. This is not a purely subjective requirement. It would, in our view, be odd and wrong if a person, on the one hand, could be criminally liable where they were sufficiently concerned for the welfare of the child to be aware of a real risk but were careless about doing what they reasonably could to prevent it materialising but, on the other hand, could not be liable if they were so careless of the child's safety that they did not even think there was a risk when they ought to. On the other hand the test does not refer to that of which "a reasonable person" would be aware. It is what the person him or herself "ought to have been aware of" which will determine whether they are potentially culpable.

6.24 Third, their awareness must be of the commission of one of the offences set out in the Schedule. One respondent[29] questioned the need for any link to a specific offence and thought it would suffice if the child would be at risk of any serious harm which occurred. In our view this would be to extend the reach of this serious criminal offence far too wide. It would impose criminal liability based on negligence on the parent whose child suffered from a serious accident due to their lack of attention whilst being distracted. At the moment this type of situation is governed by the exacting requirements of gross negligence manslaughter and of child neglect based on wilful neglect. There is, so far as we are aware, no particular perception of a problem with this required fault basis where the child has suffered an accident. The difficulty is where the child is the victim of deliberately inflicted harm. As there was no other suggestion that the offence be cast so wide we do not recommend it.

25 Children Act 1989 s 31(2)(a).

26 *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 Lord Nicholls at p 584 G.

27 *Ibid*, at p 592 G.

28 *Ibid*, at p 585 F.

29 The Criminal Bar Association.

6.25 We have altered the Schedule of offences from that which we suggested in the Consultative Report by the addition of three offences. The first is assault occasioning actual bodily harm. Whilst it might be thought that this is not the most serious of offences, as two of our respondents[30] correctly pointed out, in the context of child abuse or bullying it may often be a matter of chance whether an assault results in actual bodily harm, or grievous bodily harm, or wounding and it does not truly represent a watershed of seriousness which should be the basis for an important legal distinction. Were it to be the dividing line there would be ample opportunity for lengthy and unmeritorious legal and factual disputes reflecting no real point of difference.

6.26 The second and third additional offences we have included are the offences of poisoning. This will be useful where the domestic context is one where there is a practice of drug taking which might affect the child.

6.27 Fourth, we have added a requirement that the offence be committed in circumstances of the kind that the person responsible anticipated or ought to have anticipated. This will provide protection in cases in which the person responsible ought to have anticipated, for example, an assault by an abusive separated parent to whom the child is sent on an errand but where, in fact, the child is assaulted in the street on his way by neighbourhood bullies about whom there is no reason to suppose the responsible person should have been aware. In those circumstances the responsible person should not be exposed to the risk of a criminal prosecution. We are concerned that the person responsible should be at risk for those things of which he or she was aware, or ought to have been aware, and which have come about. We do not believe that such a person should be liable where what occurred was the commission of the same category of offence but where its commission was not, nor could have been, reasonably foreseen. The offence requires, therefore, that the circumstances are of the kind which the responsible person anticipated or ought to have done.

The duty of care and the burden of proof

6.28 Although we have taken as a model for the principles underlying this offence the offences created under the Health and Safety at Work etc. Act 1974, we have not copied it slavishly. The first difference is that we have drafted in such a way that, though the duty is an objective one measuring the responsible person's conduct or omission against a standard of reasonableness, the test is what would have been reasonable for that person. We have not incorporated the standard to be expected of a reasonable person. This is in accordance with the views of those respondents who expressed a view on this issue. We address the separate question of intoxication below.

6.29 The second way in which the offence differs from the Health and Safety at Work etc. Act offences is that it does not impose any burden on the defendant to raise, in evidence, the issue of reasonable practicability. On the contrary it remains for

[30] Professor D W Elliott and Professor David Ormerod.

the prosecution to prove to the criminal standard that the defendant failed to take the steps it would have been reasonable to expect him or her to take. One respondent[31] argued forcefully that placing an evidential burden on the defendant was necessary for the offence to work as he felt that it would be a difficult matter for the prosecution to establish, to the requisite standard, what were the reasonably practicable steps available to the defendant which were not taken. It may be a difficult task for the prosecution, but a balance has to be struck. It must be remembered that such a prosecution will be brought only when, as the jury will know, the child will have suffered harm. It is easy to judge with hindsight and we think that the risk of a jury doing so (against which a judge would no doubt warn them) would be enhanced if an evidential burden were placed on the defendant. A defendant ought to be convicted only where the jury is sure that any reasonable person in the defendant's position would have taken action and that should be for the prosecution to prove. Whilst we can see that it might not always be straightforward for the prosecution, we believe that for the most part in the commonplace situations in which offences are committed against children it will be a matter of obvious common sense to identify what it was reasonable to expect the responsible person to do.

6.30 In any event, there are a number of important differences between this kind of case and offences under the health and safety at work legislation, each of which militates against imposing an evidential burden on the defendant. First, this offence will carry a significant term of imprisonment, not merely a financial penalty. Second the defendant will be an, often inadequate, individual with few material or mental resources. The defendant in the health and safety at work regime will be a business carrying on an undertaking. It is reasonable to expect a business to bring resources to bear in order to demonstrate what was and was not reasonable to expect of them. Third, in the health and safety context, the social policy underlying the offence requires that the offence should be regarded as proved by the prosecution establishing that a person sustained harm in the context of the defendant's undertaking. In those circumstances it is not unfair to impose a legal, let alone an evidential, burden on a defendant to show that what has been proved was not avoidable by the taking of reasonably practicable precautions.[32] In our case the social policy underlying the offence is that the offence is only complete once the prosecution has shown the requisite degree of fault on the part of the defendant. It is, therefore, by no means obvious that the defendant should bear even an evidential burden and we do not think that he or she should.

Sentence

6.31 There were a number of different views on this, ranging from support for a maximum sentence of 2 years, through 5 years, to support for the maximum of 7 years upon which we were consulting. We remain of the view that 7 years is

[31] Judge Jeremy Roberts QC.

[32] See *Davies v HSE* [2003] IRLR 170.

appropriate. It must be remembered that although the offence will potentially be committed in the context of an offence of actual bodily harm being committed, which has a statutory maximum sentence of 5 years, it may also be committed where the offence which is committed is murder. Thus the maximum has to be appropriate to a wide range of offending up to the most serious. In our view a maximum sentence of 7 years enables the court to reflect this full range of offences. We are in little doubt that, as a matter of correct sentencing principles, sentencers will have to have regard to the maximum sentence for the substantive offence which has been committed when sentencing for this offence.

6.32 **Clause 3**

3 Effect of intoxication

(1) A person's voluntary intoxication is to be disregarded in determining –

(a) for the purposes of section 2(1)(a), whether he ought to be aware of a risk; and

(b) for the purposes of section 2(1)(b), what steps it would be reasonable to expect him to take.

(2) A person's intoxication is voluntary if he takes an intoxicant, or allows an intoxicant to be administered to him –

(a) knowing that it is or may be an intoxicant; and

(b) otherwise than in accordance with medical advice.

(3) "Intoxicant" means alcohol, drugs or anything else which may impair awareness.

(4) A person's intoxication is to be taken to be voluntary unless sufficient evidence is adduced to raise an issue with respect to whether it was voluntary.

(5) Where sufficient evidence is so adduced, the court is to assume that his intoxication was not voluntary unless the prosecution prove beyond reasonable doubt that it was.

Commentary

6.33 Clause 3 specifically excludes voluntary intoxication from consideration when the questions of the defendant's awareness of risk, or the reasonableness of steps he or she could be expected to take, are being considered. Thus, whilst these tests have elements of both objectivity and subjectivity, this provision prevents the defendant from taking advantage of his or her own voluntary intoxication (whether through drink, drugs or anything else) in the jury's assessment of what it was reasonable for him or her to be aware of, or to do.

6.34 On this issue there is an evidential burden on the defendant to displace the presumption of voluntariness. Once displaced, the burden on the prosecution of disproving involuntariness is to do so beyond reasonable doubt.

CLAUSES 4 TO 6: THE STATUTORY RESPONSIBILITY, INVESTIGATIONS BY POLICE AND RESPONSIBILITY OF WITNESS IN CRIMINAL PROCEEDINGS

The recommendations

6.35 These clauses derive from the interim recommendations, which we confirm, and which were consultation issues Nos. 7 and 8:

> **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) 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.**
>
> **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.**

6.36 There was little opposition to this recommendation. A number of respondents questioned whether a statutory statement would have any real effect.[33] Even on its own, however, it was said by one academic commentator to have "valuable symbolic significance".[34] Only one of our respondents suggested that this recommendation would flout the requirements of the European Convention on Human Rights being, it was said, akin to a reversal of the burden of proof in cases where the person responsible was not present and so could not give an account of what happened.[35] In our view this concern fails to give any, or any due, weight to the fact that the responsibility is to give such account *as they can*. Thus, if they were not present and are unaware of what occurred then they can discharge their responsibility by giving an account of where they were and why it

[33] Judge Jeremy Roberts QC, the Association of Chief Police Officers, the Criminal Bar Association.

[34] Professor David Ormerod.

[35] JUSTICE.

is that they do not know what happened. It is the failure to do even that, particularly at trial, which may have adverse consequences for that person.

6.37 **Clause 4**

4 The statutory responsibility

(1) This section applies if a serious offence has been committed against a child or there are reasonable grounds for suspecting that such an offence has been committed.

(2) Any person who had responsibility for the child at the relevant time also has the responsibility imposed by this section ("the statutory responsibility").

(3) "The relevant time" means –

(a) the time when the offence was committed (if known); or

(b) any time during the period within which the offence could have been committed.

(4) The statutory responsibility is responsibility for assisting –

(a) the police in any investigation of the offence, and

(b) the court in any proceedings in respect of the offence,

by providing as much information as the person is able to give about whether and, if so, by whom and in what circumstances the offence was committed.

6.38 **Clause 5**

5 Investigations by the police

(1) This section applies if a constable –

(a) is investigating a serious offence against a child; and

(b) reasonably suspects that a person whom he is questioning in connection with the offence ("A") is subject to the statutory responsibility in relation to the offence.

(2) If A is being questioned under caution, the constable must inform A of his suspicion –

(a) when he cautions A; or

(b) as soon as he forms that suspicion (if later).

(3) When giving that information, the constable must explain –

(a) the nature of the statutory responsibility; and

(b) the effect of subsections (5) and (6).

(4) If A is not being questioned under caution, the constable may nevertheless give A –

(a) the information mentioned in subsection (2); and

(b) an explanation of the nature of the statutory responsibility and the effect of subsection (5).

(5) A is not obliged to answer a question put to him by a constable investigating an offence merely because he is, or may be, subject to the statutory responsibility in relation to the offence.

(6) But if section 34(2) of the Criminal Justice and Public Order Act 1994 (c.33) (circumstances in which inferences may be drawn from failure to mention facts) applies in relation to a failure by A to mention any fact, a court, judge or jury may, in deciding whether it is proper to draw an inference under that provision, take into account any evidence that A was given the information and explanations mentioned in subsections (2) and (3).

6.39 **Clause 6**

6 Responsibility of witness in criminal proceedings

(1) This section applies if a person ("W") –

(a) is a witness in criminal proceedings for a serious offence against a child; but

(b) is not a person charged with an offence in those proceedings.

(2) If the court is of the opinion that W is subject to the statutory responsibility in relation to the offence, it may –

(a) inform W of its opinion; and

(b) explain to W the nature of that responsibility and the effect of this section.

(3) If the court acts under subsection (2), it may take into account that W was given that information and explanation in determining –

(a) whether W's behaviour as a witness has amounted to contempt of court; and

(b) if it has, what punishment to impose.

(4) This section does not –

(a) oblige W to answer any question which W is entitled to refuse to answer as a result of any enactment or on the ground of privilege; or

(b) affect the court's power, in the exercise of its general discretion, to excuse a witness from answering a question.

Commentary

6.40 These three clauses describe respectively (i) the nature of the statutory responsibility placed upon a person who is responsible for the child to give such account as they can concerning the commission of a serious offence against the child at a time when they were responsible for her, (ii) the obligations upon the police when investigating such an offence to draw this responsibility to the attention of such a person and the way in which that responsibility impacts on section 34 of the Criminal Justice and Public Order Act 1994 and (iii) the ways in which that responsibility operates in respect of a person who is a witness but not accused in criminal proceedings in respect of such an offence.

6.41 Clause 4(1) has the effect that the statutory responsibility arises both where a serious offence is committed and where it is reasonably suspected that it has been committed. This is appropriate as we are concerned with the investigative stage before matters may have become clear.

6.42 Subsection (2) provides that the statutory responsibility to give an account is co-extensive with responsibility for the child at the relevant time.

6.43 Subsection (3) defines the relevant time by reference to when the offence was, or could have been, committed. The latter caters for the position where the exact time at which the offence was committed is not known but the time frame within which it could have been committed is.

6.44 Subsection (4) states the nature of the statutory responsibility. It is a responsibility which is owed both to the police who are investigating the offence and to the court in any proceedings in respect of the offence. The responsibility is to provide whatever information the person is able to give on the questions whether any offence was committed and, if so, by whom and in what circumstances. Thus, if the person was not present and has no knowledge of what happened he or she has a responsibility to provide that information. If the person does so then he or she has discharged her responsibility. If he or she says nothing then the responsibility has not been discharged.

6.45 Clause 5 sets out the obligations placed upon a constable when he or she is investigating such an offence and reasonably suspects that the person whom he or she wishes to question in connection with the offence is subject to the statutory responsibility.

6.46 Subsection (2) imposes an obligation upon the constable to warn the person being questioned when he or she is cautioned of his or her suspicion that he or she is a person with the statutory responsibility. It also provides for the constable to warn the person as soon as the suspicion is formed, if that only arises in the course of the questioning.

6.47 Subsections (3), (5) and (6) require the constable, when giving the warning, to explain the nature of the statutory responsibility, to emphasise that the person is under no obligation to answer any question but to warn him or her that a jury may take into account that he or she was given this information when deciding whether to draw any adverse inference in the event of a failure to mention facts which are subsequently relied upon by that person.

6.48 Subsection (4) applies where the constable intends to question a person but not under caution. It gives the constable the power but does not impose a duty to give the warning and the explanation.

6.49 Clause 6 concerns the responsibility of a person who is a witness, but not a defendant, in relevant criminal proceedings.

6.50 Subsection (2) is designed to apply in circumstances where a person who is subject to the statutory responsibility is a witness and is proving to be recalcitrant or otherwise reluctant to give evidence. It gives the court certain additional powers to enable it to deal with such a person. Where the court is of the opinion that the witness has such a responsibility, subsection (2) gives the court the option of explaining to the witness the nature of the responsibility and the powers given to the court under the clause.

6.51 Those powers are set out in subsection (3) and enable the court to take the statutory responsibility into account in determining whether the witness is in contempt of court and if so what punishment to impose.

6.52 Subsection (4) makes it clear that the statutory responsibility does not impose any new obligation to answer questions nor does it remove the power of the court to excuse a witness from answering any question.

6.53 As we anticipated in the Consultative Report,[36] the Codes of Practice regulating the conduct of interviews will have to be amended to cater for these changes. In particular, the form of the caution in these cases will have to change. The impact of this part of the Bill on the operation of section 34 of the 1994 Act will be to provide that the jury may take into account the fact that the person was given the information and explanation about the statutory responsibility when determining whether it would be proper to draw any inference from the failure to mention a fact which is relied on at trial. In the light of this limited impact upon the operation of section 34, it may be that the changes to the Codes of Practice will be less extensive than might otherwise be the case.

[36] Law Com No 279 para 6.11.

6.54 One of our practitioner respondents[37] pointed out that in this kind of case it will be even more important that each of the persons who may be interviewed as a suspect, and who has responsibility for the child, should have independent legal advice as the potential for the legal adviser to have a conflict of interest if asked to act for more than one suspect is clear and potentially damaging. We agree. This is a matter which it may be useful to consider putting into the Codes as something for the police to ask a suspect to consider if another suspect already has legal representation and he or she asks for the same solicitor.

CLAUSE 7: SPECIAL PROCEDURE DURING TRIAL

The recommendation:

6.55 This clause derives from our interim recommendation, which we have decided to confirm, and which was consultation issue No. 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.**

6.56 This is one of the two central recommendations in our procedural and evidential scheme and was the subject of both support and opposition. In Part V we explain why we have decided to confirm them. In this Part we explain how they will operate in practice so as to take into account certain of the concerns which have been expressed.

6.57 **Clause 7**

7 Special procedure during trial

(1) This section applies if –

(a) a person is, or two or more persons are, charged with a serious offence against a child; and

(b) at the conclusion of the evidence for the prosecution, it has been proved to the court that three conditions are met.

[37] Mr Anthony Edwards of TV Edwards Solicitors.

(2) The first condition is that the offence charged or any alternative offence has been committed (but it is not necessary for it to have been proved which of those offences was committed).

(3) The second is that –

(a) the number of persons who could have committed the offence charged or any alternative offence is known; and

(b) those persons can be described, whether by reference to their names, their personal characteristics or their relationship to one another or to other persons.

(4) The third is that –

(a) if there is only one accused, he is subject to the statutory responsibility in relation to the offence charged; or

(b) if there are two or more accused, at least one of them is subject to that responsibility in relation to the offence charged.

(5) If the court is satisfied, in respect of the accused, or an accused, that he could not have committed the offence charged or any alternative offence –

(a) the court must acquit him of the offence charged or direct his acquittal; and

(b) he may not be convicted of any alternative offence.

(6) Subsection (7) applies if, after the court has acted under subsection (5) –

(a) one or more persons remain accused of the offence charged; and

(b) the third condition continues to be met.

(7) A submission that the accused, or an accused, does not have a case to answer in relation to the offence charged or an alternative offence may not be made at any time before the conclusion of the evidence for the accused or all of the accused.

(8) If the court considers at the conclusion of the evidence for the accused, or all the accused, that no court or no jury properly directed could properly convict the accused, or an accused, of the offence charged –

(a) the court must acquit him of that offence or direct his acquittal; and

(b) if the court is of the same opinion in relation to an alternative offence, he may not be convicted of that offence.

(9) This section does not affect –

(a) any power a court may have to acquit or direct the acquittal of an accused otherwise than on a submission made on his behalf; or

(b) any power a court may have to discharge a jury or otherwise prevent a trial continuing.

(10) "Alternative offence", in relation to an offence charged, means any other offence of which the accused could lawfully be convicted on that charge.

Commentary

6.58 This clause sets out the mechanism by which we intend that the effects of *Lane v Lane*[38] may be avoided. Subsection (1) provides that the clause applies to cases where a serious offence against a child is charged and at the conclusion of the prosecution case three conditions have been met. The test we have adopted for meeting these conditions is that these matters have been proved to the court. One respondent in particular[39] focused on this issue and thought that the test ought to be the same as where the question is whether a case proceeds beyond "half time" i.e. that a jury could, upon being properly directed, find that the conditions had been met. We are of the view this misstates the nature of the exercise. These conditions are the trigger to the operation of a special procedure which will, amongst other things, deny the defendant the facility of seeking to have the case dismissed at the close of the prosecution case. Of the matters which have to be proved, only the first constitutes something which has to be proved by the prosecution in order for the jury to convict. The other two are matters which may or may not be relevant to that consideration but are not elements in the offence. Thus it would, in our view, be artificial to require the judge to consider the propriety of a prospective decision of the jury which the jury will never have to make. The issue whether the conditions are fulfilled is for the judge to determine and so it is his state of mind which is paramount.

6.59 We have used the expression "proved to the court" to mark that the matter has to be proved to the criminal standard on the evidence available at the close of the prosecution case. The fact that at the conclusion of the prosecution case the judge is sure that the conditions have been met, does not preclude the issues being raised subsequently, on the basis of the then state of the evidence, for the different purposes which are relevant at that stage. It does not preclude the defence, in the course of its own case, calling evidence or arguing subsequently on the basis of the then evidence that the child was not killed, but died accidentally, or that the defendant did not have responsibility for the child. Those arguments may be deployed by the defence for the purpose of making a

[38] (1986) 82 Cr App R 5. Where the prosecution cannot establish a prima facie case against a defendant the court is obliged to dismiss the case at that stage even though it must have been one of the two defendants and neither has given any explanation.

[39] Ms Laura Hoyano.

submission at the conclusion of the defence case that the case ought not to be left to the jury and/or for the purpose of arguing that it would not be proper for the jury to be permitted to draw an adverse inference from a failure to give evidence at trial. If the case were left to the jury, these issues would be left to be determined by them on the whole of the evidence.

6.60 Subsection (2) sets out the first condition. It has to be proved so that the judge is sure that the offence charged, or any alternative offence, has been committed.

6.61 Subsection (3) sets out the second condition. It requires the prosecution to prove that the case is one in which there is a closed group of persons one, or some, or all of whom must have committed the offence. This is a crucial provision for the operation of the scheme. It imposes the obligation on the prosecution to narrow the field of suspects so that they can all be described either by name, or by personal characteristics, or by their relationships. It is a substantial additional hurdle. The special procedure will not apply where the question for the court is "are we sure it was the defendant, chosen from the whole world, who did it". The procedure only applies where the question is "are we sure that the defendant was the perpetrator from a field which has first been narrowed to a group of known persons". In many cases, typical in this kind of case, the field will be very narrow indeed.

6.62 The process of adducing evidence which satisfies this condition will be a substantial undertaking for the prosecution and will take them a long way down the road of establishing the guilt of a defendant. It will often involve adducing evidence from which the court can be sure that it must have been one or other or both of two people. It may also apply where the prosecution can adduce evidence which narrows it down to more than two if each is capable of description in the ways set out in the Bill. In the light of this onerous requirement, any subsequent conviction of a defendant who has the statutory responsibility and in which an inference from their silence at trial plays a part cannot, in our view, be said to be one which is based "solely or mainly" on that inference. Such a case is a long way from one where the thought process is, "a crime has been committed, the defendant has the statutory responsibility, he or she has said nothing and so on that basis we can be sure of his or her guilt". Whilst the inference may be said to be decisive, it will only be so on the back of a great deal of other material which the prosecution has had to call to prove that they can narrow the field to the extent required by this condition.

6.63 The third condition set out in subsection (4) is that at least one of the defendants is subject to the statutory responsibility. As long as there is at least one then the special procedure applies to the trial of each defendant. Thus, the non responsible boyfriend who is one of the known group of suspects and is a defendant will not be able to have the case against him discharged before he or his co-accused have had the opportunity to give evidence.

6.64 It is not our intention that each member of the known group must be a defendant. The important point is that there is such a group. The Crown Prosecution Service (CPS) will have to consider how their guidelines on whom to prosecute will be affected by the availability of these special procedures. We do not envisage that the basic principles will have to be entirely overturned but the CPS will have to factor into their assessments a consideration of how the evidence (or failure to give evidence) may pan out in the light of the operation of the scheme. In particular they will have to have regard to the fact that the decision of the judge whether or not to permit the case to be left to the jury will be made in the light of the evidence and any inferences from silence which may properly be drawn at the close of the defence case. Thus, the CPS will have to make that judgement without complete knowledge of what the state of the evidence is likely to be when the judge makes his decision. A judgement on bringing prosecutions will have to be made not only on the basis of evidence which the CPS anticipate calling but also on an assessment of what evidence might be given by the defendants, or the fact that one or other of them may not give evidence. Whilst we accept that this will make the task less straightforward, we do not think that this change of approach need be either unduly problematic or conducive to inappropriate prosecutions.

6.65 Subsection (5) imposes a duty on the court at the conclusion of the prosecution case to acquit any defendant whom it is satisfied could not have committed the offence charged or any alternative offence. It also imposes a duty on the court to withdraw from the jury any alternative offence to that charged. This is a safeguard to prevent a case against a defendant proceeding to the end of the defence case where it would be wholly inappropriate for it to do so. Its effect will be that the only defendants whose case will continue to the conclusion of the defence case will be those who remain within the known group of potential perpetrators. A defendant will be able to make a submission that his or her case falls within this subsection and the court will have to determine it.

6.66 After the court has acted under subsection (5), subsection (6) requires it to consider whether there remain one or more defendants of whom at least one is subject to the statutory responsibility. If so, subsection (7) applies.

6.67 Subsection (7) provides that in such a case a submission of no case to answer may not be made until the conclusion of the defence case. This is the nub of this clause. It prevents the case being dismissed on the basis only of the prosecution case. It requires that the case continues until the close of the defence case and it forces the defendants to decide whether to give evidence. If the defendant(s) do give evidence the judge will decide whether the case may be left to the jury on the basis of all the evidence which is before the court. If they remain silent the judge will determine that question on the basis of all the evidence which is before the court and any inference from the defendant’s silence at trial which the judge concludes it would be proper to permit the jury to draw.

6.68 Subsection (8) sets out the approach the judge must take at this stage. It requires the court to apply a test which is familiar to courts and practitioners as applicable at the conclusion of the prosecution case. That test is whether a properly directed jury could convict the defendant. If it could then the case may go to the jury. If not, the judge is under a duty to acquit the defendant of the offence charged and withdraw any alternative offence from the consideration of the jury.

6.69 This subsection contains a fundamental safeguard for the defendant. It means that the case cannot go to the jury unless the judge is satisfied that it may properly be considered by the jury.

6.70 It was suggested by one respondent[40] that there would be substantial pressure on the judge to allow the case to go to the jury, the implication being that the judge would seldom decline that course of action. We agree that where a defendant or defendants have given or called evidence which, directly or by implication, inculpates or exculpates a co-defendant, it will be rare that the judge would withdraw the case from the jury, the assessment of evidence being a jury function. That would not, in our view, mean that cases were going to the jury which should not. On the contrary it would be a mark of the success of the scheme that cases were properly being left to the jury to decide on evidence, which includes evidence given by one or more defendant, whereas previously the case would have fallen for procedural reasons.

6.71 On the other hand, where a defendant with the statutory responsibility does not give evidence the judge, in determining whether the case should be left to the jury, may first have received and considered argument on whether it would be proper for the jury to draw an adverse inference from that silence. We consider this issue when we deal with clause 8. Suffice it to say that this will be a further substantial hurdle for the prosecution to surmount and by no means a formality. Only when the issue of inferences has been determined will the judge turn his or her attention to this submission which will be considered in the light of all the evidence and any inference which the judge has decided it would be proper to permit the jury to consider drawing. There is no reason to suppose that courts will be any less rigorous in applying this familiar test in this kind of case than where it is presently applied at the conclusion of the prosecution case.

6.72 Thus the scheme has at its core a series of decisions to be made by the trial judge on the basis of clear, and often familiar, tests. We are confident that they will enable judges to deliver trials which are fair.

6.73 Subsection (9) preserves any other power which the judge has to terminate the case in the various ways set out.

6.74 Subsection (10) defines what is meant by an alternative offence in familiar terms.

CLAUSE 8: INFERENCES FROM ACCUSED'S SILENCE

The recommendation

6.75 This derives from the interim recommendations, which we confirm, and which were consultation issues Nos. 10 and 11:

That where:

[40] Professor David Ormerod.

(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 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.

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.

6.76 This pair of recommendations was at the heart of our scheme and attracted support and opposition. In Part V of this Report we set out our arguments for confirming them. In this part we focus on how the draft Bill gives effect to our recommendations and highlights the ways in which we are satisfied that the Bill, if properly applied, will result in a fair trial for the defendants.

6.77 **Clause 8**

8 Inferences from accused's silence

(1) The Criminal Justice and Public Order Act 1994 (c.33) is amended as follows.

(2) In section 35 (effect of accused's silence at trial), after subsection (7), insert –

"(8) This section does not apply if section 35A applies."

(3) After section 35, insert –

"**35A Effect of accused's silence at trial in special cases**

(1) This section applies if a person is on trial for a serious offence against a child and, at the conclusion of the evidence for the prosecution –

(a) it has been proved to the court that the conditions in section 7(2) to (4) of the Act of 2004 (conditions for application of special procedure) apply in relation to the offence;

(b) section 7(7) of that Act (restriction on submissions of no case) applies in relation to the offence; and

(c) the court is of the opinion that the accused is subject to the statutory responsibility in relation to the offence.

(2) But this section does not apply if –

(a) the accused's guilt is not in issue, or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence.

(3) The court shall, at the conclusion of the evidence for the prosecution, satisfy itself that the accused is aware –

(a) that the court is of the opinion that he is subject to the statutory responsibility in relation to the offence;

(b) of the nature of that responsibility;

(c) that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence;

(d) that, if he chooses not to give evidence or, having been sworn, refuses, without good cause, to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from that failure or refusal; and

(e) that, in deciding whether it is proper to draw an inference, the court or jury may, if it is of the opinion that he is subject to the statutory responsibility in relation to the offence, take that into account.

(4) If the accused –

(a) fails to give evidence, or

(b) refuses, without good cause, to answer any question,

the court or jury may, in determining whether the accused is guilty of the offence charged or any other offence of which he could lawfully be convicted on that charge, draw such inferences as appear proper from the failure or refusal.

(5) If the court or jury is of the opinion that the accused is subject to the statutory responsibility in relation to the offence charged –

(a) it must consider any explanation which has been given in evidence for the failure or refusal; but

(b) it is not necessary for it to be satisfied, before drawing an inference (whether in relation to that offence or any other offence of which he could lawfully be convicted on that charge), that he could be properly convicted, on the basis of the other evidence against him, if no such inference were drawn.

(6) Subsections (4) and (5) of section 35 apply for the purposes of this section as they apply for the purposes of section 35.

(7) In this section –

(a) "the Act of 2004" means the Offences Against Children Act 2004; and

(b) "serious offence against a child" and "statutory responsibility" (in relation to such an offence) have the same meaning as in Part 2 of that Act."

Commentary

6.78 This clause takes effect by providing for an amendment of the Criminal Justice and Public Order Act 1994 by adding a new section 35A which will operate in place of the present section 35 in those cases to which section 35A applies. The additional section 35A is contained in subsection (3) of this clause.

6.79 Section 35A(1) defines the cases in which the section applies. The section applies where a person is on trial for a serious offence against a child and at the conclusion of the prosecution case two things are established. The first is that the case is one in which, pursuant to the clause 7 scheme, no submission may be made of no case to answer at the conclusion of the prosecution case. The second is that the court is "of the opinion" that the defendant is subject to the statutory responsibility. All that is required is that the court be of that opinion because that question is a matter upon which the jury will have to make a finding before deciding whether or not to draw an adverse inference under this section. The opinion that the judge forms is what triggers the obligation on the court at the start of the defence case to give certain warnings and explanations.

6.80 It is important to note that section 35A applies only to a defendant who, in the opinion of the court, bears the statutory responsibility. Thus, if there is a co-defendant who does not, this framework does not apply to him or her. This is because we regard the fact that the defendant bears the statutory responsibility as an important element in enabling a jury to say that the circumstances disclosed by the evidence "call for an explanation from that defendant". Of course, more than one defendant may bear that responsibility. It can arise quite easily. We anticipate there will be relatively few cases of this type where there will be a defendant who is not subject to it. Where there is, it necessarily follows that, for as long as the strict requirement of *Cowan*[41] applies in the generality of cases, the non responsible defendant may feel easier about not giving evidence than one who is subject to this regime. This may, conversely, serve to make the responsible defendant more inclined to give evidence. If neither that defendant nor the co-defendant gives evidence the judge may be forced to decline to let the case of the non responsible defendant go to the jury but to leave to the jury that of the responsible defendant. That may appear odd to the jury but it would have to be explained. We also appreciate that juries may in some circumstances feel sympathetic to a responsible defendant who is left "in the frame" whilst the non responsible defendant has been released from the case. Short of changing section 35 in parallel with what we recommend for clause 35A, so as to remove the strictness of the rule in *Cowan*[42] for all cases, this apparent anomaly will remain.

6.81 Section 35A(2) is modelled on section 35(1) of the 1994 Act. It excludes the operation of the section in those cases where, in similar circumstances, section 35 does not apply. One of those circumstances is that it appears to the court that the defendant's physical or mental condition makes it undesirable for him or her to give evidence. This is an important safeguard for the defendant which we retain for this scheme.

6.82 We do not expressly exclude the operation of the section where the court is informed by the defendant's legal representative, or by the defendant if unrepresented, that the defendant will give evidence. One member of the judiciary[43] in his response to the Consultative Report pointed out that under the present regime a defendant who has not received the warning but who has failed to give evidence properly will present the court with a difficulty because he or she will not have received the public warning of the consequence. We agree that this is at least a theoretical flaw with section 35 as it applies in the generality of cases. We are unaware of any concern that it impacts in a particularly damaging way in the type of case with which we are concerned. It is, therefore, a wider question which it would not be wise to consider only within the scope of this project.

6.83 Nonetheless we have not made identical provision to that which is made in section 35(1). The effect of our change is that the judge has to be satisfied that the defendant is aware of the risks of not giving evidence or failing without good cause to answer any questions. He or she is not, however, required to do so in the presence of the jury. We anticipate that in the first instance this will be done in the absence of the jury and it would only be done in the presence of the jury if the judge was informed that the defendant was not going to give evidence, or if the defendant gave evidence but decided to refuse to answer questions. In such cases, which will be rare, the impact of a defendant refusing in the course of evidence to answer pertinent questions is likely to be extremely damaging to his

41 [1996] QB 373. Before the jury may draw an adverse inference from silence at trial, they must first find that there is a case to answer on the prosecution evidence.

42 [1996] QB 373.

43 Buxton LJ.

or her case. In practice, therefore, we believe that, even in these cases, the question of an adverse inference direction being given would only be raised as a possibility in the rarest of cases.

6.84 Section 35A(3) contains the obligation of the court to satisfy itself that the defendant is aware of a number of things. These include the essence of the present warning contained in section 35(2). In addition, however, the court must satisfy itself that the defendant is aware that the court is of the opinion that he or she is subject to the statutory responsibility, the nature of that responsibility and that, in deciding what inferences, if any, it is proper to draw, the jury may, if it is of that opinion, take into account the fact that he or she is subject to that responsibility. This provision ensures that the defendant, in deciding finally whether or not to give evidence, is given fair warning of the possible consequences of not doing so.

6.85 Section 35A(4) replicates the essence of the present section 35(3). It is important to note that in doing so it places emphasis on the court or jury only drawing such inferences as appear "proper". Some disquiet was expressed[44] in the consultation that the terms of the recommendation foreshadowed a derogation from the requirement that any inference drawn had to be one which it was proper to draw. We are happy to confirm that this was not our intention and subsection (4) gives effect to that intention.

6.86 We are, however, grateful to respondents for emphasising the point which is of importance. It means that the judge will have to consider, where asked, whether in the circumstances of the case it would be "proper" for the jury to be permitted to draw such an inference. We anticipate that it will be at this stage that arguments may be raised whether, in the circumstances of the particular case, it would be consistent with a fair trial to permit the jury to draw an inference from silence. For example, we are aware that the Judicial Studies Board model direction now provides that it would not be proper for the jury to draw an adverse inference unless they were of the view that the only sensible reason for the defendant not giving evidence was that he or she had no explanation to give or none that would withstand cross examination. Similarly, it would not be proper to permit the jury to draw such an inference where the linkage between the defendant and the offence was so tenuous that any conviction which followed would be solely or mainly based on that failure to give evidence. On the other hand, where the evidence was such that the defendant was so close to the events that he or she must either have been the perpetrator, or been complicit in it, or be able, even if only by exculpatory evidence, to cast light on which other person was responsible for the child's death or injury, then the court may well conclude that the circumstances so called for an explanation from him or her, as a person with the statutory responsibility, that it would be proper to permit the jury to draw an adverse inference from the defendant's silence.

[44] Notably in the response of Liberty.

6.87 In such a case the "eloquent silence" of the defendant might be said to be the "decisive" element in a decision to convict but it would not mean that the defendant was convicted "solely or mainly" on an inference from silence any more than the "decisive" straw is the "sole or main" cause of the camel's broken back. It is for this reason that we see no inconsistency between our scheme and the provisions of section 38(3) of the 1994 Act which prohibits, amongst other things a person's being convicted solely on an inference from silence. [45]

6.88 Subsection (5) contains two crucial provisions. The first (in paragraph (a)) is that the court or jury, in considering whether or not it would be proper to draw an inference, must consider any explanation which has been given in evidence for the failure or refusal. This is important in two respects. First it imposes a duty on the fact finder to consider any explanation which has been given for the defendant's not having given evidence. This represents a further strengthening of the effectiveness of the safeguards for the defendant by, implicitly, requiring the judge to direct the jury to this effect. Second, before this duty is triggered, evidence of the explanation must have been given. It may come in as part of the prosecution case, in chief or in cross examination, it may be apparent from the terms of the interview given by the defendant, or it may be in the form of evidence, whether lay or expert, called on behalf of the defendant.

6.89 The second provision (in paragraph (b)) disapplies, for the purposes of section 35A, what appears to be the technical effect of the fourth condition enunciated in *Cowan*[46] for the drawing of an adverse inference pursuant to section 35.[47] Since this provision is at the heart of our scheme we now take a few paragraphs to explain our reasoning.

6.90 It is our view that the technical approach to the principle which underlies *Cowan* is flawed in two respects. First, it ignores the way in which any adverse inference operates in order to have any effect on the outcome. Second, it envisages, unrealistically, the jury undertaking a convoluted and artificial process of reasoning. In our view, it is simpler and more consistent both with practice and with principle to make it clear that the technical approach which appears to have found favour in *Cowan*[48] does not apply to this kind of case. The underlying, non controversial, principle will remain intact.

6.91 That commonly adhered to principle is that the drawing of an inference from silence is a matter which has to be regarded as separate from consideration of the evidence in the case. Before any inference may be drawn, the fact finders must first consider the evidence and be satisfied that the circumstances revealed by the evidence call for an explanation from the defendant. If no explanation is

[45] Paragraph 7 of Schedule 3 of the draft Bill amends section 38(3) of the 1994 Act so as to incorporate a reference to the new section 35A.

[46] [1996] QB 373.

[47] See Law Com No 279 para 6.36.

[48] [1996] QB 373.

forthcoming the fact finders are obliged to consider why that might be. Then, having done so, the fact finders must consider whether they are sure of the defendant's guilt on the basis of all the evidence and any adverse inference which it appears to them proper to draw.

6.92 The case of *Cowan*[49] appears to give a narrow and technical meaning to what is required in order for it to be said that the evidence presented calls for an explanation from the defendant. The requirement imposed by *Cowan*[50] is the same as the legal test applied by the judge at the conclusion of the prosecution case namely: whether the prosecution have adduced sufficient evidence such that a jury properly directed *could* find the defendant guilty without any adverse inference being involved.

6.93 It follows from the course of deliberations required of the jury that if the fact finders were sure of the defendant's guilt upon considering the evidence, there would be no need for them to consider whether to draw any inference. They would proceed to convict without any consideration of adverse inference. It follows, therefore, that an inference from silence can only have an impact on the verdict in a case where, without it, there would not be a conviction, i.e. where the evidence alone is not such as to make the fact finders sure of guilt.

6.94 What, therefore, does the test in *Cowan*[51] require of the jury? It seems to envisage that the jury will first consider the evidence and conclude that they are not sure of the defendant's guilt. On the footing, therefore, that they are not sure of the defendant's guilt, the test then envisages that the jury ask itself whether "there is a case to answer", not in a colloquial sense of "would we expect an innocent person in these circumstances to provide an answer or explanation?" but in a strict legal sense. That requires the jury to pose the legal question "though we have just now concluded, on the evidence alone, that we are not sure of guilt, do we now think, on that same evidence, that another jury, properly directed, *could* be sure of the defendant's guilt?" Only if the answer is yes may the jury consider whether to draw an adverse inference from silence.

6.95 We do not think it unduly discourteous to juries, nor unduly cynical, to characterise as pure fantasy the expectation that they will have either the ability, or the inclination, to follow such a tortuous path of reasoning. We doubt that the underlying principle is so rigid that it requires such an approach.

6.96 The intent of section 35A(5)(b) is explicitly to remove this artificial requirement. It will leave intact the principle that an inference may only be drawn where it is proper to do so. It will also leave intact the approach to what is proper which requires the evidence to be such that it calls for an explanation from the defendant. By our scheme, the evidence will have to be such as to establish (i)

[49] *Ibid*.

[50] *Ibid*.

[51] *Ibid*.

that the offence has been committed, (ii) that the defendant is within those known persons who must, from within their number, have committed the offence and, (iii) by reason of the defendant's responsibility for the child, he or she is subject to the statutory responsibility to give such account as he or she can. It is our firm view that it may, in appropriate cases, be proper to characterise such circumstances, in a non technical sense, as "calling for an explanation" or as establishing "a case to answer" so as to render fair a conviction in which such an inference has played a part.

6.97 Section 35A(6) expressly applies subsections (4) and (5) of section 35. They provide that nothing in section 35 makes the defendant a compellable witness [(4)] and make detailed provision for when a defendant once sworn may and may not have good cause to refuse to answer any question [(5)].

6.98 Section 35A(7) provides for certain definitions and references to other statutes. This subsection is the last in the new section 35A.

6.99 Although this commentary concentrates on trials on indictment, the relevant provisions in the Bill are drafted so as to be capable of encompassing proceedings in magistrates' courts.

CLAUSE 9: SAVINGS AND INTERPRETATION

6.100 This provides for certain savings and interpretation. The only provision which calls for any further comment is subsection (4) which defines "serious offence" by reference to Schedule 2.

6.101 **Clause 9**

9 Savings and interpretation

(1) Nothing in this Part affects any provision which has the result that an answer or evidence given by a person in specified circumstances is not admissible in evidence against him, or some other person, in any proceedings or class of proceedings.

(2) Nothing in this Part restricts any power of a court to exclude evidence (whether by preventing questions being put or otherwise).

(3) In subsection (1), the reference to giving evidence is a reference to giving evidence in any manner, whether by providing information, making discovery, producing documents or otherwise.

(4) In this Part, "serious offence" means an offence specified in Schedule 2.

SCHEDULE 2

SERIOUS OFFENCES FOR PURPOSES OF PART 2

The following are serious offences for the purposes of Part 2 –

(a) murder,

(b) manslaughter,

(c) an offence under section 18 or 20 of the Offences against the Person Act 1861 (wounding and causing grievous bodily harm),

(d) an offence under section 23 or 24 of that Act (administering poison),

(e) an offence under section 1 or 1A of the 1933 Act (cruelty to persons under sixteen and cruelty contributing to death),

(f) an offence under section 1 of the Sexual Offences Act 1956 (rape),

(g) an offence under section 14 or 15 of that Act (indecent assault),

(h) an offence under section 2 (failure to protect a child),

(i) attempting to commit any such offence.

Commentary

6.102 The offences in this Schedule are to some extent different to those which are scheduled for the purpose of the new offence under clause 2. It excludes assault occasioning actual bodily harm. In our judgement this is not a sufficiently serious offence to justify this special procedure. On the other hand it is an alternative offence of which a defendant may be convicted upon a charge of either a section 18 or a section 20 offence and so a jury would, in the case of such charges, still be able to convict of actual bodily harm after the special procedure had been applied. The Schedule also includes the offence of child cruelty under the 1933 Act and the two new offences provided for by clauses 1 and 2. It also includes attempts to commit any of these offences. These are, in our judgement, sufficiently serious offences so as to attract the new procedure and may often be found in the same indictment as another offence in the Schedule.

CLAUSES 10-12: INTERPRETATION, MINOR AND CONSEQUENTIAL AMENDMENTS, AND COMMENCEMENT AND TRANSITIONAL PROVISIONS

6.103 These concern general interpretation, minor and consequential amendments and the short title, commencement and extent. Other than appears below, none of these call for any particular comment.

6.104 **Clause 10**

10 Interpretation: general

(1) “Child” means a person under the age of 16.

(2) “The 1933 Act” means the Children and Young Persons Act 1933 (c.12).

(3) Section 17 of the 1933 Act (persons presumed to have responsibility for a child) applies for the purposes of this Act as it applies for the purposes of Part 1 of that Act.

6.105 **Clause 11**

11 Minor and consequential amendments

Schedule 3 contains minor and consequential amendments.

6.106 **Clause 12**

Commencement and transitional provisions

(1) This Act, except this section and section 13, comes into force on such day as the Secretary of State may by order appoint.

(2) An order under subsection (1) may –

(a) make different provision for different purposes;

(b) include supplementary, incidental, saving or transitional provisions.

(3) Any provision of sections 6 to 8, and Part 2 of Schedule 3, has effect only in relation to criminal proceedings begun on or after the commencement of that provision.

Commentary

6.107 Clause 12(3) makes transitional provision for the new procedure. There are two possible approaches to this issue. On the one hand the new procedure could be applied to criminal proceedings begun on or after commencement of the Act. Alternatively, it could apply in relation to offences committed wholly or partly on or after commencement. We decided that the former would be the better approach as there may be uncertainty about when an offence was committed. This may be a particular problem in cases of this type, where the victim is, for any of a variety of reasons, unable to give details of when abuse was perpetrated. The changes made by clause 5 will apply in relation to any interview conducted on or after the commencement date.

6.108 In Schedule 3, which deals with consequential amendments, paragraphs 5, 6, and 8 make amendments, respectively, to the arrangements in magistrates' courts for committal for trial or transfer for trial or sending cases for trial so as to ensure that in the case of a serious offence against a child provision is made for the dismissal of the charge upon lines which are parallel to those which will apply at the Crown Court during the trial.

6.109 In addition, the following provisions are amended to include the new section 1A of the 1933 Act as inserted by clause 1 of the Bill: Schedule 1 to the 1933 Act; section 103 of the Magistrates' Courts Act 1980; section 35 of the Youth Justice and Criminal Evidence Act 1999 and Schedule 4 to the Criminal Justice and Court Services Act 2000. The above provisions, excluding Schedule 4 to the Criminal Justice and Court Services Act 2000, are also amended to include the new offence under clause 2 of the Bill. We have excluded that offence from Schedule 4 to the 2000 Act although we acknowledge that the new offence is an offence "against a child" for the purposes of our procedural and evidential reforms contained in Part II of the draft Bill. We do not believe, however, that it is in keeping with the policy of the 2000 Act to include within it an offence which is designed essentially to ensure that persons, with a responsibility for and connection with the child, take reasonable steps to prevent an offence being committed against the child.

(*Signed*) ROGER TOULSON, *Chairman*
HUGH BEALE
STUART BRIDGE
MARTIN PARTINGTON
ALAN WILKIE

MICHAEL SAYERS, *Secretary/Chief Executive*
6 August 2003

Offences Against Children

CONTENTS

DRAFT

OF A

B I L L

TO

Create new offences against children; and to make provision about the investigation and trial of certain offences against children.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1

OFFENCES

1 Cruelty contributing to death

In the Children and Young Persons Act 1933 (c. 12), after section 1 (cruelty to persons under sixteen), insert—

"1A Cruelty contributing to death

(1) A person is guilty of an offence if—

(a) he commits an offence under section 1 against a child or young person ("C");

(b) suffering or injury to health of a kind which was likely to be caused to C by the commission of that offence occurs; and

(c) its occurrence results in, or contributes significantly to, C's death.

(2) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both."

2 Failure to protect a child

(1) A person ("R") is guilty of an offence if—

(a) at a time when subsection (3) applies, R is aware or ought to be aware that there is a real risk that an offence specified in Schedule 1 might be committed against a child ("C");

(b) R fails to take such steps as it would be reasonable to expect R to take to prevent the commission of the offence;

(c) an offence specified in Schedule 1 is committed against C; and

(d) the offence is committed in circumstances of the kind that R anticipated or ought to have anticipated.

(2) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both.

(3) This subsection applies if R—

(a) is at least 16 years old;

(b) has responsibility for C; and

(c) is connected with C.

(4) R is connected with C if—

(a) they live in the same household;

(b) they are related; or

(c) R looks after C under a child care arrangement.

(5) R and C are related if they are relatives within the meaning of Part 4 of the Family Law Act 1996 (c. 27).

(6) R looks after C under a child care arrangement if R—

(a) looks after C (whether alone or with other children) under arrangements made with a person who lives in the same household as, or is related to, C; and

(b) does so wholly or mainly in C's home.

(7) It does not matter whether R looks after C for reward or on a regular or occasional basis.

3 Effect of intoxication

(1) A person's voluntary intoxication is to be disregarded in determining—

(a) for the purposes of section 2(1)(a), whether he ought to be aware of a risk; and

(b) for the purposes of section 2(1)(b), what steps it would be reasonable to expect him to take.

(2) A person's intoxication is voluntary if he takes an intoxicant, or allows an intoxicant to be administered to him—

(a) knowing that it is or may be an intoxicant; and

(b) otherwise than in accordance with medical advice.

(3) "Intoxicant" means alcohol, drugs or anything else which may impair awareness.

(4) A person's intoxication is to be taken to be voluntary unless sufficient evidence is adduced to raise an issue with respect to whether it was voluntary.

(5) Where sufficient evidence is so adduced, the court is to assume that his intoxication was not voluntary unless the prosecution proves beyond reasonable doubt that it was.

PART 2

INVESTIGATION AND TRIAL

Responsibility to provide information

4 The statutory responsibility

(1) This section applies if a serious offence has been committed against a child or there are reasonable grounds for suspecting that such an offence has been committed.

(2) Any person who had responsibility for the child at the relevant time also has the responsibility imposed by this section ("the statutory responsibility").

(3) "The relevant time" means—

- (a) the time when the offence was committed (if known); or
- (b) any time during the period within which the offence could have been committed.

(4) The statutory responsibility is responsibility for assisting—

- (a) the police in any investigation of the offence, and
- (b) the court in any proceedings in respect of the offence,

by providing as much information as the person is able to give about whether and, if so, by whom and in what circumstances the offence was committed.

5 Investigations by the police

(1) This section applies if a constable—

- (a) is investigating a serious offence against a child; and
- (b) reasonably suspects that a person whom he is questioning in connection with the offence ("A") is subject to the statutory responsibility in relation to the offence.

(2) If A is being questioned under caution, the constable must inform A of his suspicion—

- (a) when he cautions A; or
- (b) as soon as he forms that suspicion (if later).

(3) When giving that information, the constable must explain—

- (a) the nature of the statutory responsibility; and
- (b) the effect of subsections (5) and (6).

(4) If A is not being questioned under caution, the constable may nevertheless give A—

- (a) the information mentioned in subsection (2); and
- (b) an explanation of the nature of the statutory responsibility and the effect of subsection (5).

(5) A is not obliged to answer a question put to him by a constable investigating an offence merely because he is, or may be, subject to the statutory responsibility in relation to the offence.

(6) But if section 34(2) of the Criminal Justice and Public Order Act 1994 (c. 33) (circumstances in which inferences may be drawn from failure to mention facts) applies in relation to a failure by A to mention any fact, a court, judge or jury may, in deciding whether it is proper to draw an inference under that provision, take into account any evidence that A was given the information and explanations mentioned in subsections (2) and (3).

6 Responsibility of witness in criminal proceedings

(1) This section applies if a person ("W")—
   (a) is a witness in criminal proceedings for a serious offence against a child; but
   (b) is not a person charged with an offence in those proceedings.

(2) If the court is of the opinion that W is subject to the statutory responsibility in relation to the offence, it may—
   (a) inform W of its opinion; and
   (b) explain to W the nature of that responsibility and the effect of this section.

(3) If the court acts under subsection (2), it may take into account that W was given that information and explanation in determining—
   (a) whether W's behaviour as a witness has amounted to contempt of court; and
   (b) if it has, what punishment to impose.

(4) This section does not—
   (a) oblige W to answer any question which W is entitled to refuse to answer as a result of any enactment or on the ground of privilege; or
   (b) affect the court's power, in the exercise of its general discretion, to excuse a witness from answering a question.

Special procedure

7 Special procedure during trial

(1) This section applies if —
   (a) a person is, or two or more persons are, charged with a serious offence against a child; and
   (b) at the conclusion of the evidence for the prosecution, it has been proved to the court that three conditions are met.

(2) The first condition is that the offence charged or any alternative offence has been committed (but it is not necessary for it to have been proved which of those offences was committed).

(3) The second is that—
   (a) the number of persons who could have committed the offence charged or any alternative offence is known; and

(b) those persons can be described, whether by reference to their names, their personal characteristics or their relationship to one another or to other persons.

(4) The third is that—

(a) if there is only one accused, he is subject to the statutory responsibility in relation to the offence charged; or

(b) if there are two or more accused, at least one of them is subject to that responsibility in relation to the offence charged.

(5) If the court is satisfied, in respect of the accused, or an accused, that he could not have committed the offence charged or any alternative offence—

(a) the court must acquit him of the offence charged or direct his acquittal; and

(b) he may not be convicted of any alternative offence.

(6) Subsection (7) applies if, after the court has acted under subsection (5)—

(a) one or more persons remain accused of the offence charged; and

(b) the third condition continues to be met.

(7) A submission that the accused, or an accused, does not have a case to answer in relation to the offence charged or an alternative offence may not be made at any time before the conclusion of the evidence for the accused or all of the accused.

(8) If the court considers at the conclusion of the evidence for the accused, or all of the accused, that no court or no jury properly directed could properly convict the accused, or an accused, of the offence charged—

(a) the court must acquit him of that offence or direct his acquittal; and

(b) if the court is of the same opinion in relation to an alternative offence, he may not be convicted of that offence.

(9) This section does not affect—

(a) any power a court may have to acquit or direct the acquittal of an accused otherwise than on a submission made on his behalf; or

(b) any power a court may have to discharge a jury or otherwise prevent a trial continuing.

(10) "Alternative offence", in relation to an offence charged, means any other offence of which the accused could lawfully be convicted on that charge.

Inferences from silence

8 Inferences from accused's silence

(1) The Criminal Justice and Public Order Act 1994 (c. 33) is amended as follows.

(2) In section 35 (effect of accused's silence at trial), after subsection (7), insert—

"(8) This section does not apply if section 35A applies."

(3) After section 35, insert—

"35A Effect of accused's silence at trial in special cases

(1) This section applies if a person is on trial for a serious offence against a child and, at the conclusion of the evidence for the prosecution—

(a) it has been proved to the court that the conditions in section 7(2) to (4) of the Act of 2004 (conditions for application of special procedure) apply in relation to the offence;

(b) section 7(7) of that Act (restriction on submissions of no case) applies in relation to the offence; and

(c) the court is of the opinion that the accused is subject to the statutory responsibility in relation to the offence.

(2) But this section does not apply if—

(a) the accused's guilt is not in issue, or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence.

(3) The court shall, at the conclusion of the evidence for the prosecution, satisfy itself that the accused is aware—

(a) that the court is of the opinion that he is subject to the statutory responsibility in relation to the offence;

(b) of the nature of that responsibility;

(c) that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence;

(d) that, if he chooses not to give evidence or, having been sworn, refuses, without good cause, to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from that failure or refusal; and

(e) that, in deciding whether it is proper to draw an inference, the court or jury may, if it is of the opinion that he is subject to the statutory responsibility in relation to the offence, take that into account.

(4) If the accused—

(a) fails to give evidence, or

(b) refuses, without good cause, to answer any question,

the court or jury may, in determining whether the accused is guilty of the offence charged or any other offence of which he could lawfully be convicted on that charge, draw such inferences as appear proper from the failure or refusal.

(5) If the court or jury is of the opinion that the accused is subject to the statutory responsibility in relation to the offence charged—

(a) it must consider any explanation which has been given in evidence for the failure or refusal; but

(b) it is not necessary for it to be satisfied, before drawing an inference (whether in relation to that offence or any other offence of which he could lawfully be convicted on that charge), that he could be properly convicted, on the basis of the other evidence against him, if no such inference were drawn.

(6) Subsections (4) and (5) of section 35 apply for the purposes of this section as they apply for the purposes of section 35.

(7) In this section—

(a) "the Act of 2004" means the Offences Against Children Act 2004; and

(b) "serious offence against a child" and "statutory responsibility" (in relation to such an offence) have the same meaning as in Part 2 of that Act."

Supplemental

9 Savings and interpretation

(1) Nothing in this Part affects any provision which has the result that an answer or evidence given by a person in specified circumstances is not admissible in evidence against him, or some other person, in any proceedings or class of proceedings.

(2) Nothing in this Part restricts any power of a court to exclude evidence (whether by preventing questions being put or otherwise).

(3) In subsection (1), the reference to giving evidence is a reference to giving evidence in any manner, whether by providing information, making discovery, producing documents or otherwise.

(4) In this Part, "serious offence" means an offence specified in Schedule 2.

PART 3

GENERAL

10 Interpretation: general

(1) "Child" means a person under the age of 16.

(2) "The 1933 Act" means the Children and Young Persons Act 1933 (c. 12).

(3) Section 17 of the 1933 Act (persons presumed to have responsibility for a child) applies for the purposes of this Act as it applies for the purposes of Part 1 of that Act.

11 Minor and consequential amendments

Schedule 3 contains minor and consequential amendments.

12 Commencement and transitional provisions

(1) This Act, except this section and section 13, comes into force on such day as the Secretary of State may by order appoint.

(2) An order under subsection (1) may—

(a) make different provision for different purposes;

(b) include supplementary, incidental, saving or transitional provisions.

(3) Any provision of sections 6 to 8 and Part 2 of Schedule 3 has effect only in relation to criminal proceedings begun on or after the commencement of that provision.

13 Short title and extent

(1) This Act may be cited as the Offences Against Children Act 2004.

(2) This Act extends to England and Wales only.

SCHEDULES

SCHEDULE 1

Section 2

SPECIFIED OFFENCES FOR PURPOSES OF SECTION 2

The following are the specified offences for the purposes of section 2—

(a) murder,
(b) manslaughter,
(c) an offence under section 18 or 20 of the Offences against the Person Act 1861 (c. 100) (wounding and causing grievous bodily harm),
(d) an offence under section 23 or 24 of that Act (administering poison),
(e) an offence under section 47 of that Act (assault occasioning actual bodily harm),
(f) an offence under section 1 of the Sexual Offences Act 1956 (c. 69) (rape),
(g) an offence under section 14 or 15 of that Act (indecent assault),
(h) attempting to commit any such offence.

SCHEDULE 2

Section 9

SERIOUS OFFENCES FOR PURPOSES OF PART 2

The following are serious offences for the purposes of Part 2—

(a) murder,
(b) manslaughter,
(c) an offence under section 18 or 20 of the Offences against the Person Act 1861 (wounding and causing grievous bodily harm),
(d) an offence under section 23 or 24 of that Act (administering poison),
(e) an offence under section 1 or 1A of the 1933 Act (cruelty to persons under sixteen and cruelty contributing to death),
(f) an offence under section 1 of the Sexual Offences Act 1956 (rape),
(g) an offence under section 14 or 15 of that Act (indecent assault),
(h) an offence under section 2 (failure to protect a child),
(i) attempting to commit any such offence.

SCHEDULE 3

Section 11

CONSEQUENTIAL AMENDMENTS

PART 1

AMENDMENTS RELATING TO PART 1

The 1933 Act

1 (1) Schedule 1 to the 1933 Act (offences to which special provisions apply) is amended as follows.

(2) In the entry relating to offences under the 1933 Act, for "sections one" substitute "sections 1, 1A".

(3) After the entry relating to the Sexual Offences Act 1956 (c. 69), insert—

"An offence under section 2 of the Offences Against Children Act 2004.".

Magistrates' Courts Act 1980 (c. 43)

2 (1) Section 103 of the Magistrates' Courts Act 1980 (evidence of persons under 14 in committal proceedings) is amended as follows.

(2) In subsection (2)(b), for "section 1" substitute "section 1 or 1A".

(3) In subsection (2)(c), after "1978;" insert—

"(ca) to an offence under section 2 of the Offences Against Children Act 2004 (failure to protect a child);".

Youth Justice and Criminal Evidence Act 1999 (c. 23)

3 (1) Section 35 of the Youth Justice and Criminal Evidence Act 1999 (child complainants and other child witnesses) is amended as follows.

(2) In paragraph (c) of subsection (3), for "section 1" substitute "section 1 or 1A".

(3) At the end of that paragraph, insert—

"(ca) an offence under section 2 of the Offences Against Children Act 2004;".

Criminal Justice and Court Services Act 2000 (c. 43)

4 In Schedule 4 to the Criminal Justice and Court Services Act 2000 (meaning of "offence against a child"), in paragraph 1(a), for "section 1" substitute "section 1 or 1A".

PART 2

AMENDMENTS RELATING TO PART 2

Magistrates' Courts Act 1980 (c. 43)

5 In section 6 of the Magistrates' Courts Act 1980 (discharge or committal for

trial), after subsection (1), insert—

"(1A) Subsection (1B) applies if the offence into which the magistrates' court is inquiring is a serious offence against a child within the meaning of Part 2 of the Offences Against Children Act 2004.

(1B) If the court considers that the conditions in section 7(2) and (4) of that Act might be proved at a trial of the accused for the offence, subsection (1) applies as if—

(a) paragraph (a) required it to commit the accused for trial unless it is of the opinion that he could not have committed the offence; and

(b) paragraph (b) required it to discharge the accused only if it is of that opinion and he is in custody for no other cause than the offence under inquiry."

Criminal Justice Act 1991 (c. 53)

6 In Schedule 6 to the Criminal Justice Act 1991 (notices of transfer: procedure in lieu of committal), after paragraph 5(2), insert—

"(2A) But if a charge is of a serious offence against a child within the meaning of Part 2 of the Offences Against Children Act 2004, and the judge considers that the conditions in section 7(2) and (4) of that Act might be proved at a trial of the applicant for the offence, he shall dismiss the charge only if it appears to him that the applicant could not have committed the offence."

Criminal Justice and Public Order Act 1994 (c. 33)

7 (1) Section 38 of the Criminal Justice and Public Order Act 1994 (interpretation and savings) is amended as follows.

(2) In subsection (3), after "35(3)," insert "35A(4),".

(3) In subsections (5) and (6), after "35," insert "35A,".

Crime and Disorder Act 1998 (c. 37)

8 In Schedule 3 to the Crime and Disorder Act 1998 (procedure where persons are sent for trial under section 51), after paragraph 2(2), insert—

"(2A) But if a charge is of a serious offence against a child within the meaning of Part 2 of the Offences Against Children Act 2004, and the judge considers that the conditions in section 7(2) and (4) of that Act might be proved at a trial of the applicant for the offence, he shall dismiss the charge only if it appears to him that the applicant could not have committed the offence."

APPENDIX B
CHILDREN AND YOUNG PERSONS ACT 1933

Section 1 Cruelty to persons under sixteen

(1) 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 misdemeanor, and shall be liable –

(a) on conviction on indictment, to a fine, or alternatively, or in addition thereto, to imprisonment for any term not exceeding ten years;

(b) on summary conviction, to a fine not exceeding the statutory maximum, or alternatively, or in addition thereto, to imprisonment for any term not exceeding six months.

Section 17 Interpretation of Part I

(2) For the purposes of this Part 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.

(3) A person who is presumed to be responsible for a child or young person by virtue of subsection (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.

APPENDIX C
LIST OF RESPONDENTS TO THE CONSULTATIVE REPORT

Mr Justice Buckley

Lord Justice Buxton

Sir David Calvert-Smith

Mr Anthony Edwards

Professor D W Elliott

Professor David Feldman

Mr Peter W Ferguson

Mr Peter Glazebrook

Lady Justice Hale DBE

Judge Gareth Hawkesworth

Professor Antony M Honore

Ms Laura Hoyano

Allan Levy QC

Mrs B Anne Meade

Professor David Ormerod

Judge David Radford

Judge Jeremy Roberts

Lord Justice Rose

Mr Justice Silber

Professor John Spencer

Detective Superintendent Russell Wate

Association of Chief Police Officers

The Criminal Bar Association

The Criminal Sub-Committee of the Council of HM Circuit Judges

Crown Prosecution Service

JUSTICE

Justices' Clerks' Society

Law Reform Committee of the Bar Council

Liberty

National Society for the Prevention of Cruelty to Children

Office of the Judge Advocate General

Police Federation of England and Wales

Serious Fraud Office

Thames Valley University, Faculty of Health