

EXECUTIVE SUMMARY

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

PROPOSALS REJECTED

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

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

² (1986) 82 Cr App R 5.

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

RECOMMENDATIONS WE ARE MINDED TO MAKE

Evidence and procedure

Scope of the recommendations

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

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

A statutory statement of principle

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

Evidential and procedural recommendations

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

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

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

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

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

Substantive law

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

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