



Dear consultee

The Law Commission regularly consults on new law reform projects to be included in its programmes of law reform. We are grateful to you for proposing an item for inclusion in the Law Commission's Eleventh Programme of law reform. Please use this questionnaire to tell us what you are proposing and why. The more you can tell us, the better able we will be to understand and assess your proposal. So please give us **as much information as you can**, even if you cannot answer all the questions. If we need to know more about your proposal at any stage, we may get back in touch with you.

What we need to know

We ask you to think carefully about whether your proposal is appropriate for the Eleventh Programme. The projects that will be taken on by the Law Commission must, of course, **relate to the law**, and will focus on issues that:

- are **systemic**,
- are caused by laws or policies that are **complex** or **hard to understand**,
- have **widespread discriminatory impact** or **cause disproportionate costs**, or
- arise from laws or policies that are **inconsistent with modern standards**.

The Commission also considers the **costs and benefits** of all of its recommendations for reform. Please tell us what you can about the economic and other impacts of your proposal.

What the Commission cannot include in its Eleventh Programme

There are some social and policy issues that the Law Commission will not normally consider because they are more appropriate for government to consider directly. These include highly controversial or political issues, such as the laws relating to abortion, immigration and the Human Rights Act, or issues of established government policy, such as the tax rate.

The Commission cannot consider individual problems, such as the way a case has been decided or unsatisfactory dealings with a local or central government authority. And finally, the Commission is not able to consider problems that arise in Scotland or Northern Ireland.

What happens next?

We will review all the proposals that are made to us before drawing up a list of potential projects, where appropriate working closely with the relevant government departments. As set out in the Law Commissions Act 1965, the Lord Chancellor will decide the final contents of the Eleventh Programme. We expect this to be during 2011.

We understand you may be disappointed if your proposal is ultimately not taken forward, but please be assured we are grateful for your contribution. If you have any questions about the consultation process, please contact us on 020 3334 0255 or via eleventhprogramme@lawcommission.gsi.gov.uk.

Thank you again for taking the time to complete this questionnaire and help us in our aim of making the law fair, simple, clear and cost-effective.

Kind regards

The Law Commission

Please send us your response no later than **Friday 15 October 2010**.



Eleventh Programme of Law Reform consultation response

Please answer as many of these questions as you can, as fully as you can. If necessary, continue on additional sheets. Please also indicate where you are not able to provide an answer.

Please tell us about yourself:

Name: Barbara Esam, Policy Lawyer

Address:

Strategy and Development Division

NSPCC

Weston House

42 Curtain Road

London

EC2A 3NH

Email: besam@nspcc.org.uk

Tel: 0207 825 2500

Member of the public

Third sector/voluntary sector

Commercial sector/business

Nature of third sector/business organisation:

Lawyer

Academic

Specialist area:

Specialist area:

Member of the judiciary

Civil servant

Specialist area:

Department:

Local authority staff member

Parliamentarian

Other (please state):

*The Law Commission is a signatory to the Government's **Code of Practice on Consultation** and we carry out our consultations in accordance with the Code criteria, which are set out on the last page of this questionnaire.*

*We treat all responses as public documents in accordance with the **Freedom of Information Act** and we may name respondents and attribute comments, if we publish details of this consultation. If you want your submission to remain confidential, you should contact us before sending your response. (Please note that we disregard automatic IT-generated confidentiality statements.)*

1. In general terms, what is the problem that requires reform?

There is a lacuna in the law which has been left by the new offence of causing or allowing the death of a child or vulnerable adult. This offence was introduced in the Domestic Violence Crime and Victims Act 2004, and came into force on 21 March 2005. The lacuna is the fact that the legislation does not cover serious injury to a child at the hands of parents or carers (or 'members of the household' to use the language of the Act). This means that these cases continue to fall into the category of 'Which of you did it?' cases where there are severe problems of achieving criminal convictions even though the evidence narrows the field of suspects down to a small group of potentially guilty parties. Put simply, greater efforts have to be made in relation to these cases to get at the evidence that would be available if the defendants were to tell the whole truth. This could be accomplished by extending s.5 of the Domestic Violence Crime and Victims Act 2004 to include serious injury to a child as well as death. This would mean that carers who are jointly accused of assaulting a child could no longer escape justice by remaining silent or blaming each other. It is unacceptable that where we know one of a small group of people must have caused the injuries to a child, but we do not know which one, those people should all escape justice.

2. Can you give an example of what happens in practice?

For example, if you are a solicitor or barrister, you might describe how the problem affects your clients.

Cases where vulnerable children are the victims of serious injury rather than death, at the hands of their parents or carers or a member of the household, continue to result in failed prosecutions. There continue to be cases where children are intentionally injured by their carers and either because the child is too young or their injuries are too severe, or they are too frightened, they cannot tell who did it. If there are two parents or carers who are suspects, the current law makes it extremely difficult to convict either of them of a criminal offence relating to the serious injury. The most recent case that the NSPCC is aware of, was tried at Newcastle Crown Court on 11 August 2010 and concerned very serious injuries to an 8-month old child, named Eli Lowery. His mother and step-father both denied responsibility. According to reports, Recorder Jeremy Baker said: "It was originally alleged these two had caused grievous bodily harm with intent. However neither of them acknowledged they were responsible for the injuries. For good reason, the Crown considered they were not in a position where they could prove that original indictment. On the one hand a child of tender years has suffered serious injuries but the two accused cannot be sentenced on the basis that they caused the injuries". The defendants pleaded to the lesser charge of neglect and were each given 12 month prison sentences suspended for 2 years with supervision. This is a prime example of a case where the current law is failing vulnerable children.

3. To which area of the law does the problem relate (please tick)?

- | | | | |
|------------------------------|--------------------------|----------------------------|-------------------------------------|
| Administrative or public law | <input type="checkbox"/> | Criminal law | <input checked="" type="checkbox"/> |
| Property or land law | <input type="checkbox"/> | Family law | <input type="checkbox"/> |
| Trusts and wills | <input type="checkbox"/> | Commercial or contract law | <input type="checkbox"/> |
| Consumer law | <input type="checkbox"/> | Regulatory law | <input type="checkbox"/> |
| Planning and environment | <input type="checkbox"/> | Don't know | <input type="checkbox"/> |

Other (please state):

4. How did you come across this problem?

For example, do you work in a government department that has identified the problem in the course of work on a particular project?

For many years the NSPCC has been greatly concerned by cases where children die or are seriously injured at the hands of their parents or carers. In July 2000 we organised a seminar titled 'Which of you did it?' where a panel of experts spoke on the topic from the perspectives of the Police; health services; social services; the Criminal Bar Association; the Crown Prosecution Service and an academic perspective. Subsequently the NSPCC invited these experts to join a working group to look into the topic more closely. The group met for just over a year and published the report of findings in 2003. The problem in relation to the killing of children in a domestic setting has been addressed by s. 5 of the Domestic Violence Crime and Victims Act 2004. However serious injury is not included and we therefore continue to have cases where no one is convicted of these terrible crimes against innocent children. This leaves an unsafe situation where perpetrators of violence against children escape conviction and are free to potentially harm other children. Our NSPCC supporters (and indeed the general public) feel a strong sense of injustice in relation to these cases.

5. **We will be looking into the existing law that relates to the problem you have described. Please tell us about any court or tribunal cases, legislation or journal articles that relate to this problem.**

For example, you might be able to tell us the name of the particular Act or a case that relates to the problem.

The law that relates to this problem has been comprehensively set out in the NSPCC report: 'Which of you did it? Problems of achieving criminal convictions when a child dies or is seriously injured by parents or carers' and the Law Commission Report No 282 titled : 'Children: Their Non-accidental Death or Serious Injury (Criminal Trials)' both dated 2003. Professor John R Spencer QC, Fellow of Selwyn College, University of Cambridge summarised the position at page 45 of the NSPCC report. The case of Lane and Lane (1987) 82 CrAppR 5 involved a child of 22 months who was killed by a single blow. A manslaughter conviction of both parents was quashed as it could not be established which one was present when the blow was struck. the Court of Appeal held that the prosecution had not established that there was a case to answer. Aston and Mason (1991) 94 CrAppR 180 involved the prosecution of both carers for the murder of a 16 month old child. A manslaughter conviction was quashed as it was not clear which parent was present when the fatal injury was inflicted and the case of Lane and Lane was applied which meant that there was no case to answer. S and C [1996] Criminal Law Review 346 involved an 18 month old child who suffered a series of assaults over 3 months and "a number of serious and horrifying injuries" during a period of 19 hours. The convictions for grievous bodily harm and child cruelty were quashed, applying Lane and Lane and Mason and Aston etc.

6. **Can you give us any information about how the problem is approached outside England and Wales?**

You might have some information about how overseas courts or tribunals approach the problem.

We regret that we do not have this information.

7. **Within the United Kingdom, does the problem extend beyond England and Wales? If so, where?**

For example, does the problem also arise in Scotland or Northern Ireland?

The same problem arises in both Scotland and Northern Ireland

8. Can you identify particular costs that occur as a result of the problem? In particular, please identify any costs that affect the following groups:

- **government**
- **businesses and the private sector**
- **non-governmental organisations or charities, and**
- **the general public.**

For example, if the problem is one which must usually be resolved in court, court fees might be payable. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would need to spend.

There are costs associated with this problem due to the amount of police, crown prosecution, and other legal resources that are currently wasted because of the inability to secure convictions as the appropriate offence is not available to them. There are also potential costs to the police, health service and social services when perpetrators are not convicted and go on to harm and possibly kill other children. The problem results in a serious human cost in that vulnerable children are not being protected because perpetrators of violence against children are not being brought to justice.

9. What is the scale of the problem?

This might include information about the number of people affected this year, or the number of cases which were decided by a court or tribunal in a given period.

The current national data which would clarify the scale of the problem is available from the Crown Prosecution Service and from the Police. The NSPCC does not have access to this data. However we have had discussions with the Metropolitan Police and the Crown Prosecution Service which indicate that there is clear evidence of the problem. There is also data about the extent of the problem in the NSPCC report: 'Which of you did it? Problems of achieving criminal convictions when a child dies or is seriously injured by parents or carers' and the Law Commission Report No 282 titled : 'Children: Their Non-accidental Death or Serious Injury (Criminal Trials)' from 2003 (see pp15-19). In the ' Which of you did it?' research, 40 out of 43 police forces responded to an ACPO request to identify the number of cases relating to the death or serious injury of children under the age of 10 over a 3 year period from 1 January 1998 to 31 December 2000. 492 children were identified. The cases were not death and serious injury categories so we only have the combined figure of the 492 children. 50% were under the age of 6 months of age. It is highly unlikely that this problem has disappeared in the intervening period.

10. Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural issues, it might affect farmers and their families more than the general population.

The problem affects vulnerable children in all areas of the UK. There is no evidence to suggest that the problem affects black and minority ethnic groups or disabled children more than others. However we do know that disabled children are more vulnerable to abuse and it is therefore likely that they will be more vulnerable to deliberate serious injury at the hands of their carers.

11. What do you see as the benefits of reforming this area of the law?

This might be in terms of economic benefits, such as saving government money or reducing the impact on frontline services. Or it might be a social or environmental benefit such as making the law clearer, or modernising an outdated approach to a particular social problem.

The benefit of reforming this area of the law is that it would make it possible to successfully prosecute violent crimes against vulnerable children where the perpetrators are their parents or carers or members of the household. If s.5 of the Domestic Violence Crime and Victims Act 2004 had not been available, then the killers of Baby Peter Connelly could not have been convicted of his death. Had he not died, but been seriously injured, there would have been no suitable offence to charge them with. Vulnerable children would benefit from reform in this area of the law. A change in the law would also increase public confidence in the criminal justice system. Reactions reported in the media make it clear that the public feel a strong sense of injustice regarding these cases.

12. In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a government department, Parliamentary committee, or a non-governmental organisation?

The Law Commission is the most appropriate body to address this problem because it involves addressing a complex area of law.

13. Have you been in touch with any part of the government (either central or local) about this problem? What did they say?

We have been in touch with the Home Office who say that they would need evidence of the extent of the problem before taking action. As we have explained in question 9 above, we do not have access to the current data which would evidence the extent of the problem caused by this lacuna in the law. We have been in communication with the ACPO lead on the Homicide Working Group (sub-group on child death) and they have also requested that this legislation be reviewed as they are concerned about the serious gap in relation to children who have suffered serious injury at the hands of their carers.

14. If the problem you have described has been previously considered by the government, why would it be appropriate for the Law Commission to look into this problem?

The Law Commission is better placed to understand the complexities of the law and also would be in a position to obtain the relevant data from the Crown Prosecution Service and the Police.

15. Is any other organisation such as the government or a non-governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue.

As far as we are aware, this problem is not being considered by any other organisation at present and the government has not considered it since 2003 when it considered the Law Commission Report No 282 titled : 'Children: Their Non-accidental Death or Serious Injury (Criminal Trials)' and the NSPCC report: 'Which of you did it? Problems of achieving criminal convictions when a child dies or is seriously injured by parents or carers'.

Thank you for your response.

Please send it to us by **Friday 15 October 2010**.

Government Code of Practice on Consultation

The Seven Consultation Criteria

1. When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

2. Duration of consultation exercise

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible

3. Clarity and scope of impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

4. Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

6. Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Comments and suggestions

You are invited to send comments to the Law Commission's Consultation Co-ordinator about the extent to which the criteria have been observed and to suggest ways of improving our consultation process. Contact Phil Hodgson, Consultation Co-ordinator, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ. Email: phil.hodgson@lawcommission.gsi.gov.uk

Full details of the Government's Code of Practice on Consultation are available on the Department for Business Innovation and Skills' website at: <http://www.bis.gov.uk/policies/better-regulation/consultation-guidance>

Send to: Chief Executive
Law Commission
Steel House
11 Tothill Street
London SW1H 9LJ
Tel: 020 3334 0255

Email: eleventhprogramme@lawcommission.gsi.gov.uk
Fax: 020 3334 0201
www.lawcom.gov.uk