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Criminal liability of carers in cases of non-accidental death or serious injury of children

by Lenny Roth

1. Introduction

Cases involving non-accidental death or serious injury of children can lead to prosecutions for offences such as murder, manslaughter, or assault. A difficulty arises in pursuing criminal proceedings in cases where the injury to the child could only have been inflicted by one of two or more persons who were at home with the child, but there is not enough evidence to prove which person was responsible. This difficulty in identifying the perpetrator may exist either because none of the relevant persons offers an explanation that is consistent with the child's injury; or because each of the persons insists that the other person was responsible for the child's injury.

In October 2013, Deputy Coroner MacMahon recommended that the NSW Attorney-General consider introducing a new offence in NSW to deal with these types of cases. He referred to an offence that had been enacted in the United Kingdom in 2004. Certain persons can be found guilty of this offence if they caused the death or serious injury of a child or if they failed to take reasonable steps to protect the child from a significant risk of this occurring. The maximum penalty is 14 years imprisonment in the case of death; and 5 years for serious injury. On 16 July 2014, it was reported that the NSW Attorney-General, Brad Hazzard, was investigating the Deputy Coroner's recommendation.¹

This e-brief begins with the Deputy Coroner's findings before examining the extent of the problem in NSW. Next, it discusses the reforms in the United Kingdom, and it reviews a similar offence that was enacted in South Australia in 2005. Note that these offences are not limited to the types of cases where the perpetrator cannot be identified; more generally, they make certain classes of person criminally liable for failing to take reasonable steps to protect a child from a significant risk of death or serious injury. The final sections of this paper refer to similar "failure to protect" offences that exist in other Australian States and New Zealand (there is no such offence in NSW).

2. Coroner's findings in 2013

On 30 October 2013, Deputy Coroner MacMahon published findings following an inquest into the death in October 2009 of a four week old baby, Cooper Scifleet.² The autopsy report concluded that Cooper's death was due to head injury; and this was suspected to be non-accidental. Cooper's parents referred to some accidents that might have caused his injuries but the Deputy Coroner rejected these explanations. He concluded:

The evidence available...establishes that on the balance of probabilities that between the afternoon of 2 October 2009 and the morning of 3 October 2009 an incident occurred at the Scifleet household that involved Cooper being shaken with such force that he suffered significant injuries that subsequently led to his death.

The finding of multiple healing fractures also suggests that prior to suffering the injuries that led to his death Cooper had experienced physical abuse on a previous occasion...I am not in a position to make a positive finding that that was the case and it is therefore possible that those injuries occurred at or about the same time as the injuries that led to Cooper's death.

I am satisfied that either Gary and/or Rebecca Scifleet [Cooper's parents] have not told the truth as to the events involving Cooper following the return of Cooper to his home on 2 October 2009 until he was taken to hospital on 3 October 2009.

Perhaps the numerous unanswered phone calls from the Scifleet landline to the Rogers landline [Cooper's grandparents] on the afternoon of 2 October 2009 provide a clue as to the occurrence of something involving Cooper however on the evidence available we will never know.

There is no dispute, and I am satisfied that the evidence discloses, that at all times relevant to the circumstances in which Cooper sustained the injuries that resulted in his death, he was under the care and responsibility of Garry and/or Rebecca Scifleet and that no other adult person had contact with Cooper.³

Deputy Coroner MacMahon then stated that "the evidence available does not disclose who [i.e. which parent] was responsible for Cooper's care when he suffered the injuries that subsequently led to his death".⁴ Accordingly, he considered that the evidence was not "capable of satisfying a jury beyond reasonable doubt that a *known person* has committed an indictable offence", as provided in section 78(1)(b) of the *Coroners Act 2009*.⁵ He therefore concluded that he could not forward the matter to the Director of Public Prosecutions pursuant to section 78(4) of the Act. Having concluded that criminal proceedings could not be taken, the Deputy Coroner recommended that the NSW Attorney General consider:

...the enactment of a new criminal offence...similar to that of *Causing or allowing the death of a child or vulnerable adult* as was created by Section 5, Domestic Violence, Crime and Victims Act 2004 (UK).⁶

3. Extent of problem in NSW

It is difficult to know how many of these cases have arisen in NSW or Australia. The only study that could be found on the rate of prosecutions of

non-accidental death or serious injury of children is one that was referred to in a September 2009 ABC [article](#). It reported:

A new study by a Sydney doctor has found fewer than half the people who inflict head injuries on children are charged for their crime.

Dr Amanda Stephens studied 68 children treated by the child protection unit at the Children's Hospital at Westmead in Sydney between 1997 and 2005.

Prosecutions were launched in only 27 cases - less than half. Twenty-three were convicted of crimes ranging from neglect to murder, and almost all had confessed to injuring their child.

Dr Stephens says the main reason for the lack of charges is it is often difficult to identify the perpetrator.

She says families generally close ranks after incidents of what doctors call non-accidental head injuries...⁷

In their 2010 book on child abuse, Hoyano and Keenan noted that:

There appears to be little published evidence that the difficulties in establishing who has killed a child in cases of domestic abuse, has become a topic of legal debate in Australia. This is not because the problem does not exist.⁸

They then referred to two South Australian court cases where there were two people who could have caused the child's death, and each blamed the other.⁹ In one of these cases the prosecution for murder/manslaughter was successful and in the other case it was not. Both of the cases preceded reforms in South Australia, which established a new offence.

In the 2001 case of [R v Foster](#), a three-year old boy died after receiving a blow to the abdomen.¹⁰ The only persons who could have inflicted the injury were the child's mother and her male partner. The man was charged with murder and the mother was one of the Crown witnesses. The trial was by judge alone and the judge was satisfied on the evidence, including evidence that the man had assaulted the boy on previous occasions while the mother was absent, that the man killed the child. He was found guilty of manslaughter rather than murder because there was not sufficient evidence of intent to cause death or grievous bodily harm.

In the 2003 case of [R v Macaskill](#), a three month old baby died from a head injury.¹¹ The only persons who could have inflicted the injury were the baby's mother and father. Both of them were charged with manslaughter but the charges against the father were later withdrawn. The father was a key witness in the Crown case. A jury found the mother guilty of manslaughter but she appealed successfully on the basis that the trial judge did not give the jury a strong warning about the need to scrutinise the father's evidence with particular care given his motive to exculpate himself.¹² At the retrial by judge alone, the judge found the father to be an unreliable witness and ultimately delivered a verdict of not guilty.

4. United Kingdom: 2004 reforms

Law Commission report: The reforms in the United Kingdom were based on recommendations in a September 2003 report by the Law Commission,

Children: Their Non-Accidental Death or Serious Injury (Criminal Trials).

The Commission noted that its inspiration for undertaking this project was the work of a National Society for the Prevention of Cruelty to Children's (NSPCC's) Working Group. The Working Group was formed in 2001 and it presented its individual and collective views at a conference at the University of Cambridge in November 2002.¹³ The Commission stated that its own recommendations were 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.

As the law stands, as a result of the Court of Appeal's ruling in *Lane and Lane* 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.¹⁴

The Commission referred to research on the extent of the problem, including an NSPCC study of cases over a three year period where children were killed or suffered serious injury.¹⁵ It found that 61 per cent of investigations which were concluded resulted in no prosecution, and of the 27 per cent of cases which resulted in a conviction, only a small proportion of those involved a conviction for either homicide or wounding/causing grievous bodily harm. The Commission commented:

Although the nature of this 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...¹⁶

The Commission's proposed reforms were twofold. First, it proposed changes to the rules of evidence and procedure, in order to make it easier to prosecute persons under an existing offence (e.g. murder, manslaughter, or assault). Second, it proposed changes to the substantive criminal law, including creating a new criminal offence that would apply if persons responsible for a child failed to take reasonable steps to protect the child from a real risk of an offence being committed against the child.¹⁷ The Commission provided this summary of its proposals:

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.

(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.

(3) If a defendant in such a case has the statutory responsibility but fails to give evidence, then the jury should be permitted to draw such inferences as may be proper from such failure without first having to conclude that they could have convicted the defendant on the evidence alone and without drawing any such inference.

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.

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 [section 1 of] 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". 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". 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.

[This offence would carry a maximum sentence of 7 years imprisonment]¹⁸

The Commission rejected several other options that it considered, including: imposing a legal or evidential burden on a defendant to provide an explanation for a child's death or injury (failing the discharge of which he or she would be guilty of an offence such as murder); imposing a direct obligation on defendants to provide an explanation, with a criminal penalty imposed on failure to do so; and reforming the law of manslaughter.¹⁹

Legislation: [Section 5](#) of the *Domestic Violence, Crime and Victims Act 2004* (UK) contained a new offence of "causing or allowing the death of a

child or vulnerable adult”; and [section 6](#) contained new provisions relating to evidence and procedure for cases involving section 5 offences. In contrast to the Commission’s proposal, the section 5 offence was originally limited to cases where a child died.²⁰ However, in 2012, the offence was extended to cases where children are seriously harmed.²¹

Section 5 now states (in part):

- (1) A person (“D”) is guilty of an offence if—
 - (a) a child or vulnerable adult (“V”) dies or suffers serious physical harm as a result of the unlawful act of a person who—
 - (i) was a member of the same household as V, and
 - (ii) had frequent contact with him,
 - (b) D was such a person at the time of that act,
 - (c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and
 - (d) either D was the person whose act caused the death or serious physical harm or—
 - (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),
 - (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
 - (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.

In contrast to the Commission’s proposal, section 5 is not just a “failure to protect” offence. It applies if the defendant was the person whose act caused the death or serious harm, or if the defendant failed to protect the child from this occurring. Significantly, subsection 5(2) states that “the prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies”. Subsections (4), (5) and (6) contain relevant definitions.

Section 6 contains these evidence and procedure provisions that apply in cases where a child has died:

- (1) Subsections (2) to (4) apply where a person (“the defendant”) is charged in the same proceedings with an offence of murder or manslaughter and with an offence under section 5 in respect of the same death (“the section 5 offence”).
- (2) Where by virtue of section 35(3) of the Criminal Justice and Public Order Act 1994 (c. 33) a court or jury is permitted, in relation to the section 5 offence, to draw such inferences as appear proper from the defendant’s failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether he is guilty—
 - (a) of murder or manslaughter, or
 - (b) of any other offence of which he could lawfully be convicted on the charge of murder or manslaughter,even if there would otherwise be no case for him to answer in relation to that offence.

(3) The charge of murder or manslaughter is not to be dismissed under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (c. 37) (unless the section 5 offence is dismissed).

(4) At the defendant's trial the question whether there is a case for the defendant to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the section 5 offence, before that earlier time).

Section 6A contains a similar provision in relation to cases of serious harm.

Debates: In June 2004, the House of Commons Library published a [briefing paper](#) which outlined some stakeholder views on the reforms proposed in the 2003 bill.²² It noted that the National Society for the Prevention of Cruelty to Children's support for the bill could be inferred from a report it published in 2003. The Association of Chief Police Officers also supported the reforms.²³ On the other hand, the Criminal Bar Association raised some concerns about the section 5 offence:

- a) there should be a defence for a person who acted or failed to act out of fear of the other to the extent that they feared physical, mental or financial violence or were helpless to intervene by virtue of their own vulnerability
- b) the minimum prosecutable age (other than parents) should be 18 instead of 16
- c) the term "family" should be used instead of "household", simplifying the convoluted definition of "household"
- d) the provisions should allow for [each] defendant's culpability to be identified, which is important for sentencing purposes.²⁴

The Bar Association also criticised the evidence and procedure reforms arguing that it was "wholly inappropriate for one type of offence to attract different rules of procedure designed to secure convictions"; and that these reforms would infringe a person's right to a fair trial.²⁵ Justice, a law reform and human rights organisation, criticised section 5 on the basis that the Crown would not have to specifically prove which defendant committed the unlawful act and which failed to prevent the child's death; and this involved "absolving the Crown of its fundamental duty to prove all the elements of the offence against an individual".²⁶ Justice also argued that the evidence and procedure reforms would deprive the defence of a fair trial.²⁷

In a 2007 article, Professor Jonathan Herring raised serious concerns about the use of section 5 to prosecute women for failing to protect their child from their violent male partner. In summary, he stated:

The evidence from other jurisdictions which have offences of this kind suggests that they are used primarily against women who have failed to protect their children from their violent male partners. The early signs are that this is how the offence will be used in the United Kingdom. It leads to the prosecution of women who are themselves victims of domestic violence. It involves criminal proceedings against women when they and their children have been let down by the state's failure to provide adequate protection from domestic violence or adequate services for those seeking to flee from it. Further the offences are often based on a glamorised view of motherhood which regards the mother in an idealistic way as an all-knowing, all-sacrificing protector. The prosecution of women who fail to live up to this

image can lead to the focus of legal and public attention not being on the abuser, but on the mother who “left her children to die”.²⁸

The reference to “the evidence from other jurisdictions” was a reference to other jurisdictions in the United States, and was based on this 2001 [article](#). In terms of the experience in the United Kingdom, Herring referred to three cases in which women had been prosecuted for failing to protect their child from their male partner. In one of these cases, the woman was aware that the male had assaulted a former girlfriend, and in another of these cases, the male had told the woman that he would kill her if she left him.

Prosecutions: Between 2005 and 2010, 31 people were convicted of committing an offence under section 5.²⁹ One example of a case where it was unclear which of two persons had injured a child is [R v Ikram & Anor](#). A boy aged 16 months died as a result of an injury that he suffered when living with his father, and his father’s new partner.³⁰ Both persons said that they knew nothing about how the injury had happened. Both were charged with murder and the section 5 offence. The Crown decided not to proceed with the murder charge against the father. The judge directed the jury that “the prosecution asserted that either defendant caused the boy’s death and that the other allowed it to happen, but [it] was not required to prove which way round this was”. The jury found both of them guilty of the section 5 offence. Both were sentenced to 9 years’ imprisonment, on the basis that each failed to protect the child from foreseeable violence.

5. South Australia: 2005 reforms

Legislation: In 2005, a new offence of criminal neglect was enacted in South Australia.³¹ It was developed in response to the 2003 case of *Macaskill* (referred to above), and having regard to the reforms that were then proposed in the United Kingdom. When introducing the Bill on 12 October 2004, the Attorney General, Michael Atkinson, said:

The bill is designed to attribute criminal liability to carers of children and vulnerable adults when the child or adult dies or is seriously harmed as a result of an unlawful act while in their care. The bill is not concerned with cases where the accused can be shown to have committed the act that killed or seriously harmed the victim or can be shown to have been complicit in that act. In these cases, the accused is guilty of the offence of homicide or causing serious harm.

The bill is aimed at a different kind of case—where the accused is someone who owes the victim a duty of care and has failed to protect the victim from harm that he or she should have anticipated. It covers two kinds of case. The first is where there is no suggestion that it was the accused who actually killed or seriously harmed the victim; the second is where the accused is one of a number of people who had the exclusive opportunity to kill or seriously harm the victim and where, because no member of the group can be eliminated as the principal offender, no principal offender can be identified, with the result that neither the accused, nor any other member of the group, can be convicted either as a principal offender or accomplice.

These acquittals often come about because the only people who know what happened are the suspects themselves, and each says nothing or tells a story that conflicts with the stories of the other suspects. The courts have held that a jury that is unable to determine whom to believe should acquit all

accused. The bill establishes a new offence of criminal neglect that can be proved without having to identify the principal offender.³²

The new offence is set out in section 14 of the [Criminal Law Consolidation Act 1935 \(SA\)](#). It provides (in part):

- (1) A person (the **defendant**) is guilty of the offence of criminal neglect if—
- (a) a child or a vulnerable adult (the **victim**) dies or suffers serious harm as a result of an unlawful act; and
 - (b) the defendant had, at the time of the act, a duty of care to the victim; and
 - (c) the defendant was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act; and
 - (d) the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.

Maximum penalty:

- (a) where the victim dies—imprisonment for 15 years; or
- (b) where the victim suffers serious harm—imprisonment for 5 years.

(2) If a jury considering a charge of criminal neglect against a defendant finds that—

- (a) there is reasonable doubt as to the identity of the person who committed the unlawful act that caused the victim's death or serious harm; but
- (b) the unlawful act can only have been the act of the defendant or some other person who, on the evidence, may have committed the unlawful act,

the jury may find the defendant guilty of the charge of criminal neglect even though of the opinion that the unlawful act may have been the act of the defendant.

The intent of subsection (2) above was explained as follows.

When a person is charged with criminal neglect, the assumption is that the unlawful act that killed or harmed the victim was committed by someone else. In cases where it is impossible to tell which of two or more people killed or harmed the victim, but it is clear that one of them did, it would be possible to escape conviction for criminal neglect by repudiating that assumption. The accused could simply point to the reasonable possibility that it was he or she, and not someone else, who killed or harmed the victim. To prevent this perverse outcome, the Bill makes it clear that a person accused of criminal neglect cannot escape conviction by saying there was a reasonable possibility that he or she was the author of the unlawful act.³³

Subsection (3) states that “the defendant has a duty of care to the victim if the defendant is a parent or guardian of the victim or has assumed responsibility for the victim's care; and subsection (4) contains definitions of some other terms that are used in subsection (1).

Although modelled on the United Kingdom offence, the South Australian offence is different in several respects. First, in the United Kingdom, a person can be liable under the offence if they either committed the unlawful act causing death or serious injury or if they failed to protect the child from this occurring; and the prosecution does not have to prove which one applied. In contrast, the South Australian offence is solely an offence of failing to protect a child from death or serious harm. However, the provision makes it clear that guilt can be established even if there is a possibility that the defendant was the person who committed the unlawful act.

Another notable difference is that in the United Kingdom liability arises for persons who were a member of the same household as the child, whereas in South Australia, liability arises for persons who were the child's parent or guardian, or who had assumed responsibility for the child's care. The maximum penalties in the offences are also different, especially in cases of serious injury to a child (10 years in the United Kingdom and 5 years in South Australia). It should also be noted that in South Australia no changes were made to the rules of evidence and procedure to make it easier to convict a person of an existing offence (e.g. murder or assault).

Debates: In debates on the 2004 Bill, the Opposition referred to concerns that had been expressed by the Law Society's Criminal Law Committee; and it sought, unsuccessfully, to have the Bill referred to the Legislative Review Committee. The Law Society's Committee had stated (in part):

The society is concerned that this legislation could encourage inadequate investigation by police and forensic experts; the presentation of weak prosecution cases; the criminalisation of innocent people; and the failure properly to prosecute an offender for the substantive offence for which they are truly guilty.

One of the stated purposes of the bill is to get one or other of the parents of a child, for example, who did not commit the unlawful act occasioning death or serious harm to have an incentive to 'say what seriously happened'.

However, it is considered equally likely that the legislation will create an incentive to fabricate, to shift blame and to make false accusations. We envisage a likely consequence of the legislation is that persons potentially liable will seek to cast blame upon each other, leaving both liable to conviction for criminal neglect and potentially resulting in an innocent party suffering conviction on that charge while the perpetrator avoids conviction for the substantive offence.³⁴

The Attorney-General responded by noting that most commentators welcomed the Bill, and that he had received letters of support from the Director of Public Prosecutions in the ACT and in Western Australia.³⁵ He replied to some of the concerns raised by the Law Society Committee:

...the bill does not...encourage the criminalisation of innocent people. The bill says that carers who fail to take reasonable steps available to them in the circumstances to protect a child or vulnerable adult in their care from harm in certain circumstances are not innocent and may be guilty of the offence of criminal neglect. If each of two suspects owed a duty of care to the victim and each can be shown to have failed to take steps to protect the victim when he or she should have been aware that the victim was at an appreciable risk of harm, each one is the perpetrator of the offence.

Of course, one of them must have done the unlawful act that killed or harmed the victim, but this law is not concerned with that. It allows each of these people to be convicted of a new offence that is different from the offence of committing the unlawful act itself. No injustice is done to the suspect who did not commit the unlawful act if the elements of the offence of criminal neglect are established beyond reasonable doubt against him or her. No injustice is done to the person who did commit the unlawful act. There is no criminalisation of innocent people; there is no shifting of any onus of proof; and there is no diminution of a right to silence.

...

...the main opposition to the bill from the Law Society and others was to its creating an offence of criminal negligence or to the way it expresses the elements of criminal negligence, or both. I have mentioned elsewhere that criminal negligence is not a new concept and is already in our law in respect of serious offences...The way this bill describes criminal negligence...mirrors the High Court's test for criminal negligence...³⁶

Prosecutions: Since mid-2006, eight persons have been convicted of an offence under section 14.³⁷ These convictions related to six separate cases of children suffering serious harm or death. The six cases are summarised in the table below.³⁸ Seven of the eight offenders pleaded guilty to the offence. However, in four of the six cases, no one admitted to inflicting the injury on the child. The sentences imposed for this offence to date have ranged from a good behaviour bond to imprisonment for 10 years.

In two of the cases, a woman was convicted for failing to protect her child from her male partner. In one of these cases (*Bath*) there was evidence of controlling behaviour by the male towards the woman; as well as evidence of violence by the male towards previous girlfriends; and the woman was sentenced to three years and two months imprisonment. In the other case (*N-T & C*) there was evidence that the male had been violent towards the woman; and the woman received a two-year good behaviour bond.

Case	Summary
<i>Barty</i> 14/12/06	<p><u>Facts:</u> 21 month old child died after being hit – mother had a history of violence towards child – only persons who were present were mother and her male partner – mother charged with murder, causing grievous bodily harm, and criminal neglect – male partner charged with criminal neglect on basis that left child alone with mother after she had been violent towards child – he pleaded guilty – he also was a witness in mother's murder trial at which she was found guilty – note that the mother alleged in her murder trial that it was her male partner rather than her who had inflicted the violence on her child</p> <p><u>Sentence:</u> Male partner was sentenced to 2 years imprisonment – mother was sentenced to life imprisonment for murder</p>
<i>Dean</i> 14/12/07	<p><u>Facts:</u> 3 year old child suffered injuries as a result of swallowing caustic soda at home - mother was using this to manufacture methyl amphetamine with her male partner – mother charged with manufacture of methyl amphetamine and criminal neglect – she pleaded guilty to both charges – man only charged with manufacture of methyl amphetamine and he pleaded guilty to this charge</p> <p><u>Sentence:</u> Mother sentenced to 3 years 2 months imprisonment (for both offences) – Her male partner received a suspended sentence of 18 months imprisonment for manufacture of methyl amphetamine.</p>

<p><i>Partridge & Field</i> 10/7/08</p>	<p><u>Facts:</u> 3 year old child died from blow to stomach - at time of injury child was in care of his mother and his mother's male partner – no evidence as to which person inflicted injury on child - mother and partner both charged with criminal neglect - both pleaded guilty</p> <p><u>Sentence:</u> mother was sentenced to 6 years imprisonment – her male partner was sentenced to 10 years imprisonment – he appealed against sentence on several grounds including that it was disproportionate to the mother's sentence – appeal was dismissed with court noting that he did not explain why he did not take the child to doctor as condition was deteriorating; and that he had criminal antecedents: see [2008] SASC 323</p>
<p><i>Clarke</i> 19/7/10</p>	<p><u>Facts:</u> 12 week old child suffered damage to brain and eyes as a result of shaking or being thrown onto a soft surface – father charged with recklessly causing serious harm and criminal neglect – pleaded not guilty and said injuries may have been caused when mother was feeding – he was found guilty of criminal neglect</p> <p><u>Sentence:</u> suspended sentence of 3 years imprisonment</p>
<p><i>Bath</i> 20/3/14</p>	<p><u>Facts:</u> 4 year old child suffered extensive injuries as a result of violence by mother's male partner over a period of three weeks – evidence that male had been violent towards several former partners – no evidence that violent towards mother but controlling behaviour towards her – mother charged with criminal neglect on basis that did not do anything to protect her child – she ensured that the child's father had no access to him at the time of the violence and she kept him away from preschool – she pleaded guilty – male partner charged with offences of assaulting child and five other women</p> <p><u>Sentence:</u> judge said mother's culpability was of a high order and sentenced her to 3 years 2 months imprisonment – male partner sentenced to 16 years imprisonment for all offences</p>
<p><i>N-T & C</i> 27/3/14</p>	<p><u>Facts:</u> 4 month old daughter died from inflicted head injuries and lack of medical attention – mother and father only persons who could have injured child – both charged with criminal neglect – both pleaded guilty – in a disputed facts hearing, judge accepted mother's evidence that father inflicted injuries – there was evidence that the father had previously been violent towards both mother and child</p> <p><u>Sentence:</u> Father sentenced to 9 years imprisonment – mother sentenced to a 2 year good behaviour bond on basis that she had a significantly reduced capacity to protect her child due to her depression and due to the intimidation by the father</p>

6. Offences in other States

Overview: Child protection laws in three other Australian States contain an offence of failing to protect a child from harm.³⁹ In Victoria, the maximum penalty for the offence is 12 months imprisonment, in Tasmania, it is two years imprisonment, and in Western Australia it is 10 years imprisonment.⁴⁰ These offences do not appear to have been enacted in response to the same issue that prompted the reforms in the United Kingdom and South Australia; and the offences have not been framed in the same way as in those two jurisdictions. There is no “failure to protect” offence in NSW.⁴¹

Proposal in Victoria: In 2011, the Victorian Department of Justice asked selected stakeholders to comment on a discussion paper on *Failure to Protect Laws*.⁴² The paper proposed new offences for adults who failed to take action in the following circumstances:

- Where the adult knows or believes that a child who they have custody or care of, or live in the same household as, is suffering sexual abuse or abuse that may result in serious injury or death; and
- Where the child living in the same household as the adult dies due to child abuse and that adult was aware of the abuse and its seriousness.⁴³

According to the paper, the offences would serve two purposes:

First, to reinforce the responsibility of adults who are living with or care for a child to protect that child from harm. Second, in circumstances where it was not clear which parent was responsible for the abuse, the laws would allow the conviction of either or both parents under the proposed failure to protect laws.⁴⁴

A 2012 [report](#) on child protection in Victoria noted several concerns about this proposal.⁴⁵ It stated that “non-abusive parents may themselves be the victims of family violence, and may be unable to act protectively towards their children”. It also noted that there was already an offence of failing to protect a child from harm; and it contained an element of intention. In addition, the report stated that the proposed offence “might have a dampening effect on help-seeking behaviour and the reporting of abuse”. It recommended reviewing the operation of the existing offence; and it stated that any new offence should provide that the prosecution is required to prove that the accused was not the subject of family violence.⁴⁶

The Government has not proceeded with its proposals.⁴⁷

7. New Zealand: 2011 reforms

In 2011, the Government introduced a new offence in [section 195A](#) of the *Crimes Act 1961* of “failure to protect a child or vulnerable adult”, which carries a maximum penalty of 10 years imprisonment. This implemented a recommendation from a 2009 Law Commission [report](#), which reviewed Part 8 of the *Crimes Act 1961* (NZ) (Crimes Against the Person). In proposing the new offence, the Law Commission explained:

No duty to intervene in such cases presently exists. It is a situation that falls beyond the scope of any of the existing statutory duties, and in the absence of such a duty, there is no criminal liability for omitting to act. In practice, this means that household members who are neither perpetrators of, nor (legally speaking) parties to, ill treatment or neglect cannot be held liable for their failure to intervene, no matter how outrageous or how obvious the ill treatment or neglect of the child may be...⁴⁸

It appears therefore that the enactment of this new offence was motivated by slightly different concerns to those which prompted the reforms in the United Kingdom and South Australia. This might explain why this offence is different to the offences introduced in those two jurisdictions. The New Zealand offence is limited to the failure to protect a child from a significant risk of death or serious harm, and it does not specifically mention the

possibility that the defendant may have been the person who committed the unlawful act which caused the child's death or serious injury.

In a Committee inquiry into the bill, some stakeholders (e.g. some Family Violence Networks) unreservedly supported the new offence.⁴⁹ Others (e.g. New Zealand Law Society) were broadly supportive but proposed various drafting changes.⁵⁰ Many persons (e.g. Associate Professor Julia Tolmie) raised concerns that "the requirement on parents and others to take reasonable steps to protect children from injury fails to recognise the reality of domestic violence or may have unintended consequences on families".⁵¹ A Ministry of Justice report suggested that there was scope for prosecutors and courts to have regard to domestic violence in these cases.⁵²

8. Conclusion

The Cooper Scifleet coronial inquest in 2013 has prompted consideration of the adequacy of the criminal law in NSW in dealing with cases where it is not possible to identify who out of two or more persons, who were at home with a child, was responsible for the child's non-accidental death or serious injury. It is not known how many of these types of cases have arisen in NSW or Australia but one study of cases at Westmead Children's Hospital suggests that several prosecutions have not been pursued in the past.

In response to these types of cases in the United Kingdom, changes to evidence and procedure rules were introduced to make it easier to prosecute existing offences; and a new offence of causing or allowing the death or serious injury of a child was enacted. In South Australia, at around the same time, a similar but narrower "failure to protect" offence was introduced; but no changes were made to evidence and procedure rules. In the United Kingdom and South Australia, the new offence carries heavy maximum penalties. Three other States and New Zealand also have "failure to protect" offences but they do not appear to have been enacted in response to the same concerns; and they are not drafted in the same way.

There has been controversy over the introduction of this type of offence. One concern is that innocent parties could be convicted of this offence while the perpetrator avoids conviction for a substantive offence (e.g. murder). The South Australian Attorney-General rejected this, noting that all of the elements of the new offence needed to be established. Critics have also argued that this type of offence is often used to prosecute women who have failed to protect their child from violent male partners. Against this, it is asserted that prosecutors and courts can take such issues into account in dealing with these cases. In the United Kingdom, the changes to evidence and procedure rules were criticised as denying the right to a fair trial.

In four of the six cases in which the South Australian offence has been successfully prosecuted (involving eight offenders), no one admitted to inflicting the injury on the child. To date, the sentences imposed for this offence have ranged from a good behaviour bond to imprisonment for 10 years. Two of the eight persons who have been convicted were women who had failed to protect their child from their male partner in cases where there was some evidence of domestic abuse. In one of these cases, the woman was sentenced to imprisonment for three years and two months; and in the other case, the woman received a good behaviour bond.

Finally, while this e-brief has been solely concerned with the criminal law's response to certain cases where children suffer non-accidental death or serious injury, the issue of prevention is also important. According to the latest figures published by the NSW Child Death Review Team, between 1998 and 2012, 128 children in NSW died as a result of fatal assault by a family member, primarily the child's parents (i.e. an average of over 8 fatal assaults per year).⁵³ Child protection statistics also show that in 2011-12, there were over 6,000 substantiated notifications to NSW child protection authorities of physical and sexual abuse of children.⁵⁴

- ¹ C Hart, [Cootamundra baby death prompts investigation of state laws](#), ABC, 16 July 2014; A Pearson, [Cootamundra baby death prompts law research](#), *Daily Advertiser*, 17 July 2014
- ² Inquest into the death of Cooper Scifleet, Findings of Deputy State Coroner MacMahon, 30 October 2013
- ³ Inquest into the death of Cooper Scifleet, note 2, p29, paras 123-127
- ⁴ Inquest into the death of Cooper Scifleet, note 2, p29, para 128
- ⁵ Inquest into the death of Cooper Scifleet, note 2, p25, para 107
- ⁶ Inquest into the death of Cooper Scifleet, note 2, p2
- ⁷ A Guest, ['Shaken baby' cases rarely prosecuted](#), ABC, 17 September 2009. See also A Horin, [Few convictions for infant head injuries](#), *Sydney Morning Herald*, 17 September 2009. This study was a research thesis for a PhD, which was [completed in 2011](#). No published articles could be found in relation to this thesis.
- ⁸ L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries*, Oxford University Press, 2010, p172
- ⁹ Hoyano and Keenan, note 8, p173
- ¹⁰ [2001] SASC 20
- ¹¹ [2003] SASC 61
- ¹² [R v Macaskill](#) [2001] SASC 449
- ¹³ National Society for the Prevention of Cruelty to Children, *Which of you did it? Problems of achieving criminal convictions when a child dies or is seriously injured by parents or carers*, November 2003
- ¹⁴ UK Law Commission, *Children: Their Non-Accidental Death or Serious Injury (Criminal Trials)*, Report, September 2003, p1
- ¹⁵ UK Law Commission, note 14, p17-18
- ¹⁶ UK Law Commission, note 14, p16
- ¹⁷ As to this twofold approach, see UK Law Commission, note 14, p4-5
- ¹⁸ UK Law Commission, note 14, p4
- ¹⁹ UK Law Commission, note 14, p21-23
- ²⁰ It was noted that extension to serious harm cases might be considered in the future: see S Broadbridge, P Strickland, G Berman, *The Domestic Violence, Crime and Victims Bill [HL]: Domestic violence provisions Bill 83 of 2003-04*, House of Commons Library Research Paper 4/44, 9 June 2004, p59
- ²¹ *Domestic Violence, Crimes and Victims (Amendment) Act 2012 (UK)*
- ²² S Broadbridge, P Strickland, G Berman, *The Domestic Violence, Crime and Victims Bill [HL]: Domestic violence provisions Bill 83 of 2003-04*, House of Commons Library Research Paper 4/44, 9 June 2004, p55-57; and p70-75
- ²³ Broadbridge, Strickland and Berman, note 22, p70
- ²⁴ Broadbridge, Strickland and Berman, note 22, p56
- ²⁵ Broadbridge, Strickland and Berman, note 22, p71-73
- ²⁶ Broadbridge, Strickland and Berman, note 22, p56-57
- ²⁷ Broadbridge, Strickland and Berman, note 22, p73-74
- ²⁸ J Herring, 'Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim', [2007] *Criminal Law Review*, p933.
- ²⁹ K Clarke, [Child abuse loophole closed](#), *Press Release*, 29 June 2012
- ³⁰ [2008] EWCA Crim 586
- ³¹ *Criminal Law Consolidation (Criminal Neglect) Amendment Act 2005 (SA)*
- ³² M Atkinson, *SA Parliamentary Debates (LA)*, 12 October 2004, p333
- ³³ M Atkinson, *SA Parliamentary Debates (LA)*, 12 October 2004, p334
- ³⁴ I Redmond, *SA Parliamentary Debates (LA)*, 8 December 2004, p1257; and R Lawson *SA Parliamentary Debates (LC)* 7 February 2005, p889
- ³⁵ M Atkinson, *SA Parliamentary Debates (LA)*, 9 December 2004, p1307-1308

- ³⁶ M Atkinson, *SA Parliamentary Debates (LA)*, 9 December 2004, p1309
- ³⁷ The cases were identified from a list provided by the South Australian Office of the Director of Public Prosecutions (DPP) on 11 September 2014. The list of cases began in mid-2006 as this was when the Office implemented its current database.
- ³⁸ In all but one case, the facts and sentences were taken from the sentencing remarks. In the case of Clarke (2010), the facts were taken from media reports on the case; and the sentence was confirmed with the South Australian District Court registry.
- ³⁹ *Children and Community Services Act 2004* (WA), section 101; *Children, Youth and Families Act* (VIC), section 493; and *Children, Young Persons and Their Families Act 1997* (TAS), [section 91](#). See also *Criminal Code* (Qld), section 286
- ⁴⁰ In Western Australia, the failure to protect offence in section 101 was enacted in 2004 as part of new child protection laws. A similar offence existed under the previous child protection laws and it had a penalty of a \$10,000 fine or 12 months imprisonment. As part of the 2004 reforms, the penalties for all offences relating to child abuse were reviewed and it was considered appropriate to increase the penalty for this offence: see *Western Australia Parliamentary Debates (LA)*, [6 April 2004](#), p1771.
- ⁴¹ The *Children and Young Persons (Care and Protection) Act 1998* (NSW) contains in section 227 an offence of child abuse; and in section 228 an offence of child neglect (i.e. failing to provide adequate food, clothing etc). Both offences have a maximum penalty of a fine of \$22,000. Note also that the *Crimes Act 1900* (NSW) has in sections 43 and 43A offences of failing to provide child with the necessities of life. Both of these offences have a maximum penalty of 5 years imprisonment.
- ⁴² P Cummins, *Report of the Protecting Victoria's Vulnerable Children Inquiry*, Volume 2, p359. The Department's Discussion Paper is not publicly available.
- ⁴³ P Cummins, note 42, p359
- ⁴⁴ P Cummins, note 42, p359
- ⁴⁵ P Cummins, note 42, p360-361. For a critical stakeholder perspective, see this [joint submission](#) to the Department of Justice by community agencies in the family violence, child and family welfare and community legal sectors
- ⁴⁶ P Cummins, note 42, p361
- ⁴⁷ Note that in 2014, in response to a 2013 Parliamentary Committee report on the handling of child abuse by religious and other organisations, the Government introduced an offence of a failure by a person in a "relevant organisation" to protect a child from a sexual offence, which carries a maximum penalty of 5 years imprisonment: see *Crimes Amendment (Protection of Children) Act 2014* (VIC)
- ⁴⁸ New Zealand Law Commission, *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person*, Report 111, November 2009, p55
- ⁴⁹ New Zealand Ministry of Justice, [Crimes Amendment Bill \(No 2\): Report of the Ministry of Justice](#), p12. See also Social Services Committee, [Crimes Amendment Bill \(No 2\)](#), 18 August 2011; and see this [page](#) listing the submissions to the Committee
- ⁵⁰ New Zealand Ministry of Justice, note 49, p13
- ⁵¹ New Zealand Ministry of Justice, note 49, p19
- ⁵² New Zealand Ministry of Justice, note 49, p20-22
- ⁵³ NSW Child Death Review Team, [Child Death Review Team Annual Report 2012](#), October 2013, p113
- ⁵⁴ Australian Institute of Health and Welfare, [Child Protection Australia 2012-13](#), 2014, p73

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