Overview of the 2004 Act

1. In July 2002, the government published its White Paper *"Justice for All"* setting out wide-ranging proposals for reforming the criminal justice process. Many of the proposals found their way into the Criminal Justice Act 2003. But many proposals for tackling domestic violence did not form part of the 2003 Act (see, for example, Ch.8 of the White Paper *Crime, Justice and Protecting the Public* (Cm.965).

2. The Domestic Violence, Crime and Victims Bill was introduced in the House of Lords on December 1, 2003. Part 2 ("criminal procedure etc") contained six clauses that were limited to three areas: (1) making common assault an arrestable offence, (2) restraining orders, and (3) procedure for trial by jury of "sample counts only". By the date of Royal Assent (November 15, 2004), Part 2 had expanded to 22 clauses, and was renamed "criminal justice". The amendments included provisions to empower courts to order offenders to pay a surcharge in respect of any fine, custodial or community sentence imposed on them (s.14), to provide that a judge alone must determine a defendant's fitness to plead and insanity (ss.22-26), to vest authorised officers with statutory powers when executing warrants (s.27). Other amendments inserted other miscellaneous but important clauses into the Bill (now ss.28-31). The range of amendments necessitated revising the wording of the Long Title.[1]

3. On January 12, 2004 the Consultation Paper *"Compensation and Support for Victims of Crime"* was published.

4. Three areas in that Paper required legislation. (1) surcharges on fixed penalty notices for criminal offences, as well as surcharges on any fine, community, or custodial sentence (the revenue being paid into a victim's fund, (2) transferring the liability to pay compensation to those criminally injured in the course of duty, to the employer, and (3) giving the Criminal Injuries Compensation Authority a legal power to recover the amount payable in compensation from the offender *(per* Baroness Scotland. *Hansard,* January 19, 2004, Grand Committee, col.GC192.).

5. Intermittent custody (and minor amendments to the Criminal Justice Act 2003 concerning prosecution appeals) was debated in March 2004. Provisions relating to unfitness to plead were shunted into, out of, and back into the Bill between March 11, 2004 and November 2, 2004. Standing Committee E considered the issue of surcharges on the July 1, 2004. Provisions relating to the rights of victims to make representations, and to receive information, in connection with offenders or patients who are subject to mental health determinations, were first debated on the July 6, 2004 (Ch.2-Pt 3). Chapter 2 was heavily revised between July and the October 27, 2004. Between December 2003, and Royal Assent, six Schedules were added to the Bill (they now appear as Schs 1-6 inclusive of the 2004 Act). Transitional provisions (originally set out in Clause 27 of the Bill) were placed into a Schedule (now Sch.12).

The Four Parts of the 2004 Act

Part I

Sections 1-4

6. Remedies available to victims of domestic violence under the Family Law Act 1996 (c.27) are extended under Pt 1 of the 2004 Act. The remedies are no longer confined to married couples, but include same-sex couples, and those in intimate relationships of "significant duration". It becomes a criminal offence to break a non-molestation order. It is irrelevant that the conduct giving rise to the breach of the order does not (apart from new s.42A of the Family Law Act 1996) amount to a criminal offence.

Sections 5-8

7. The 2004 Act has not altered the law relating to murder and manslaughter, but Pt 1 creates a new offence of "causing or allowing the death of a child or a vulnerable adult" (s.5). The offence is intended to deal with the problem of securing convictions in cases that are often styled "familial homicide", involving two or more householders in respect of whom it is not possible to prove who performed the fatal act. For the purposes of the new offence, a "child" means a person under the age of 16, and a "vulnerable adult" is a person 16 or over "whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old-age or otherwise". The offence goes further than the Law Commission's proposals.[2] A concise and helpful review of law and policy in this area is to be found in *Research Paper 04/44*, June 9, 2004, House of Commons.

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1 See for example, *Hansard,* July 1, 2004, col.241; July 6, 2004, col.338; and November 2, 2004, col.240.

2 *"Children: Their Non-Accidental Death Or Serious Injury (Criminal Trials),* Law Commission Report No.282, and the Consultation Paper No.279.

8. The s.5 offence may only be charged against those aged 16 or over, unless *the mother* or the *father* of the victim is aged less than 16 years. Parents under 16 years of age have a duty towards the child to prevent harm and suffering. Other children under that age "will not be considered to have a duty to prevent their parents from harming a sibling or other member of the household" (per the Parliamentary Under-Secretary of State for the Home Department (Paul Goggins), Standing Committee *E, Hansard,* June 22. 2004, col.85). The reach of the offence is not restricted to the parents or legal guardians of the child or vulnerable adult.

9. Section 6 (formerly Clause 5 in the original version of the Bill, December 2003), applies where a person is charged with both a homicide offence (murder or manslaughter) *and* the s.5 offence. If, at the end of the prosecution case, there is a case for the defendant to answer on the s.5 offence, a judge will not be permitted to hear a submission of 'no case to answer' in respect of a charge of murder or manslaughter. A judge may only entertain such a submission at the close of all the evidence in the case (s.6(4)).

10. If s.35(3) of the Criminal Justice Public Order Act 1994 (c.33) applies in respect of the s.5 offence, a court or jury may draw proper inferences from silence in relation to a charge of homicide (i.e. murder or manslaughter, or "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" (s.6(2)). This highly controversial provision (and its corresponding provision for Northern Ireland: s.7) had been removed from the Bill at Third Reading in the House of Lords,[3] but it was restored to the Bill (without objection) in Standing Committee E.[4] Section 6 was again debated in the House of Lords on the November 2, 2004.

11. It is not the government's intention that ss.6 and 7 should result in a person being convicted of murder or manslaughter purely on the basis of his/her failure to testify or to answer a question. An amendment moved in the House of Lords, which would have removed s.6,[5] was withdrawn following an assurance by the Minister of State, Home Office (Baroness Scotland) that such a result was not possible by reason of s.38(3) of the Criminal Justice and Public Order Act 1994 read in conjunction with the case of *Murray* (European Court of Human Rights): *Hansard,* November 2, 2004, cols 190-200 (the debate is worth reading).

12. Part 1 also provides the means for furnishing guidance on "the establishment and conduct of domestic homicide reviews so that statutory and other agencies can learn lessons from them" (*Explanatory Notes*, June 2005, para.46).

Part 2

13. Part 2 is concerned with criminal procedure. On the June 14, 2004, the Home Secretary (David Blunkett) announced that the government intended to press ahead with surcharges on both criminal convictions and fixed penalty notices *(Hansard:* June 14, 2004, col.540). Sections 14-16 were added to the Bill by amendments debated in Standing Committee *E (Hansard, cols* 293-313) and agreed by the House of Lords on the November 2. 2004 *(Hansard,* col.201).

Part 3

14. Part 3 consisting of three chapters, makes provision for victims, introduces a statutory code for victims, extends the jurisdiction of the Parliamentary Ombudsman, and creates a new *Commissioner For Victims and Witnesses*.

15. Chapter 2 to Pt 3 gives the victims of serious and violent offences the right to information, and the right to make representations, about conditions imposed on an offender for the protection of the victim (whether the offender is mentally disordered or not: see s.35 of the 2004 Act). Victims will have the right to be kept informed about decisions taken about their protection in relation to the offender's release or discharge.

Part 4

16. Part 4-supplementary-contains provisions detailing amendments to other enactments, repeals, and transitional arrangements. extent, and short title.

No statutory definition of "domestic violence"

17. The 2004 Act does not provide a definition of "domestic violence". This is deliberate. A workable definition of "domestic violence" proved elusive. It will also be noted that the expression does not appear in any section in the Act. When the provisions of the 2004 Act were debated in Parliament, the government stated that it was working with various agencies towards a single definition of domestic violence, but this was not needed

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3 See Research Paper 04/44, p.64, and *Hansard,* March 25, 2004.

4 July 6, 2004, *Hansard, cols* 345-346.

5 And no doubt s.7, Northern Ireland.

for the purposes of the Act because "it would be difficult for any statutory definition to reflect the breadth of domestic violence and to keep it up to date as it will change" (Baroness Scotland, *Hansard,* December *15. 2003,* col.1015: and see the speech of the Parliamentary Under-Secretary of State for the Home Department. House of Commons, *Hansard,* June 22, 2004, Standing Committee E col.26).

18. However, a national definition of 'domestic violence' now exists (2004)[6]: it is used by government departments, local governments and their agencies, the CPS, and police forces in the UK:

> "any incident of threatening behaviour, violence or abuse [psychological, physical, sexual, financial or emotional] between adults who are or have been intimate partners or family members, regardless of gender or sexuality."
>
> "An adult is defined as any person aged 18 years or over. Family members are defined as mother, father, son, daughter, brother, sister, and grandparents, whether directly related, in laws or stepfamily."

19. The above is wider than the older Home Office definition of 'domestic violence':

> "any violence between current and former partners in an intimate relationship, wherever and whenever it occurs. The violence may include physical, sexual, emotional or financial abuse" *(Safety And Justice, The Government's Proposals On Domestic Violence,* June 2003 Cm.5847)

20. The CPS definition used to be:[7]

> "any criminal offence arising out of physical, sexual, psychological, emotional, or financial abuse by one person against a current or former partner in a close relationship, or against a current off former family member" (*Research Paper*, 04/44, p.10)

No offence of "domestic violence"

21. Three reasons appear to have influenced government thinking against creating a single statutory offence of 'domestic violence': (a) it was not practicable to devise a workable definition of 'domestic violence', (b) behaviour associated with "domestic violence" is broad and best dealt with by way of an array of measures, and (c) a specific offence would require the enactment of precisely defined statutory duties and responsibilities.[8] Defining statutory duties and responsibilities would entail analysing the structure of domestic relationships. The government successfully argued against attempts to define a 'domestic relationship' on the grounds that "it may only serve to create a more complex legal framework that is unlikely to benefit the victim".[9]

The Act does not create an Integrated Court with civil/criminal jurisdiction

22. Given that many cases of domestic violence involve civil and criminal processes, there have been requests to set up an integrated court having civil and criminal jurisdiction (see *Lomas v Parle.* The Times, January 13, 2004, CA: and see the speeches of Lord Campbell of Alloway.[10] Lord Campbell moved an amendment to insert a new clause setting up such a court, but this was withdrawn pending further consultation with Lady Scotland regarding the need for the clause and the form the amendment should take.[11] The Parliamentary Under-Secretary of State for the Home Department reported that the government was looking to see how it might combine the two courts to hear both civil and criminal aspects of domestic violence, and that a working group had been set up with the support of the President of the Family Division of the High Court.[12]

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6 http://www.crimereduction.gov.uk/dv01.htm. See "*Domestic Violence, a National Report, March 2005*". See also *Home Office Research Study No290, Tackling Domestic Violence: Effective Interventions And Approaches*: "A report from Her Majesty's Inspectorate of Constabulary (HMIC) and Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI), on domestic violence, recommended that a common definition should be adopted across the Association of Chief Police Officers (ACPO), the CPS and the Home Office (HMIC and HMCPSI, 2004). In 2004 the Home Office adopted a new definition of domestic violence that includes family members. This will help with consistency in future research and evaluations, although it will remain important to be able to disaggregate incidents into ex/partners and other family members for analytical purposes".

7 But see now the CPS document "*Policy for Prosecuting Cases of Domestic Violence*",

8 *Hansard.* January 19, 2004, col. GC212: and see the speeches of Lord Borrie, *Hansard,* January 19, 2004, col.GC211, and Lord Carlisle of Bucklow, col.GC212; and see *Safety and Justice: The Government's Proposals on Domestic Violence,* Cm.5847, June 2003, para.22.

9 *Hansard.* Standing Committee E, June 22, 2004, cols 9 and 27-28.

10 *Hansard,* January 19, 2004, col.GC211 and at GC233.

11 *Hansard.* January 19, 2004, col.GC43, and see *Hansard* February 2, 2004. col.GC223: February 9, 2004, col.GC461: March 4, 2004 col.851.

12 *Hansard* June 22, 2004, cols 34-37.

The Main Provisions of the 2004 Act

The *Domestic Violence. Crime and Victims Act 2004* received Royal Assent on November 15, 2004.

Section 1: Breach of non-molestation order to be a criminal offence

In Part 4 of the Family Law Act 1996 (c. 27) (family homes and domestic violence). After section 42 insert

"42A Offence of breaching non-molestation order

(1) A person who without reasonable excuse does anything that he is prohibited from doing by a non-molestation order is guilty of an offence.

(2) In the case of a non-molestation order made by virtue of section 45(1), a person can be guilty of an offence under this section only in respect of conduct engaged in at a time when he was aware of the existence of the order.

(3) Where a person is convicted of an offence under this section in respect of any conduct. that conduct is not punishable as a contempt of court.

(4) A person cannot be convicted of an offence under this section in respect of any conduct which has been punished as a contempt of court.

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

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both;

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum, or both.

(6) A reference in any enactment to proceedings under this Part, or to an order under this Part, does not include a reference to proceedings for an offence under this section or to an order made in such proceedings.

"Enactment" includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978 (c. 30)."

Background to section 1

23. The 1996 Act created two new orders, namely. "non-molestation orders" and "occupation orders". Previous legislation was repealed. The 1996 Act does not define "molestation" because it is a term defined by case law, and one that is familiar to the judiciary. An "occupation order" is a drastic remedy because it is often used to exclude an occupier from a dwelling, and perhaps from the surrounding area as well. Non-molestation orders may be made in family proceedings to which the respondent is a party. They may also he made to protect the Applicant or a relevant child from molestation by an "associated person". A person may he associated by virtue of:

- marriage or former marriage;
- cohabitation or former cohabitation ;
- living together or having lived together in the same household other than as employees, tenants, lodgers or boarders;
- being related;
- an agreement to marry;
- being parents or having parental responsibility for a child;
- being connected by adoption; or being parties to the same family proceedings (see *Explanatory Notes*, June, 2005, para.13).

24. A breach of either order is punishable as a civil contempt of court (maximum two years' imprisonment). Section 1 of the 2004 Act inserts a new s.42A into the Family Law Act 1996, which makes a breach of a non-molestation order a criminal offence. The maximum penalty is five years' imprisonment, and therefore the s.42A offence is an "arrestable offence" by virtue of s.24(l) of the Police and Criminal Evidence Act 1984 (c.60). Section 42A gives an officer a power of arrest if he has reasonable grounds to suspect that a s.42A offence has been committed. A constable may arrest a person under s.42A even if the court that originally made the order did not attach a power of arrest to it (previously, if no power of arrest was attached to the order, the complainant had to apply to the civil court for an arrest warrant). As a matter of civil law, when no power is attached to the order the complainant must apply to the civil court for an arrest warrant. In cases where a power is attached to the order the respondent must be taken to a court of the same tier of jurisdiction as the court that made the order.

25. In cases where a power of arrest is attached to a non-molestation order, the officer is empowered to arrest without a warrant, and to take the respondent hack to the court that made it.

The new s.42A FLA 1996 offence

26. For the offence to be committed, the prosecution must (I) prove that a non-molestation order was made against the defendant, (2) prove the terms of the order, (3) prove that the defendant was aware of the existence of the order at the time he performed the acts complained of, and (4) prove that the defendant performed the acts that are alleged to put him in breach of the order. Those are ingredients that the prosecution must prove to the criminal standard of proof.

27. There is nothing in subsection (l) that requires the prosecution to prove that the respondent acted "wilfully" or "knowingly" with respect to the order. If a respondent was aware of the existence of the order it is likely that he/she knew the conduct prohibited. However, the safeguard lies in the phrase "without reasonable excuse".

28. The safeguard protects those who, in error, were not served with a non-molestation order, but not those who refused to accept service. The safeguard also protects those who because of illiteracy or blindness were unable to discover, or to understand, the terms of the order *(Hansard,* March 4, 2004, col.871; and see *Hansard,* January 19, 2004, col.GC226; *Hansard,* June 22, 2004, col.36).

29. "Does anything": the Family Law Act 1996 does not define "molestation", but it is a term well understood by the judges. It is a term of great breadth. Accordingly, the phrase "does anything" in the s.45 offence is correspondingly broad.

Occupation orders made without a non molestation order

30. Applications for occupation orders are nearly always made alongside applications for non-molestation orders. Paragraph 36 of Sch.10 to the 2004 Act. amends the 1996 Act by placing an obligation on the court to consider, whenever it is deciding whether to make an occupation order, whether it should also make a non molestation order *(Hansard,* March 15, 2004, col.39). This detail is important because new s.42A does not apply to occupation orders. The court when making an occupation order will therefore have to think ahead in the event that the respondent acts in breach of the order.

Subsection (5)

31. The significance of this provision is that the maximum penalty of five years' imprisonment serves a twofold purpose: (1) it puts the offence into the category *of being* ***an arrestable*** offence" for the purposes of the Police and Criminal Evidence Act 1984, and (2) it signifies Parliament's disapproval of conduct of this type (Standing Committee E, June 22.2004; col.43).

Civil route or criminal route?

32. The government has said that it is not "trying to trump the civil route with the criminal route; both will remain open, for good reason... The person protected by the order can have some degree of choice dependent upon the circumstances (he/she) faces... If the CPS and the police decide not pursue a particular action by the criminal route, it was still he open to the person protected by the order to pursue the matter by the civil route" (Standing Committee E, June 22. 2004, col.36 *per* the Parliamentary Under-Secretary of State for the Home Department, Paul Goggins: and see Baroness Scotland, Grand Committee, col.GC237; Second Reading, December 15, 2003, col.1014). Concern was expressed in both Houses of Parliament about the likely effectiveness of the new offence given that many victims of domestic violence would not wish to criminalise the actions of their partners, but simply wish to have the action complained of, stopped. The new offence-with a power of arrest without warrant-is intended to give the victims of abuse "the greater support offered by the Criminal Court as well as that of the civil court" (Baroness Scotland, *Hansard,* Grand Committee, January 19, 2004, col.GC240). Others have doubted whether a criminal offence will achieve very much given the flexibility of the civil route (note for example, the interesting speech of Lord Thomas of Gresford, January 19, 2004, *Hansard,* col.GC231).

Section 2: Additional considerations if parties are cohabitants or former cohabitants

(1) Section 41 of the Family Law Act 1996 (c. 27) (which requires a court, when considering the nature of the relationship of cohabitants or former cohabitants, to have regard to their non-married status) is repealed.
(2) In section 36(6)(e) of that Act (court to have regard to nature of parties' relationship when considering whether to give right to occupy to cohabitant or former cohabitant with no existing right), after "relationship" insert "and in particular the level of commitment involved in it".

33. This section was added to the Bill to address concerns voiced in Grand Committee that unmarried persons were unfairly disadvantaged in the making of occupation orders under the Family Law Act 1996 *(Hansard,*

January 19, 2004, Grand Committee, col.GC220).[13] Under the 1996 Act, where the court is required to consider the nature of the party's relationship it must "have regard to the fact that they have not given each other the commitment involved in marriage" (s.41, Family Law Act 1996). The government recognised that it is important that the court should have regard to all relevant factors when deciding whether to make an occupation order: the nature of the relationship between the parties is of crucial importance. The pre-existing law did not apply to same-sex couples (see *Hansard,* January 19, 2004, col.GC222).

34. Section 2 of the 2004 Act repeals s.41 of the 1996 Act .

35. Section 3 extends the definition of "cohabitants" to same-sex couples.

"The courts must consider whether the parties before them are associated persons within the definition of the Act; whether the individuals have the legal entitlement to occupy the dwelling house by virtue of a beneficial estate, interest or contract, or any enactment giving them the right to remain in occupation; whether there has been evidence of molestation; and whether there is a need to secure the health, safety and well-being of the applicant and any relevant child…Section 41 deals with cases where the courts are required to consider the nature of the parties' relationship.….When considering the removal of an individual from their home. it is critical that the courts should be able to take into account all the aspects of a couple's relationship. By removing s.41, I am concerned that the courts will suppose it is not part of their remit to consider the commitment the couple have or have not given to each other."

Causing or allowing the death o f a child or vulnerable adult

***Section* 5: The offence**

(1) A person ("D") is guilty of an offence if
- (a) a child or vulnerable adult ("V") dies 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 V's death 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.

(2) 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.

(3) If D was not the mother or father of V
- (a) D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused V's death;
- (b) for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.

(4) For the purposes of this section
- (a) a person is to be regarded as a "member" of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it;
- (b) where V lived in different households at different times, "the same household as V" refers to the household in which V was living at the time of the act that caused V's death.

(5) For the purposes of this section an "unlawful" act is one that
- (a) constitutes an offence, or
- (b) would constitute an offence but for being the act of
  - (i) a person under the age of ten, or
  - (ii) a person entitled to rely on a defence of insanity.

Paragraph (b) does not apply to an act of D.

(6) In this section
"act" includes a course of conduct and also includes omission; "child" means a person under the age of 16;
"serious" harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861 (c. 100);

[13] On Report in the Lords by way of a government amendment *(Hansard,* March 4, 2004, col.874).

"vulnerable adult" means a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.

(7) 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.

36. Sections 5 and 6 should be read together (ss.5 and 7, in the case of Northern Ireland). Neither section is straightforward to analyse.

The problem - "which one of you did it?"

37. The problem was explained by Lord Goddard C.J., in *Abbott* (1955) 2 QB 497:

> "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" (see Law Commission Report, No.282, p.8)

38. The problem is not confined to crimes of "domestic violence" (see *Russell and Russell, per* Lord Lane CJ (1987) 85 Cr.App.R. 388), but the problem is acutely felt in cases where two or more persons have joint custody and control of a child (or a vulnerable person), or where a crime is committed by two or more members of the same household; and see *Lane and Lane* (1986) 82 Cr.App.R.5.

39. In cases where a child has been subjected to assaults committed over many hours or weeks, and notwithstanding that two or more members of a household blame each other for those assaults, it has often been necessary for the prosecution to prove in whose charge the child was when the unlawful acts took place: *S and C* (1996) Criminal Law Review 346. Occasionally, the problem is overcome if a joint enterprise to commit the offence can be inferred (e.g. *Marsh and Marsh v Hobson* (1974) Criminal Law Review 35).

40. The problem is less acute in cases of child cruelty or neglect charged under s.l of the Children and Young Persons Act 1933 (c.12), and which now carries a maximum penalty of 10 years' imprisonment. The penalty was increased by s.45 of the Criminal Justice Act 1988 (c.33) ("the 1988 Act").

*Options for reform **rejected** by the Law Commission*

41. The Law Commission rejected

(1) imposing a legal burden 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" (Law Commission Report No.282, para.3.2)

(2) imposing 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 of whom must have killed or injured the child" (para.3.4)

(3) 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 failed to do so" (para.3.5)

(4) the adduction, as part of the prosecution case, of a pre-trial statement made by one defendant against another (paras 3.7-3.10).

(5) reforming the law of manslaughter.

*The Law Commissions **recommendations***

42. These fall into three main categories:

(1) Preliminary issues

(a) the reforms should apply in cases of death of, or serious injury to, children who were under the age of 16 years (para.4. I).

(b) the reforms should apply to those who arc responsible for the child in the same way as the matter is dealt with in the children and Young Persons Act 1933, and in particular, that the presumptions provided by s.17 of that Act should apply (para.4.2).

(2) Two substantive offences

(a) the creation of an aggravated offence of child cruelty under s.1 of the children Young Persons Act 1933, namely, "cruelty contributing to death" (para.4.5; and see Clause I of the draft Bill);

(b) and the creation of a negligence based offence, "failure to protect a child" (para.4.9; clause 2 of the draft Bill).

(3) Procedural and evidential reforms

(a) The reforms were to apply to the list of offences set out in Sch.2 of the Law Commission's proposed draft Bill, e.g. murder. manslaughter, s.18, and s.20 of the Offences Against the Person Act 1861 (c.100), rape, and indecent assault (para.4.4)

(b) Reforms based on three propositions. These are set out in para.5 2 of the Law Commission paper No. 282:

(i) 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;

(ii) 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:

(iii) In such a case, if a defendant who was responsible for the child fails to give evidence 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."

43. All three propositions mentioned in (3)(b) above are controversial not least because the same principles could be widened to apply to other forms of conduct viewed as being particularly serious. The Law Commission did not think that this was a sufficient reason for not implementing its recommendation: Law Commission Report No. 282, para.5.32.

44. Proposition 3(b)(iii): The Law Commission was clear about the effect of this proposal, namely, "that it will not be necessary for the jury to he 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" (Law Commission Report No. 282, para.5.42). Such a change could only be brought about by removing the requirement (to the opposite effect) stipulated by the Court of Appeal in *Cowan* (1996) QB 393. This would require primary legislation. In the opinion of the Law Commission its proposal did not entail the removal of a valid, necessary, procedural safeguard for the accused, because the requirement in *Cowan was* "flawed in two respects" (para.6.90):

> 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* does not apply to this kind of case. The underlying. non controversial, principle will remain intact."

45. There are two important passages in the Law Commission Report No.282 that explains the path of reasoning the Commission believes is asked of juries by the test in *Cowan:*

> 6.94 What, therefore, does the test in *Cowan* 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."

46. The Law Commission recommended the enactment of a self-contained set of rules for the drawing of adverse inferences from silence where a defendant is charged with a "serious offence" against a child (see the proposed s.35A of the Criminal Justice and Public Order Act 1994; see Law Commission Report 282, para.6.77). These

safeguards (set out in the Law Commission's draft Bill appended to the Law Commission's report), were summarised by the Joint Committee on Human Rights: (4th Report, February 2, 2004):

> "2.5 The safeguards were:
>
> a) the prosecution would have had to prove that a crime had been committed, and that the death was not accidental; b) the prosecution would have had to prove that the person from whose silence an adverse inference was to be drawn was a person with responsibility for the child at the relevant time;
> b) the prosecution would have had to prove that they had narrowed the field of suspects to a known group of individuals, often just one or two people;
> c) the court would have been required not to draw any inference from silence if it appears to the court that the physical or mental condition of the accused makes it undesirable for him or her to give evidence;
> d) the court would have been required to acquit or direct the acquittal of a defendant if satisfied at the end of all the evidence that no court or jury could properly convict him or her.
>
> 2.6 In addition, the Law Commission pointed out that the trial judge would have had a duty to give a proper direction to the jury that, if they think that the accused may have remained silent for reasons other than guilt, they should acquit if the evidence without any inference from silence would not support a conviction. They would have been told to convict only if they were sure that the only proper conclusion from all the evidence and the defendant's lack of an explanation was that the defendant was guilty. The Law Commission thought that the inference from silence would not be the only or main evidence: it would have to be seen in the context of the circumstances of the case, including everything that makes it seem that a defendant could and should have explained the circumstances of the death and that the failure to do so could only he indicative of guilt. As a result, the Law Commission took the view that there would not be a serious risk of violating ECHR Article 6, which, as interpreted in *Murray v United Kingdom* and other cases, prohibits a conviction where an inference from failure to give evidence is the only or main evidence of guilt."

47. The Law Commission proposed prohibiting inferences being drawn if it "appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence" (s.35A(2)(b), draft Bill; Law Commission Report 282, para.6.77) and which therefore mirrors s.35(1)(b) of the 1994 Act (and see *Friend* (2004) EWCA 2661, (1997) 2 Criminal Appeal Reports 231).

48. Section 6 differs from the Law Commission's approach in three main ways:[14]

> "a) First, the Bill contains no statutory statement of the responsibility of a person to assist the investigation of the death by providing information. b) Secondly, clause 5 (s.6) would allow a decision-maker to draw inferences from silence only when a person is charged with an offence contrary to clause 4 (s.5) of the Bill as well as with murder or manslaughter in respect of the same death. c) Thirdly, clause 5 (s.6) does not set out a self-contained set of rules to govern adverse inferences from silence in cases where two or more suspects refuse to incriminate themselves or each other."

Parliament approach to "which one of you did it?"

The offence of "causing or allowing"

49. The Government's views of the effect of the 2004 Act is set out in the *Explanatory Notes* to the Bill (as at June 2005), and see Research Paper 04/44. Paragraphs 25 and 27 of the *Explanatory Notes* read:

> "25. Subsection (1) … limits the offence to where the victim has died of an unlawful act…. The offence only applies to members of the household who had frequent contact with the victim, and could therefore be reasonably expected both to be aware of any risk to the victim, and to have a duty to protect him from harm.
>
> 36... .
>
> 27. The victim must also have been at significant risk of serious physical harm.…The offence will not apply if the victim died of a blow when there was no previous history of abuse, nor any reason to suspect a risk. Where there is no reason to suspect the victim is at risk, other members of the household cannot reasonably be expected to have taken steps to prevent the abuse. They will therefore not be guilty of the new offence, even where it is clear that one of them is guilty of a homicide offence."

[14] See Joint Committee on Human Rights, 4th Report, para.2.8.

Subsection 5(1)

50. The Law Commission's proposals relate only to "children". But ss.5 and 6 apply to the death of "vulnerable adults" who were unable to protect themselves (and see *Research Paper 04/44*, p.58). The government's view is that the definition of a "vulnerable adult" being "a matter of commonsense and properly and safely left to the courts".[15] The words "or otherwise" in s.5(6) is intended to be read in the light of the preceding words "physical or mental disability or illness" *(ibid;* coI.GC334).

Features of the section 5 offence

51. The main features of the section 5 offence are:

- First, the s.5 offence may be committed (without resorting to the concept of secondary liability) not only by the person who caused death, but also by the person who ought have been aware of a significant risk of serious physical harm being caused to "V".
- Secondly, both "D" and "V" must be members of the same household, "although this expression is given an extended meaning by s.5(4) in order to include those who would not ordinarily be regarded as members of a household-for example, "a violent boyfriend or other disagreeable person who comes round regularly" *(per* Baroness Scotland, Grand Committee, *Hansard.* col.GC346, January 21, 2004). By placing liability at the door of a particular "household". the government says that it is sending out the message that the 2004 Act is tackling "domestic" violence and abuse.
- Thirdly, the s.5 offence applies to "vulnerable adults".
- Fourthly, culpability under s.5 extends to the persons specified in s.5(4) who do not live together but who are to be treated as "members of the same household" nonetheless. A person may be liable under s.5 even if he was not physically present in the house at the time of death.[16] The Government's view is that members of a household who are aware of the risk mentioned in s.5(1)(c) have power to take reasonable steps to protect "V" from that risk, and that they should not be absolved of all responsibility.[17] The offence applies to members of the household with no caring role or duty.[18]
- *"Dies":* the subsection is limited to children and vulnerable persons who die. It will be noted that the Law Commission offence of "failure to protect a child" was not confined to unlawful acts resulting in death.
- *"Unlawful act":* note of the definition of "unlawful" in s.5(5). A cot death or an accident is not unlawful. Any act will be unlawful if it constitutes an offence (or would do so but for the matters mentioned in s.5(5)(b)). It is therefore immaterial that the person who actually caused death was under the age of 10 or entitled to plead insanity (see Standing Committee E, June 22, 2004, col.81-90).

"Frequent contact with him"

52. The expression is intended to limit the range of persons potentially liable (for example, a lodger or a student who takes a room in a house, but who fails to prevent abuse). The Government's intention is that the section will not catch such persons even if they take meals with members of a household, or who "share their leisure pursuits or much of their living space" *(per* Paul Goggins, Standing Committee E, June 22, 2004, col.67).

To what extent is the standard objective?

53. Section 5(1)(d)(i) is concerned with D's *awareness* of the risk mentioned in s.5(1)(c). Subparagraph (i) is therefore satisfied if D was aware of the risk or-even if he was not aware of it-that having regard to his attributes and circumstances, he "ought to have been" aware of it. The issue is not one of reasonableness, but an inference that can properly be drawn as to whether D had. or ought to have had, the requisite awareness of the risk. Subparagraph(ii) is concerned with D's *failure to take reasonable steps* to protect "V" from the risk. Note the words "he could reasonably have been expected to take". The test is objective, but having regard to D's circumstances and attributes. Subparagraph (iii) is different: it is not concerned with D's awareness of the risk, but with D's *foresight of circumstances* of the kind that occurred in which the act performed resulted in V's death. In most cases the answers to subparas (i) and (iii) will be the same.

Subsection (3)

54. Liability was set at the age of 16 because that is the age adopted in other enactments (for example, it is the age in the "child cruelty" offence). Carers of children and vulnerable adults may be as low as 16 years of age. There are also a number of parents under that age who have responsibility for a child. Such parents may be

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15 *Hansard,* Grand Committee, January 21, 2004, col.GC334.

16 *Hansard,* January 21, 2004, col.GC344-353.

17 *per* Baroness Scotland, *ibid,* col.GC 349.

18 See the speech of the Parliamentary Under-Secretary of State for the Home Department, Paul Goggins. Standing Committee E, June 24, 2004, col.102.

liable under s.5 for the death of that child.[19] The government was not prepared to lower the age of responsibility for all members of a household to 14 years' (Standing Committee E, June 22, 2004, col.86-90).

Subsections (3)(a) and (b)

55. Baroness Scotland said that paragraph (a) ensures that a person is not charged with the section 5 offence if he/she is under 16, whereas (s.5(3)(b)) is intended as a safeguard to ensure that persons who have turned 16, are not held responsible for failing to take reasonable steps when they were under that age *(Hansard,* March 25, 2004, col.814 and 815, House of Lords). However, the relevant date is the age of the offender at the time the relevant act caused V's death, and not the date on which a charge under s.5 is contemplated. Section 5(3)(b) is intended to "ensure the exclusion of part of a course of conduct that may have taken place before the defendant's 16th birthday" (Baroness Scotland, *Hansard,* March 25, 2004, col.815; and *Hansard.* March 9, 2004, col.1169). Note that the Law Commission was minded to recommend that its proposal should apply in cases of non accidental death (and serious injury) two children under the age of 16.[20]

Section 6: Evidence and procedure: England and Wales

(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 often 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).

(5) An offence under section 5 is an offence of homicide for the purposes of the following enactments-
sections 24 and 25 of the Magistrates' Courts Act 1980 (c. 43) (mode of trial of child or young person for indictable offence);
section 51 A of the Crime and Disorder Act 1998 (sending cases to the Crown Court: children and young persons);
section 8 of the Powers of Criminal Courts (Sentencing) Act 2000 (c. 6) (power and duty to remit young offenders to youth courts for sentence).

Introduction

56. Sections 5 and 6 should be read together.

57. Section 6 differs from the Law Commission's approach in three main ways (see Joint Committee on Human Rights, 4th Report, para.2.8):

> "a) First, the Bill contains no statutory statement of the responsibility of a person to assist the investigation of the death by providing information.
>
> b) Secondly, clause 5 (s.6) would allow a decision-maker to draw inferences from silence only when a person is charged with an offence contrary to clause 4 (s.5) of the Bill as well as with murder or manslaughter in respect of the same death.
>
> c) Thirdly, clause 5 (s.6) does not set out a self-contained set of rules to govern adverse inferences from silence in cases where two or more suspects refuse to incriminate themselves or each other."

58. It is important to note that s.6 applies only where the defendant is charged in the same proceedings with a s.5 offence, *and a* charge of murder and/or manslaughter. In these cases a submission of "no case to answer" in respect of murder or manslaughter must be postponed until the close of all the evidence in the case. It is open to the defence to submit, at the end of the prosecution case, that there is 'no case to answer' in respect of the s.5 offence. If the submission succeeds, it will then be open to the defence to make a submission of `no case to answer' in respect of a charge of murder, or manslaughter: see s.6(4). The same principle applies if there is an application to dismiss under para.2 of Sch.3 to the Crime and Disorder Act 1998 (c.37): see s.6(3).

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19 *Hansard,* January 21, 2004, col.GC348.

20 Law Commission paper No. 279, issue 1: p.100; Law Commission Report No. 282, para.4.1, para.4.34, p.25.

Section 6(2) -"even i f there would otherwise he no case for him to answer"

59. The Minister of State informed the House of Lords that section 6 would not result in a person being convicted of murder or manslaughter purely on the basis of his/her failure to testify, or to answer a question. However, the wording of s.6 suggests that the result is not only possible, but also permissible, by reason of the closing words of subs.(2) "even if there would otherwise be no case for him to answer in relation to that offence". The government's position is that s.6 operates in cases where an adverse inference drawn under either section *supplements other evidence in the case* sufficient to take the evidence as a whole "over the threshold necessary safely to leave the case to the jury without the inference being the sole or main basis for the conviction" (Baroness Scotland, *Hansard,* January 28, 2004, cols GC154-GC169).

60. The Minister of State informed their Lordships that (emphasis added):[21]

> "In relation to the drawing of adverse influences, we are proposing only one only one-significant change from the current regime under Section 35 of the Criminal Justice and Public Order Act 1994. That is, following the recommendation of the Law Commission, to remove what is called the "highly technical and artificial" approach in the *Cowan* judgment to the question of what is a situation which clearly calls for an explanation from the defendant.
>
> In these cases, under our scheme, **it will not be necessary for the jury, before being able to draw an inference, to have first to find that the defendant could be found guilty on consideration of the evidence alone**.
>
> The Law Commission set out its reasons for coming to the conclusion that a technical approach to the principle, which underlies Cowan, *is* flawed. We debated the issue previously, but your Lordships will find it at paragraphs 6.90 to 6.95 of its report. We entirely agree with its arguments.
>
> After deep reflection-and we have given the matter deep reflection-I can assure noble Lords, in particular the noble Baroness, Lady Anelay of St Johns, that this is not a concerning breach of long-held principles in respect of inferences from silence... Furthermore, the clause is not broader or more improper than is acceptable... These are cases which cry out for an appropriate response. **It is simply not the case that a person may be convicted of murder or manslaughter solely on the basis of his or her silence. That simply is not correct and it is not our intention. The law as currently drafted in the Bill would not allow it**.
>
> Under our scheme, a conviction that rested wholly or mainly on the basis of silence would be proscribed by virtue of Section 38(3) of the 1994 Act, in the same way as that section currently proscribes adverse inferences that may be drawn on that basis. This Bill does not change that position one jot. Under this clause, the principle that an inference may be drawn only where it is proper to do so remains intact. It also leaves intact that approach to what is proper which requires the evidence to he such that it calls for an explanation from the defendant. Although under our scheme the point in the trial at which the question of whether a case to answer exists or not is determined later than ordinarily is the case, it remains the case that, before an adverse inference from silence can he drawn, the evidence will still have to be such as to establish, first, that the victim was unlawfully killed; and, secondly, that the defendant is within the closed group of people, at least one of whom must have committed the offence.
>
> In addition, there must also be established against the defendant a case to answer in respect of the new offence under Clause 5 (s.6)-that he or she caused the death or was in a position wherein he or she ought to have taken reasonable steps to protect the victim from the risk of the harm that ultimately caused it. These three things together constitute circumstances which, as the Law Commission has argued, it may, in appropriate cases, be proper to characterise, in a non-technical sense, as "calling for an explanation" or even as "establishing a case to answer".
>
> But yet involvement in the new offence will on its own still not be sufficient to be found a conviction for murder or manslaughter. For a safe conviction on that charge, **the court or jury must be convinced beyond reasonable doubt that the ingredients for the offence of murder or manslaughter are present and that they can be applied in respect of the defendant**.
>
> For this to happen, **either the jury must have heard some evidence** - either from the prosecution or during the defence cases - **that the defendant did commit, or may have committed, the act that caused the death**, **or they must be in a position in relation to all the evidence properly to conclude that the defendant is maintaining what the Law Commission called an "eloquent silence" and he able to draw such inferences from that as are proper**.

[21] *Hansard.* March 25, 2004, col.823.

If neither of these is the case, the judge would he duty bound not to put the charge of murder or manslaughter to the jury. Delaying the point at which the decision on a submission of no case to answer is determined allows the possibility that the trial itself will create the circumstances such that the case may he left to the jury to decide by allowing more evidence to emerge. We do not believe that that is improper."

61. If s.6(l) and s.35(3) of the CJPOA 1994 apply, a jury is permitted - in relation to the s.5 offence - to draw inferences that are proper from the defendant's failure to give evidence or (if he/she does do so) from his refusal to answer a question.

62. The following points should be noted:
- The Government agrees with the Law Commission that the Court of Appeal's approach in *Cowan* is flawed in so far as it requires fact-finders to first find that there is a case of the defendant to answer before drawing adverse inferences from the defendant's failure:
- A count of murder or manslaughter is to be left to the jury (even if, but for his failure to testify, there would be no case for him to answer), only if there is a case for the defendant to answer in respect of the s.5 offence.
- If there is a case for the defendant to answer in respect of the s.5 offence, the jury will be entitled to consider the related homicide offence (or other offence(s) of which he could lawfully be convicted on the charge of murder or manslaughter: s.6(2)(b)), and to draw inferences that are proper from his failure to testify even if there would otherwise be no case for him to answer in relation to any of the related offences. Thus, "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." (*Hansard,* January 28, 1 Grand Committee, col.GC159, Baroness Scotland, referring to a passage in the Law Commission Report No. 282, para.6.87). Note that in fact, s.38(3) of the 1994 Act does not speak of "solely or mainly", but only "solely".
- Notwithstanding s.35(3) of the 1994 Act a judge must withdraw a charge of murder or manslaughter (or "other offence": s.6(2)(b)) from the jury if there is no evidence of involvement. He must do this because s.38(3) states that a defendant is not to be "convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in s.35(3)..."

63. It will be noted that where a defendant *does* testify, s.6(2) does *not* apply, but s.6(4) does apply.

PART 2
CRIMINAL JUSTICE

Assault, harassment etc

Section 10: Common assault to an arrestable offence

(1) In Schedule IA to the Police and Criminal Evidence Act 1984 (c. 60) (specific offences which are arrestable offences), before paragraph 15 (but after the heading *"Criminal Justice Act 1988")* insert "14A Common assault."

(2) In Article 26(2) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989/1341 (N.I. 12)) (specific offences which are arrestable offences), after paragraph (m) insert "(n) an offence under section 42 of the Offences against the Person Act 1861 (c. 100) (common assault etc)."

64. In "*Safety and Justice*" (Cm.5847) the government proposed making common assault an "arrestable offence" without warrant (s.24, and in Sch.1A, Police and Criminal Evidence Act 1984). Section 10 of the 2004 Act gives effect to that proposal. Note that if the Serious Organised Crime and Police Bill becomes law, all offences will be arrestable subject to a necessity test.

65. Note that s.10(1) is liable to be repealed by s.174, and Sch.17 of the Serious Organised Crime and Police Act 2005. Note section 110 of the SOCPA 2005 (powers of arrest).

Section 11: Common assault etc as alternative verdict

In section 6 of the Criminal Law Act 1967 (c.58) (trial of offences), after subsection (3) (alternative verdicts on trial on indictment) insert

"(3A) For the purposes of subsection (3) above an offence falls within the jurisdiction of the court of trial if it is an offence to which section 40 of the Criminal Justice Act 1988 applies (power to join in indictment count for common assault etc.), even if a count charging the offence is not included in the indictment.
(3B) A person convicted of an offence by virtue of subsection (3A) may only be dealt with for it in a manner in which a magistrates' court could have dealt with him."

66. This section addresses a problem occasionally encountered in the criminal courts, when a jury is invited to consider the offence of "common assault" as an alternative to a more serious offence charged against the defendant, notwithstanding that the indictment failed to include a specific count of common assault. Convictions for common assault have been quashed on this basis: *Mearns* 91 Cr.App.R.312, CA, *Brownless* (2000) *6 Archbold News 2,* CA.

Trial by jury of sample counts only

Section 17: Application by prosecution for certain counts to be tried without a jury

(1) The prosecution may apply to a judge of the Crown Court for a trial on indictment to take place on the basis that the trial of some, but not all, of the counts included in the indictment may be conducted without a jury.
(2) If such an application is made and the judge is satisfied that the following three conditions are fulfilled, he may make an order for the trial to take place on the basis that the trial of some, but not all, of the counts included in the indictment may be conducted without a jury.
(3) The first condition is that the number of counts included in the indictment is likely to mean that a trial by jury involving all of those counts would be impracticable.
(4) The second condition is that, if an order under subsection (2) were made, each count or group of counts which would accordingly be tried with a jury can be regarded as a sample of counts which could accordingly be tried without a jury.
(5) The third condition is that it is in the interests of justice for an order under subsection (2) to be made.
(6) In deciding whether or not to make an order under subsection (2), the judge must have regard to any steps which might reasonably be taken to facilitate a trial by jury.
(7) But a step is not to be regarded as reasonable if it could lead to the possibility of a defendant in the trial receiving a lesser sentence than would be the case if that step were not taken.
(8) An order under subsection (2) must specify the counts which may be tried without a jury.
(9) For the purposes of this section and sections 18 to 20, a count may not be regarded as a sample of other counts unless the defendant in respect of each count is the same person.

The problem

67. The problem concerns offending conduct that is repeated so many times that it is impracticable or impossible to indict/charge each and every offence committed by the defendant. Repeated unlawful acts can be appropriately charged by way of a single "conduct" offence, for example, conspiracy, or cheat, or fraudulent evasion (at least in relation to dutiable goods: see R. v *Martin and White* (1998) 2 Cr.App.R. 385, CA.

68. Before the Court of Appeal decision in *Canavan and Kidd* (1998) 1 WLR 604, it was commonplace for the prosecution to draft an indictment containing "sample" or "specimen" counts on the understanding that it would be open to the court to impose a sentence that reflected a wider pattern of offending. It was not unusual for evidence to be placed before fact finders to show the extent of the defendant's offending even if only part of that evidence was directly referable to the counts on indictment.

69. In *Canavan and Kidd,* the Court of Appeal held that it was a fundamental principle of sentencing that a defendant may only he sentenced "for an offence proved against him (by admission off verdict) or which he has admitted and asked the court to take into consideration" *(per* Lord Bingham CJ). Furthermore, the Criminal Justice Act 1991 did not legitimate sentencing persons for unindicted, unadmitted offences. The court approved the decision oft he Court of Appeal in *Clarke* (1996) 2 Cr.App.R.(S) 351, and disapproved *Bradshaw* (1997) Crim.L.R.239. In *Barry* (unreported, July 30, 1996, Court of Appeal), Mr Justice Jowitt gave a seminal account of the practice of preferring an indictment that contained sample and specimen counts:

> "Before the coming into force of the Criminal Justice Act 1991 it had long been the practice in a case in which there was a continuing course of criminal conduct to include in the indictment what were called specimen counts. These were specimens of a larger, often much larger, number of offences of a similar nature committed over a period of time. In a trial the prosecution would adduce evidence of the whole course of offending of which the counts in the indictment were put forward as specimens. This had nothing to do with the similar fact rule, though it is right to say that such evidence might also be admissible as similar fact evidence. It was regarded as unnecessary and undesirable that the indictment should be complicated and overloaded by the inclusion of innumerable counts to represent each or most of the offences committed ....
>
> ... Specimen counts were of two kinds. It might he possible to identify particular occasions of criminality, for example in a case of false accounting or a case of multiple obtainings by deception of social security benefit. In such a case the count would give particulars of the offence which tied it to a particular occasion which was able to be identified, whether or not by reference to its date. Though presented in the trial as a specimen count it would not be open to the jury to convict upon

it unless they were sure that the material particulars averred relating to an offence committed on that occasion had been proved. This was really a case of employing a specific count as a specimen count.

The second kind of specimen count was used when, although there had been a continuing course of repeated criminal acts particular incidents could not be identified, generally because the offences were not of a kind which were supported by documentary evidence enabling a particular occasion to be identified and there were no pegs on which to hang particular incidents. A specimen count in this type of case would not therefore relate to an identifiable occasion. The typical case in which specimen counts of this kind were used was the child sex abuse case....

The indictment in this kind of case would be likely to contain a mixture of specific and specimen counts. Additionally, when, for example, repeated acts of indecent assault had taken significantly different form (perhaps oral sex and digital penetration) there might be specimen counts for each. The jury would be directed that before they could convict on a specimen count they must all be sure that even though it could not be dated or fixed in some other way there was an occasion when the defendant committed the offence alleged in the count. And if there were specimen counts relating to different forms the offence had taken. though the particulars of the counts might not always distinguish between these different forms, it would be made clear in the trial to what type of conduct each of the specimen counts related. In such a case the jury would be directed that they had all to be sure, before they could convict, that the occasion was one when the offence had taken the form to which the particular specimen count was directed.

Where the period of offending was a long one, even though there might be no occasion to distinguish between specimen counts in the way just described, it was usual to break up the period into shorter periods with a specimen count for each. It would be especially important to do this if there was room for argument, if the defendant was guilty. as to when his offending had begun or come to an end or whether it had been broken off and then resumed. It would also be important when the age of the child was relevant to sentence on liability to have counts which were age related. If the jury convicted on a specimen count then the judge's task in sentencing was to make up his own mind about the extent of offending which it embraced. He would be likely to find assistance from the jury's verdicts on any other specimen counts and on any specific count included in the indictment. Where there was a plea of guilty to an indictment which included one or more counts intended by the prosecution to be specimen counts it was necessary for the judge to satisfy himself that the defence accepted them as such. If they were not accepted then the prosecution had to consider whether to seek to add further counts or to invite the defendant to ask to have other offences taken into consideration which, together with the counts in the indictment, would embrace the full scale of offending which the prosecution wished to establish. But unless a count was accepted as a specimen count the judge was not entitled to treat it as such. There could be occasions when a count was accepted as a specimen count but not to the extent alleged by the prosecution. The judge had then to decide whether there should be *a Newton* hearing.

There was an important qualification to the use of specimen counts. A specimen count had to be a specimen of criminal acts committed against the same victim or in respect of an offence whose gravamen was not victim orientated. Thus it would not have been appropriate to include a count of burglary as a specimen of burglaries committed at different premises from the one named in the count."

70. The Law Commission made the following recommendations (p.viii, para.6):

"(1) We recommend the extension of the ambit of the offence of Fraudulent Trading in s.458 of the Companies Act 1985, to the non-corporate fraudulent trader. This would allow an individual to be prosecuted in a single count for the activity of fraudulent trading, although that activity may be made up of a number of otherwise discrete offences.

(2) Where a defendant has been convicted in the Crown Court of a count citing conduct which under existing law may be regarded as a °continuous offence", we recommend the use of special verdicts as a means of better informing judges, for the purpose of sentencing, of the extent of offending of which the jury is sure. (3) Where there are allegations of repetitious offending which are not apt to be described as a continuous offence but which, prior to Kidd,5 could have been dealt with by means of specimen counts we recommend a two stage trial procedure. The first stage of the trial will take place before judge and jury in the normal way, on an indictment containing specimen counts. In the event of conviction on one or more counts, the second stage of the trial may follow, in which the defendant would be tried by judge alone. The judge will, at that stage, determine questions of guilt in respect of any scheduled offences linked, at a pre-trial hearing, to a specimen count of which the defendant has been convicted."

71. The Law Commission described the benefits of these recommendations as (para.7):

(1) the prosecution will be able to prosecute individual fraudulent traders for the full extent of their offending even where there is no conspiracy nor any involvement of a company in the trading.

(2) the prosecution will be able to make greater use in the Crown Court of the method of charging ongoing offending in a single count, known at present as the "continuous offence". Our recommendation for use of special verdicts where the indictment contains such a compound allegation would enable the trial judge to sentence with knowledge of the extent of guilt determined by the jury. The position of the judge would in this way be closer to that of the District Court judge in such cases, as demonstrated by the case of Barton.6 The benefit to the defendant would be that the judge would discount for sentence any of the offences about which the jury was unable to agree his or her guilt.

(3) the two-stage procedure would:
(a) preserve jury trial in respect of core examples of the defendant's criminality; (b) ensure that the jury trial is manageable and comprehensible;
(c) ensure that defendants would not be able to take advantage of the practical limits of trial by jury so as to go unpunished for a significant part of their offending: (d) result in defendants only being sentenced for offences which have been proved to a court after a trial;
(e) be likely to encourage guilty defendants, either on initial arraignment or after conviction of a number of specimen counts, to plead guilty to or to admit any linked offences of which they are also guilty;
(f) allow full expression of each of the competing requirements of justice identified earlier, in that
(i) the defendant would be given a fair hearing, with an opportunity to present a defence in relation to any or all of the alleged offences;
(ii) the Crown would be able to seek verdicts of the court that would enable the judge to sentence the defendant for the full extent of his or her offending.

72. Sections 17-21 inclusive, broadly follow the Law Commission's scheme.

Subsection (3): first condition

73. Although s.17 does not expressly say so, the counts included in the indictment will be in respect of offences that are of the same or similar description: note the indictment Rules (see also the speech of the Attorney-General, *Hansard,* March 11, 2004, col.1396).

74. Section 17 does not define what a "sample count" is, but subs.(9) provides that a count may not be regarded as a sample of other counts "unless the defendant in respect of each count is the same person".

75. Admissibility is not an express criterion for determining whether counts are 'sample counts'. The government argued that this issue was best left to judicial discretion (Baroness Scotland, col.832), and that it would not be appropriate to use admissibility as a criterion for whether counts are sufficiently similar for one to he a sample of another (see also the *Hansard.* March 11, 2004, cols 1390-1402, and see the Research Paper. 04/43 (June 9, 2004), p.18).

Use of convictions at the first stage in the proceedings as evidence at the second stage:

76. "where a defendant has been convicted of counts which are samples of counts, it will be appropriate for the court to take account in the second stage of the trial both the fact that he has been convicted and of an v evidence adduced in the first stage that is relevant and admissible" *(Baroness Scotland, Hansard,* November 2004, col.224).

77. *Jury trial impracticable not "unmanageable*": "impracticability does not carry with it the same possible connotation that someone is simple not up to doing what is required" *(per* the Attorney General, col.1397). It will be for the judge to decide how each count, or group of counts, is to be tried, and to determine the criteria by which charges are to be grouped. The discretion of the judge to sever an indictment is not constrained by ss.[1]7-21: "we should trust the judges to apply this provision in a sensible was˙ the way that is intended *(per* the Attorney-General, col.1398).

Subsection (5) "interests of justice for an order under subs.(2) be made"

78. The Government's position is that ss.17-21 are to be used in respect of trials where there would otherwise be no trial, and that the provisions are not steps on the way to ending trial by jury in the United Kingdom.

79. The 2004 Act gives no guidance as to when it would be "in the interests of justice" for sample counts to be tried without a jury. Some organisations (for example Liberty, and the Criminal Bar Association of England and Wales) strongly opposed this part of the 2004 Act. Some will argue that rarely - if ever - will it be in the

interests of justice for a defendant to be denied trial by jury merely because such a trial is "impracticable" - not because a given case is beyond the competence of most juries.

Subsection (6)-"facilitate a trial by jury"

80. Steps taken must be reasonable, for example, the steps must not frustrate the object of the section, for example by reducing the number of counts to a number that if the defendant was convicted-would fail to reflect the extent of the defendant's criminal conduct. Note also a subs.(7). Steps that might reasonably be taken to assist a jury in its understanding of the facts and issues in the case, would be relevant for the purposes of subs.(7), for example, schedules, detailed lists of admitted facts, and so on.

Section 18: Procedure for applications under section 17

(1) An application under section 17 must be determined at a preparatory hearing.

(2) Section 7(1) of the 1987 Act and section 29(2) of the 1996 Act are to have effect as if the purposes there mentioned included the purpose of determining an application under section 17.

(3) Section 29(1) of the 1996 Act is to have effect as if the grounds on which a judge of the Crown Court may make an order under that provision included the ground that an application under section 17 has been made.

(4) The parties to a preparatory hearing at which an application under section 17 is to he determined must be given an opportunity to make representations with respect to the application.

(5) Section 9(11) of the 1987 Act and section 35(1) of the 1996 Act are to have effect as if they also provided for an appeal to the Court of Appeal to lie from the determination by a judge of an application under section 17.

(6) In this section

"preparatory hearing" means a preparatory hearing within the meaning of the 1987 Act or Part 3 of the 1996 Act;

"the 1987 Act" means the Criminal Justice Act 1987 (c. 38); "the 1996 Act" means the Criminal Procedure and Investigations Act 1996 (c. 25).

Section 19: Effect of order under section 17(2)

(1) The effect of an order under section 17(2) is that where, in the course of the proceedings to which the order relates, a defendant is found guilty by a jury on a count which can be regarded as a sample of other counts to be tried in those proceedings, those other counts may be tried without a jury in those proceedings.

(2) Where the trial of a count is conducted without a jury because of an order under section 17(2), the court is to have all the powers, authorities and jurisdiction which the court would have had if the trial of that count had been conducted with a jury (including power to determine any question and to make any finding which would be required to be determined or made by a jury).

(3) Except where the context otherwise requires, any reference in an enactment to a jury, the verdict of a jury or the finding of a jury is to be read, in relation to the trial of a count conducted without a jury because of an order under section 17(2), as a reference to the court, the verdict of the court or the finding of the court.

(4) Where the trial of a count is conducted without a jury because of an order under section 17(2) and the court convicts the defendant of that count

(a) the court must give a judgment which states the reasons for the conviction at, or as soon as reasonably practicable after, the time of the conviction, and

(b) the reference in section 18(2) of the Criminal Appeal Act 1968 (c.19) (notice of appeal or of application for leave to appeal to be given within 28 days from date of conviction etc) to the date of the conviction is to be read as a reference to the date of the judgment mentioned in paragraph (a).

(5) Where, in the case of proceedings in respect of which an order under section 17(2) has been made, a jury convicts a defendant of a count, time does not begin to run under section 18(2) of the Criminal Appeal Act 1968 in relation to an appeal against that conviction until the date on which the proceedings end.

(6) In determining for the purposes of subsection (5) the date on which proceedings end, any part of those proceedings which takes place after the time when matters relating to sentencing begin to be dealt with is to be disregarded.

(7) Nothing in this section or section 17, 18 or 20 affects the requirement under section 4A of the Criminal Procedure (Insanity) Act 1964 (c. 84) that any question, finding or verdict mentioned in that section be determined, made or returned by a jury.

Subsection (5)

81. This subsection provides that time for appealing against verdicts of guilty by a jury, does not run until the end of the non-jury part of the trial. In other words, time for appealing runs from the date of the last conviction/finding of guilt, and not from the date of sentence. The sentencing stage is quite separate: Note "the date on which the proceedings end" (subs.(5)) and read this provision in conjunction with subs.(6).

Subsection (6)

82. This subsection was added at the Report stage in the House of Lords *(Hansard,* March 11, 2004, col.1410). The provision clarifies when "proceedings end" for the purpose of ascertaining the moment time begins to run for appealing against a jury's verdict of guilty.

Section 20: Rules of court

(1) Rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of sections 17 to 19.
(2) Without limiting subsection (1), rules of court may in particular make provision for time limits within which applications under section 17 must be made or within which other things in connection with that section or section 18 or 19 must be done.
(3) Nothing in this section is to be taken as affecting the generality of any enactment conferring powers to make rules of court.

Section 21: Application of sections 17 to 20 to Northern Ireland

(1) In their application to Northern Ireland, sections 17 to 20 have effect subject to the modifications in Schedule 1.
(2) Sections 17 to 20 do not apply in relation to a trial to which section 75 of the Terrorism Act 2000 (c.11) (trial without jury for certain offences) applies.

Unfitness to plead and insanity

89. Sections 22-26, schedules 2 and 3, various paragraphs in schedule 10, and paras.8 and 9 to schedule 12, came into force on the 31st March 2005: *The Domestic Violence, Crime and Victims Act 2004 (Commencement No.1) Order 2005* (SI 2005/579).

90. However, two serious errors are being made.

91. The first relates to the transitional and transitory provisions in para.8 of Schedule 12. The source of the confusion is *Home Office Circular 24/2005*, paras.4 and 5 which read:

> "4. The new provisions will come into force on 31 March 2005. Where a person is arraigned in (**or, in the case of a person said to be unfit to plead, committed or sent to**) the Crown Court before that date or where the hearing of an appeal in the Court of Appeal began before that date, the 1964 Act (as amended by the 1991 Act) applies. Arrangements remain as set out in Home Office Circular 93/1991…..
> 5. Where a person is arraigned on or after 31 March 2005, the changes introduced by the 2004 Act apply. In cases where a person is said to be unfit to plead and so cannot be arraigned, the 2004 Act will apply if the person is committed or sent to the Crown Court on or after 31 March 2005."

92. However, as Simon Mayo has pointed out,[22] the above does not accord with the actual wording of para.8 of schedule 12 that reads:

> "8 (1) The provisions mentioned in sub-paragraph (2) do not apply-
> (a) in relation to proceedings before the Crown Court or a court-martial, where the accused was arraigned before the commencement of those provisions;
> (b) in relation to proceedings before the Court of Appeal or the Courts-Martial Appeal Court, where the hearing of the appeal began before that commencement.
> (2) The provisions are-
> (a) sections 22 and 23;
> (b) section 24 and Schedule 2;
> (c) section 26 and Schedule 3;
> (d) paragraphs 5, 6, 8, 17 to 21, 45, 60 and 61 of Schedule 10"

93. The relevant date is the date of arraignment: if the defendant was arraigned on or after the 31st March 2005, the new provisions apply.

94. The second error relates to s.22(4). The judge determines whether a defendant is fit to plead, but he/she does not determine "whether the defendant committed the actus reus of the offence with which he or she is charged" [Simon Mayo is plainly right about this: *CrimeLine*, 24th June 2005]. The latter issue remains a matter for a jury.

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22 Barrister, 187 Fleet Street, in *CrimeLine 135*; and see *CrimeLine* 24th June 2005.

Section 22: Procedure for determining fitness to plead: England and Wales

(1) The Criminal Procedure (Insanity) Act 1964 is amended as follows.
(2) In section 4 (finding of unfitness to plead), in subsection (5) (question of fitness to be determined by a jury), for the words from "by a jury" to the end substitute "by the court without a jury".
(3) In subsection (6) of that section, for "A jury" substitute "The court".
(4) In subsection (1) of section 4A (finding that the accused did the act or omission charged against him), for "jury" substitute "court".
(5) For subsection (5) of that section substitute
"(5) Where the question of disability was determined after arraignment of the accused, the determination under subsection (2) is to be made by the jury by whom he was being tried."

95. This section gives effect to a recommendation of Lord Justice Auld in his *"Review of The Criminal Courts",* namely, that it should be for a judge and not for a jury to determine the issue of fitness to plead (recommendation 51, Ch 5, paras.212-213):

"There is a strong case for transferring from the jury to the judge determination of the issue of fitness to plead...

213 In the majority of cases the jury's role on the issue of unfitness to plead is little more than a formality because there is usually no dispute between the prosecution and the defence that the defendant is unfit to plead. However, the procedure is still cumbrous, especially when the issue is raised, as it mostly is. on the arraignment, because it can then require the empanelling of two juries. More importantly, it is difficult to see what a jury can bring to the determination of the issue that a judge cannot. He decides similar questions determinative of whether there should be a trial, for example, whether a defendant is physically or mentally fit to stand or continue trial in applications to stay the prosecution or for discharge of the defendant. The consequences of a finding of unfitness to plead are now much more flexible than they were, ranging from a hospital order with restrictions to an absolute discharge; and the judge is entrusted with the often very difficult task of what to do with the defendant, with the assistance of medical evidence."

Section 4. Criminal Procedure (Insanity) Act 1964 [Finding of unfitness to plead]

(1) This section applies where on the trial of a person the question arises (at the instance of the defence or otherwise) whether the accused is under a disability, that is to say, under any disability such that apart from this Act it would constitute a bar to his being tried.

(2) If, having regard to the nature of the supposed disability, the court are of opinion that it is expedient to do so and in the interests of the accused, they may postpone consideration of the question of fitness to be tried until any time up to the opening of the case for the defence.

(3) If, before the question of fitness to be tried falls to be determined, the jury return a verdict of acquittal on the count or each of the counts on which the accused is being tried, that question shall not be determined.

(4) Subject to subsections (2) and (3) above, the question of fitness to be tried shall be determined as soon as it arises.

(5) The question of fitness to be tried shall be determined by the court without a jury[23] ~~a jury and~~
~~(a) where it falls to be determined on the arraignment of the accused and the trial proceeds, the accused shall be tried by a jury other than that which determined that question;~~
~~(b) where it falls to be determined at any later time, it shall be determined by a separate jury or by the jury by whom the accused is being tried, as the court may direct.~~

(6) The court[24] ~~A jury~~ shall not make a determination under subsection (5) above except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved.

Section 4A. Finding that the accused did the act or made the omission charged against him

(1) This section applies where in accordance with section 4(5) above it is determined by a court[25] ~~jury~~ that the accused is under a disability.

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23 S.22(2) DVCVA 2004
24 S.22(3) DVCVA 2004
25 S.22(4) DVCVA 2004

(2) The trial shall not proceed or further proceed but it shall be determined by a jury -
(a) on the evidence (if any) already given in the trial; and
(b) on such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this section to put the case for the defence,
whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence.

(3) If as respects that count or any of those counts the jury are satisfied as mentioned in subsection (2) above, they shall make a finding that the accused did the act or made the omission charged against him.

(4) If as respects that count or any of those counts the jury are not so satisfied, they shall return a verdict of acquittal as if on the count in question the trial had proceeded to a conclusion.

(5) Where the question of disability was determined after arraignment of the accused, the determination under subsection (2) is to be made by the jury by whom he was being tried.[26]
~~A determination under subsection (2) above shall be made -~~
~~(a) where the question of disability was determined on the arraignment of the accused, by a jury other than that which determined that question; and~~
~~(b) where that question was determined at any later time, by the jury by whom the accused was being tried.~~

Section 24 : Powers of court on finding of insanity or unfitness to plead etc

(1) For section 5 of the Criminal Procedure (Insanity) Act 1964 (c. 84) substitute-

"5 Powers to deal with persons not guilty by reason of insanity or unfit to plead etc.

(1) This section applies where-
(a) a special verdict is returned that the accused is not guilty by reason of insanity; or
(b) findings have been made that the accused is under a disability and that he did the act or made the omission charged against him.

(2) The court shall make in respect of the accused-
(a) a hospital order (with or without a restriction order);
(b) a supervision order; or
(c) an order for his absolute discharge.

(3) Where-
(a) the offence to which the special verdict or the findings relate is an offence the sentence for which is fixed by law, and
(b) the court have power to make a hospital order,
the court shall make a hospital order with a restriction order (whether or not they would have power to make a restriction order apart from this subsection).

(4) In this section-
"hospital order" has the meaning given in section 37 of the Mental Health Act 1983;
"restriction order" has the meaning given to it by section 41 of that Act;
"supervision order" has the meaning given in Part 1 of Schedule 1A to this Act.

5A Orders made under or by virtue of section 5

(1) In relation to the making of an order by virtue of subsection (2)(a) of section 5 above, section 37 (hospital orders etc) of the Mental Health Act 1983 ("the 1983 Act") shall have effect as if-
(a) the reference in subsection (1) to a person being convicted before the Crown Court included a reference to the case where section 5 above applies;
(b) the words after "punishable with imprisonment" and before "or is convicted" were omitted; and
(c) for subsections (4) and (5) there were substituted-
"(4) Where an order is made under this section requiring a person to be admitted to a hospital ("a hospital order"), it shall be the duty of the managers of the hospital specified in the order to admit him in accordance with it."

(2) In relation to a case where section 5 above applies but the court have not yet made one of the disposals mentioned in subsection (2) of that section-
(a) section 35 of the 1983 Act (remand to hospital for report on accused's mental condition) shall have effect with the omission of the words after paragraph (b) in subsection (3);
(b) section 36 of that Act (remand of accused person to hospital for treatment) shall have effect with the omission of the words "(other than an offence the sentence for which is fixed by law)" in subsection (2);

[26] Section 22(5) DVCVA 2004

(c) references in sections 35 and 36 of that Act to an accused person shall be construed as including a person in whose case this subsection applies; and

(d) section 38 of that Act (interim hospital orders) shall have effect as if-

(i) the reference in subsection (1) to a person being convicted before the Crown Court included a reference to the case where section 5 above applies; and

(ii) the words "(other than an offence the sentence for which is fixed by law)" in that subsection were omitted.

(3) In relation to the making of any order under the 1983 Act by virtue of this Act, references in the 1983 Act to an offender shall be construed as including references to a person in whose case section 5 above applies, and references to an offence shall be construed accordingly.

(4) Where-

(a) a person is detained in pursuance of a hospital order which the court had power to make by virtue of section 5(1)(b) above, and

(b) the court also made a restriction order, and that order has not ceased to have effect,

the Secretary of State, if satisfied after consultation with the responsible medical officer that the person can properly be tried, may remit the person for trial, either to the court of trial or to a prison.

On the person's arrival at the court or prison, the hospital order and the restriction order shall cease to have effect.

(5) Schedule 1A to this Act (supervision orders) has effect with respect to the making of supervision orders under subsection (2)(b) of section 5 above, and with respect to the revocation and amendment of such orders.

(6) In relation to the making of an order under subsection (2)(c) of section 5 above, section 12(1) of the Powers of Criminal Courts (Sentencing) Act 2000 (absolute and conditional discharge) shall have effect as if-

(a) the reference to a person being convicted by or before a court of such an offence as is there mentioned included a reference to the case where section 5 above applies; and

(b) the reference to the court being of opinion that it is inexpedient to inflict punishment included a reference to it thinking that an order for absolute discharge would be most suitable in all the circumstances of the case."

(2) Before Schedule 2 to the Criminal Procedure (Insanity) Act 1964 (c. 84) insert the Schedule set out in Schedule 2 to this Act.

(3) In section 6 of the Criminal Appeal Act 1968 (c. 19) (substitution of finding of insanity or findings of unfitness to plead etc) and in section 14 of that Act (substitution of findings of unfitness to plead etc), for subsections (2) and (3) substitute-

"(2) The Court of Appeal shall make in respect of the accused-

(a) a hospital order (with or without a restriction order);

(b) a supervision order; or

(c) an order for his absolute discharge.

(3) Where-

(a) the offence to which the appeal relates is an offence the sentence for which is fixed by law, and

(b) the court have power to make a hospital order,

the court shall make a hospital order with a restriction order (whether or not they would have power to make a restriction order apart from this subsection).

(4) Section 5A of the Criminal Procedure (Insanity) Act 1964 ("the 1964 Act") applies in relation to this section as it applies in relation to section 5 of that Act.

(5) Where the Court of Appeal make an interim hospital order by virtue of this section-

(a) the power of renewing or terminating it and of dealing with the appellant on its termination shall be exercisable by the court below and not by the Court of Appeal; and

(b) the court below shall be treated for the purposes of section 38(7) of the Mental Health Act 1983 (absconding offenders) as the court that made the order.

(6) Where the Court of Appeal make a supervision order by virtue of this section, any power of revoking or amending it shall be exercisable as if the order had been made by the court below.

(7) In this section-

"hospital order" has the meaning given in section 37 of the Mental Health Act 1983;

"interim hospital order" has the meaning given in section 38 of that Act;

"restriction order" has the meaning given to it by section 41 of that Act;

"supervision order" has the meaning given in Part 1 of Schedule 1A to the 1964 Act."

(4) Section 14A of the Criminal Appeal Act 1968 (c. 19) (power to order admission to hospital where, on appeal against verdict of not guilty by reason of insanity, Court of Appeal substitutes verdict of acquittal) is repealed.

(5) Section 5 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (c. 25) and Schedules 1 and 2 to that Act are repealed.

Subsection (1)

96. This is explained by the *Explanatory Notes* (June 2005), as follows:

> 89. Subsection (1) substitutes a new section 5 and inserts a new section 5A of the Criminal Procedure (Insanity) Act 1964. The new section 5 sets out the court's options on a finding of unfitness or insanity. The court has three options. The first option is to make a hospital order under section 37 of the Mental Health Act 1983 (which can also be accompanied by a restriction order under section 41 of that Act). The second option is to make a supervision order and the third option is to order the defendant's absolute discharge.
>
> 90. If the court wishes the defendant to be detained in hospital, the appropriate order will be a hospital order. To make a hospital order, the court must have the evidence required by the 1983 Act: that the defendant is mentally disordered and requires specialist medical treatment. This means that there must be medical evidence that justifies his detention on grounds of his mental state. The making of a restriction order alongside a hospital order gives the Secretary of State certain powers in relation to the management of the defendant in hospital, such as the requirement that the Secretary of State consent to the defendant being given leave or discharged. Restriction orders are made in cases where the defendant poses a risk to the public (see section 41(1) of the 1983 Act). The power of the court to make a hospital order and a restriction order under the 1983 Act represents a change from the current position, whereby the court makes an order for the defendant's admission to hospital under Schedule 1 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, without any requirement to hear medical evidence, and specifies whether it thinks restrictions are appropriate. Once the court has made an admission order, the Secretary of State has two months to issue a warrant for the defendant's admission to hospital. The defendant is then treated for the purposes of his management in hospital as if he had been given a hospital order (and if appropriate a restriction order) under the 1983 Act.
>
> 91. The two principal differences under the new system will be that the Secretary of State no longer has a role in deciding whether or not the defendant is admitted to hospital and that a court can no longer order the defendant's admission to a psychiatric hospital without any medical evidence.
>
> 92. Existing provision in section 5(3) of the 1964 Act and paragraph 2(2) of Schedule 1 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 requires the court to admit the defendant to hospital subject to restrictions where he was charged with an offence for which the sentence is fixed by law (i.e. murder). The new section 5 does the same but the court is only obliged to make a hospital order with a restriction order on a charge of murder if the conditions for making a hospital order are met. If the conditions are not met, for example if the reason for the finding of unfitness to plead related to a physical disorder, the court has the option of making one of the other orders.
>
> 93. The new section 5A makes provision about the detail of these orders. Subsections (1) and (3) of new section 5A modify the 1983 Act so that the provisions on hospital orders (which are normally given after conviction of an offence) apply equally to those given a hospital order following a finding of unfitness or insanity. The one difference is that a court will be able to require a hospital to admit a person found unfit to plead or not guilty by reason of insanity, whereas it has no such power in respect of those convicted of an offence.
> 94. Subsection (2) of new section 5A extends the powers under the 1983 Act to remand an accused person to hospital for a report or treatment and to make an interim hospital order so that the court can exercise these powers where a person has been found unfit to plead or not guilty by reason of insanity and the court is considering which disposal would be appropriate.
>
> 95. Subsection (4) of new section 5A replicates existing provision in paragraph 4 of Schedule 1 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and allows the Secretary of State to remit for trial a person who is found unfit to plead and given a hospital order with a restriction order and who subsequently recovers.
>
> 96. Subsection (5) of new section 5A introduces a new Schedule 1A to the 1964 Act, which makes provision about the supervision order. The new Schedule 1A is inserted by subsection (2) of section 24 and Schedule 2 to the Act. The supervision order will replace the existing supervision and treatment order, provision for which is made in Schedule 2 to the 1991 Act. The new supervision order differs from the old supervision and treatment order in that it enables treatment to be given under supervision for physical as well as mental disorder and in that it

cannot include a requirement for a person to receive treatment as an in-patient. It is designed to enable support and treatment to be given to the defendant to prevent recurrence of the problem which led to the offending. There is no sanction for breach of either the new supervision order or the existing supervision and treatment order; the orders simply provide a framework for treatment.

97. Subsection (6) of new section 5A applies the provision on absolute discharge in section 12 the Powers of Criminal Courts (Sentencing) Act 2000 to the case where a defendant is given an absolute discharge following a finding of unfitness or insanity.

Criminal Procedure (Insanity) Act 1964, s.5

5. Powers to deal with persons not guilty by reason of insanity or unfit to plead etc.[27]

5 Powers to deal with persons not guilty by reason of insanity or unfit to plead etc.

(1) This section applies where-
(a) a special verdict is returned that the accused is not guilty by reason of insanity; or
(b) findings have been made that the accused is under a disability and that he did the act or made the omission charged against him.

(2) The court shall make in respect of the accused-
(a) a hospital order (with or without a restriction order);
(b) a supervision order; or
(c) an order for his absolute discharge.

(3) Where-
(a) the offence to which the special verdict or the findings relate is an offence the sentence for which is fixed by law, and
(b) the court have power to make a hospital order,
the court shall make a hospital order with a restriction order (whether or not they would have power to make a restriction order apart from this subsection).

(4) In this section-
"hospital order" has the meaning given in section 37 of the Mental Health Act 1983;
"restriction order" has the meaning given to it by section 41 of that Act;
"supervision order" has the meaning given in Part 1 of Schedule 1A to this Act.

5A Orders made under or by virtue of section 5

(1) In relation to the making of an order by virtue of subsection (2)(a) of section 5 above, section 37 (hospital orders etc) of the Mental Health Act 1983 ("the 1983 Act") shall have effect as if-
(a) the reference in subsection (1) to a person being convicted before the Crown Court included a reference to the case where section 5 above applies;
(b) the words after "punishable with imprisonment" and before "or is convicted" were omitted; and
(c) for subsections (4) and (5) there were substituted-
"(4) Where an order is made under this section requiring a person to be admitted to a hospital ("a hospital order"), it shall be the duty of the managers of the hospital specified in the order to admit him in accordance with it."

(2) In relation to a case where section 5 above applies but the court have not yet made one of the disposals mentioned in subsection (2) of that section-
(a) section 35 of the 1983 Act (remand to hospital for report on accused's mental condition) shall have effect with the omission of the words after paragraph (b) in subsection (3);
(b) section 36 of that Act (remand of accused person to hospital for treatment) shall have effect with the omission of the words "(other than an offence the sentence for which is fixed by law)" in subsection (2);
(c) references in sections 35 and 36 of that Act to an accused person shall be construed as including a person in whose case this subsection applies; and
(d) section 38 of that Act (interim hospital orders) shall have effect as if-

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(i) the reference in subsection (1) to a person being convicted before the Crown Court included a reference to the case where section 5 above applies; and

(ii) the words "(other than an offence the sentence for which is fixed by law)" in that subsection were omitted.

(3) In relation to the making of any order under the 1983 Act by virtue of this Act, references in the 1983 Act to an offender shall be construed as including references to a person in whose case section 5 above applies, and references to an offence shall be construed accordingly.

(4) Where-

(a) a person is detained in pursuance of a hospital order which the court had power to make by virtue of section 5(1)(b) above, and

(b) the court also made a restriction order, and that order has not ceased to have effect,

the Secretary of State, if satisfied after consultation with the responsible medical officer that the person can properly be tried, may remit the person for trial, either to the court of trial or to a prison.

On the person's arrival at the court or prison, the hospital order and the restriction order shall cease to have effect.

(5) Schedule 1A to this Act (supervision orders) has effect with respect to the making of supervision orders under subsection (2)(b) of section 5 above, and with respect to the revocation and amendment of such orders.

(6) In relation to the making of an order under subsection (2)(c) of section 5 above, section 12(1) of the Powers of Criminal Courts (Sentencing) Act 2000 (absolute and conditional discharge) shall have effect as if-

(a) the reference to a person being convicted by or before a court of such an offence as is there mentioned included a reference to the case where section 5 above applies; and

(b) the reference to the court being of opinion that it is inexpedient to inflict punishment included a reference to it thinking that an order for absolute discharge would be most suitable in all the circumstances of the case."

~~5(1) This section applies where -~~

~~(a) a special verdict is returned that the accused is not guilty by reason of insanity; or~~

~~(b) findings are recorded that the accused is under a disability and that he did the act or made the omission charged against him.~~

~~(2) Subject to subsection (3) below, the court shall either -~~

~~(a) make an order that the accused be admitted, in accordance with the provisions of Schedule 1 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, to such hospital as may be specified by the Secretary of State; or~~

~~(b) where they have the power to do so by virtue of section 5 of that Act, make in respect of the accused such one of the following orders as they think most suitable in all the circumstances of the case, namely -~~

~~(i) a guardianship order within the meaning of the Mental Health Act 1983;~~

~~(ii) a supervision and treatment order within the meaning of Schedule 2 to the said Act of 1991; and~~

~~(iii) an order for his absolute discharge.~~

~~(3) Paragraph (b) of subsection (2) above shall not apply where the offence to which the special verdict or findings relate is an offence the sentence for which is fixed by law.~~

~~[This section is printed as substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991,s.3.]~~