RESEARCH PAPER 04/44
9 JUNE 2004

The *Domestic Violence, Crime and Victims Bill* [HL]: Domestic violence provisions

Bill 83 of 2003-04

The *Domestic Violence, Crime and Victims Bill* has completed its passage through the House of Lords, and is due to be debated on second reading in the Commons on 14 June 2004. It would make a number of changes to the law on domestic violence, particularly to non-molestation orders and occupation orders. It would also allow courts to make restraining orders after acquittal and introduce a new offence of causing or allowing the death of a child or vulnerable adult.

Other provisions in the Bill would allow part of a trial to be conducted without jury in cases of multiple offending. It would also introduce a new statutory code of practice for victims and a new Commissioner for Victims and Witnesses.

The Bill would apply to England and Wales, although some provisions apply to Northern Ireland.

This Research Paper looks at those provisions which relate to domestic violence, including familial homicide. Library Research Paper 04/43 deals with provisions relating to victims, and other provisions on criminal procedure.

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Summary of main points

- The *Domestic Violence, Crime and Victims Bill* has completed its passage through the Lords and is due to be debated on second reading in the Commons on 14 June 2004.
- There is no statutory or common administrative definition of domestic violence, and the Bill does not introduce one, although some have called for this. An Inter-Ministerial Group on Domestic Violence is working on a common administrative definition.
- The Bill makes changes to occupation orders and non-molestation orders, two key civil remedies for domestic violence victims. The definition of "associated persons", which is central to eligibility for these orders, is to include same-sex couples (clause 3) and couples who have never cohabited or been married (clause 4). The Bill makes breach of a non-molestation order a criminal offence (clause 1).
- The Bill would introduce statutory domestic homicide reviews, a mechanism for relevant professionals to learn lessons where a death had resulted from domestic violence (clause 7)
- The Bill makes common assault an arrestable offence, and allows it to be found as an alternative verdict in some cases despite there being no specific count. The latter is intended to resolve a problem which has recently been highlighted in the Court of Appeal.
- Recent court cases have highlighted problems where children must have been killed by one or other of their parents, but there was no evidence to say which. The Bill has sought to provide ways of obtaining convictions in such cases. It introduces a new offence of causing or allowing the death of a child or vulnerable adult (clause 5). An Opposition amendment was agreed to on division requiring the court to have particular regard to the extent to which the accused has been subjected to domestic violence. Another clause, which proved highly controversial and was seen by some as an unacceptable erosion of defendants' rights, was removed in the Lords. It had been intended to make it possible for the more culpable party to be convicted of homicide, by modifying the conduct of trials where defendants were charged with the new offence as well as homicide.
- Also controversial has been the proposal to make restraining orders available where a defendant has been acquitted if the court believes it necessary to protect a person from harassment (clause 10).
- The Bill extends to England, Wales and in part to Northern Ireland.
- Many organisations have generally welcomed the intentions to strengthen the legal protection for victims of domestic violence.
- Some civil liberties groups and lawyers' organisations have expressed concerns, particularly about familial homicide and restraining orders on acquittal.
- Some organisations representing survivors of domestic violence have argued that the Bill should include a definition of domestic violence, greater protection in child contact arrangements, and better protection for vicitms subject to public funds restrictions under immigration law.
- A separate Research Paper, RP 04/43 deals with the provisions relating to victims and remaining provisions concerning criminal procedure.

CONTENTS

I Introduction

A. Overview

The *Domestic Violence, Crime and Victims Bill* was introduced in the Lords on 1 December 2003. After second reading on 15 December 2003,[1] it was committed to Grand Committee. It completed its passage through the Lords and was introduced into the Commons on 29 March 2004. It is due to be debated on second reading in the Commons on 14 June.

The Bill is divided into three parts. Part 1 deals with domestic violence. Part 2 covers criminal procedure. Some of these provisions are also part of the Government's proposals on domestic violence. Other provisions deal with issues which have arisen in recent court cases, including the use of "specimen counts" in cases of multiple offending and allowing an alternative verdict to be returned in respect of certain summary offences. Part 3 of the Bill deals with the provisions for victims, including the introduction of a statutory code of practice for victims, the extension of the jurisdiction of the Parliamentary Ombudsman, and a new Commissioner for Victims and Witnesses.

Part II of this Research Paper looks at the provisions on domestic violence which arose from the Government's 2003 consultation document, *Safety and Justice*.[2] Part III deals with the new "familial homicide" offence, which has its origins in a Law Commission report,[3] although the Government's proposals are different in certain key respects.

The provisions dealing with criminal procedure (other than those relating to domestic violence) and victims are discussed in a separate Library Research Paper, RP04/43. A select bibliography on domestic violence is available as Library Standard Note SNHA/737.

B. The Bill's domestic violence provisions in brief

- Clause 1 would make breach of a non-molestation order a criminal offence punishable with up to five years in prison. Currently it is punishable only as a civil contempt, which carries a 2-year maximum sentence.[4] One of the points about the sentence is that it would make the offence arrestable without warrant, whereas this would currently be the case only if the court had attached a power of arrest to the order.

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1 HL Deb 15 December 2003 cc947-1017

2 Home Office, *Safety and Justice: The Government's proposals on Domestic Violence*, Cm 5847, June 2003, http://www.homeoffice.gov.uk/docs2/domesticviolence.pdf

3 Law Commission, *Children: Their Non-accidental Death or Serious Injury (Criminal trials) A Consultative Report*, Law Com No 279, April 2003, http://www.lawcom.gov.uk/files/lc279.pdf

4 Section 14(1) *Contempt of Court Act 1981*

- Clause 2 would repeal a provision which requires the court to consider the fact that a couple have chosen not to marry in making occupation orders in favour of a cohabitant or former cohabitant with no right to occupy. It would replace this with a requirement for the court to consider the level of commitment when considering the nature of their relationship.
- Clause 3 would give same-sex couples the same rights under Part IV of the *Family Law Act 1996* as heterosexual cohabiting couples. It would have the effect of entitling same-sex couples to apply for occupation orders.
- Clause 4 would extend non-molestation orders to couples who have never cohabited and never been married.
- Clause 5 would create a new offence of causing or allowing the death of a child or vulnerable adult.
- Clause 7 would allow the Secretary of State to order the setting up of a multi-agency domestic homicide review.
- Clause 8 would make common assault an arrestable offence.
- Clause 9 would allow an alternative verdict of common assault (and other summary offences) to be returned under section 6(3) of the *Criminal Law Act 1967*. It is intended to resolve a problem which has recently been highlighted in the Court of Appeal.
- Clause 10 would extend the circumstances where a restraining order under s5 of the *Protection from Harassment Act 1997* may be made following criminal proceedings. It would be possible to make such an order on conviction of any offence, not just an offence under the 1997 Act, and it would also be possible to make such an order following acquittal.

C. Additions and omissions

1. Additions

During its passage through the House of Lords, the Bill grew from 31 to 39 clauses, and it is anticipated that further additions may be made in the Commons. The Government added clauses: (in response to a Liberal Democrat suggestion) to change the way in which the court considers the nature of a cohabiting couple's relationship when making occupation orders (clause 2); to make technical amendments to the *Criminal Justice Act 2003* (clauses 19 and 20); to modify provisions applicable when defendants may be unfit to plead, or not guilty by reason of insanity (clauses 17 and 18); and (in response to an Opposition suggestion) to make it possible to have an alternative verdict of common assault although no specific count has been included in the indictment (clause 9).

2. Omissions

Two clauses were taken out. One was the controversial clause in Part 1 which would have laid down special rules for familial homicide trials. This is discussed in part III of this paper. The other was a new clause, inserted in Part 2 on Report, which would have required judges instead of juries to determine issues of fitness to plead. This is discussed in Library Research Paper 04/43.

There had been some expectation that the Bill would have included a measure to reform the law of provocation, upon which the Law Commission had published a consultation paper in October 2003.[5] At Second Reading, Opposition spokesperson Baroness Anelay noted that an early version of the Home Office press release announcing publication of the Bill had referred to provocation.[6] The Home Office Minister Baroness Scotland of Asthal replied that a final report was expected from the Law Commission in late spring: the Government would look carefully at the recommendations, considering all the different permutations and the other defences to reduce murder to manslaughter. The Law Commission published *provisional* conclusions on 1 May 2004.[7]

3. Further additions anticipated

On more than one occasion, peers protested about the insertion of new provisions during the Bill's passage.[8] The exception was the insertion of clause 9, which arose from what Baroness Anelay described as a "friendly Christmas tree", whose objective was to make a non-partisan offer to the Government to resolve a problem highlighted recently in the Court of Appeal. The most serious protest concerned amendments which were referred to but have not yet been produced. These relate to a government consultation on compensation and support for victims of crime, and are discussed in Library Research Paper 04/43.

D. Costs

The Government's Explanatory Notes estimate that the Bill will result in ongoing costs of £40m per year, and a relatively small increase in work for the Police, the CPS and the courts (and, in the case of victims measures, the Parliamentary Ombudsman's office). [9] Further detail is given in the Regulatory Impact Assessment.[10]

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5 Law Commission, *Partial Defences to Murder*, Consultation Paper 173, 31 October 2003, http://www.lawcom.gov.uk/files/cp173.pdf

6 HL Deb 15 December 2003 c 955

7 Law Commission, *Partial Defences to Murder: Provisional Conclusions on Consultation Paper No 173*, 1 May 2004, Law Com No http://www.lawcom.gov.uk/files/cp173-prov.pdf

8 see e.g. HL Deb 4 March 2004 c848

9 *Domestic Violence, Crime and Victims Bill Explanatory Notes Bill 83-EN*, 29 March 2004 paragraph 122, http://www.publications.parliament.uk/pa/cm200304/cmbills/083/en/04083x--.htm

10 Home Office, *Domestic Violence, Crime and Victims Bill Consolidated regulatory impact assessment for all measures*, April 2004 .http://www.homeoffice.gov.uk/docs3/riadomviol.pdf

II Domestic Violence

A. What is domestic violence?

There is no statutory definition of domestic violence, and the term covers a range of behaviour, much but not all of which is criminal. Most definitions would include physical violence between partners or former partners, but the extent to which it extends to other household or family members varies, even in "official" definitions. The Home Office definition is:

> Any violence between current or former partners in an intimate relationship, wherever and whenever it occurs. The violence may include physical, sexual, emotional or financial abuse.[11]

The Audit Commission's *Best Value Performance Indicators* for assessing the performance of police authorities also limits the definition to adults, but it includes family members: [12]

> Domestic violence: any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or are family members regardless of gender.

The Crown Prosecution Service definition for prosecution purposes is wider, including "current and former" family members:[13]

> 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 or former family member

Family law barrister, Alicia Collinson argues that the lack of a single formal definition is damaging:[14]

> While it may now be difficult to formulate a definition, the continued absence of a formal definition is going to leave individual Governemnt departments and other organisations each operating on subtly different wordings. The prospect of

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11 Home Office, *Safety and Justice: The Government's proposals on Domestic Violence*, Cm 5847, June 2003, http://www.homeoffice.gov.uk/docs2/domesticviolence.pdf See also http://www.homeoffice.gov.uk/crimpol/crimreduc/domviolence/domviol98.html#defining

12 Audit Commission, *Best Value Performance Indicator No 153* , 2001 Annex A http://www.homeoffice.gov.uk/docs/anxapi.html

13 Crown Prosecution Service, http://www.cps.gov.uk/legal/section3/chapter_c.html#_Toc44571258

14 Alicia Collinson, *Tough Love: A Critique of the Domestic Violence, Crime and Victims Bill 2003,* 2004, pp 20-21

> a coherent strategy being introduced is thereby reduced. It would be better to have a single and established defiinition, even if some groups fell outside it, or the problem changed with changes in society.

As will be seen on pages 41-42 below, a number of organisations are arguing for a formal definition to be included in the Bill, although the Government is reluctant to do this. However, the Domestic Violence Inter-Ministerial Working Group is working on a common non-statutory definition.[15]

B. The extent of domestic violence

1. Overview

The problems in assessing the extent of domestic violence go well beyond difficulties with definitions. By its very nature it is a private crime. Many commentators argue that there is a great deal of under-reporting and under-recording.[16] A recent literature review comments that further research is needed on the scale of this:[17]

> It is clear that many victims of domestic violence will be assaulted a number of times before contacting the police, and whilst some recent research suggests that patterns of reporting may have changed over time we lack a detailed study of these shifts. There is some confusion surrounding the origin of the oftquoted statistic that a victim of domestic violence will be assaulted 35 times before contacting the police but it seems to be based on a Canadian study from the 1980s. There is a need for up to date UK research to understand the stages at which victims of domestic violence seek police intervention.

Because 'domestic violence' is currently not a legally defined offence, it is not separately identified in Police Forces' statistical returns of recorded crime to the Home Office. Crimes of domestic violence can be recorded by the Police and prosecuted in numerous ways, under categories such as threatening behaviour or various types of assault. In addition, the Police do not have to record the relationship between victim and offender. This means that distinguishing domestic crime statistics from other offences of violence is difficult.

There is a lack of sufficiently robust statistical information which makes it very difficult to assess the scale of the domestic violence problem. The majority of available statistics are derived from surveys such as the British Crime Survey (BCS). The BCS asks people

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15 HL Deb 9 March 2004 c1223

16 See for example L Smith, *Domestic Violence: An Overview of the Literature*, Home Office Research Study No 107, 1989 and NACRO, *Making it count: A practical guide to collecting and managing domestic violence data*, July 2003, http://www.nacro.org.uk/data/briefings/nacro-2003080700-csps.pdf

17 Kate Paradine and Jo Wilkinson, *A Research and Literature Review Protection and Accountability: the Reporting, Investigation and Prosecution of Domestic Violence Cases*, produced by CENTREX for HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary, February 2004 http://www.hmcpsi.gov.uk/reports/DomVio0104LitRev.pdf

about their experience as victims. Being a household survey, it picks up more crime than the official police figures, as not all crime gets reported to the police, let alone recorded by them. The BCS estimates are based on a relatively broad definition covering male and female victims of all violent incidents, except mugging, from partners, ex-partners, household members and other relatives.

Discussions on domestic violence tend to concentrate on attacks by males on females, although attacks by women on men do occur. British Crime Survey research[18], published in 1999, found that whilst 4.2% of both men and women said that they had been physically assaulted in the previous year by a current or former partner, women had a higher risk over their whole life-time and their chances of serious assault and injury were greater than men's.

A summary of domestic violence statistics suggests that:

- One in four women and one in seven men reported a physical assault by a current or former partner in their lifetime.
- One incident of domestic violence is reported to the police every minute.
- In any given police service, between 1.1% and 4.9% of all calls to the police for assistance by the public are for domestic violence.
- On average two women per week are killed by a current or former male partner. 40% of all female homicides are carried out by a current or former partner.

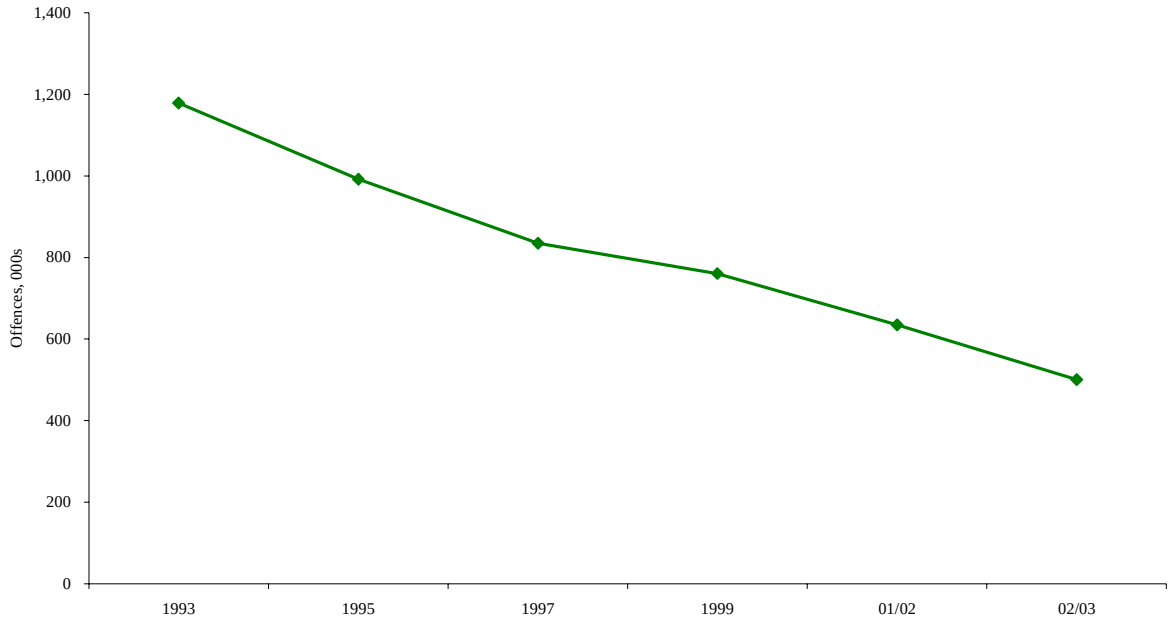
[18] C Mirrlees-Black, *Domestic Violence: findings from a new British Crime Survey self-completion questionnaire*, HORS 191, Home Office 1999

2. Trends

The latest BCS results are based on interviews that were conducted during 2002/03. Over the past decade there have been large falls in the number of domestic violence offences recorded by the BCS. However when interpreting changes in levels of domestic violence some caution should be exercised as results only relate to those incidents reported in face-to-face BCS interviews. Respondents may not have wished to disclose such information face-to-face so changes in recorded offences may show changes in reporting rather than offending.

The 2001 BCS included a self-completion inter-personal violence module and a report on the results derived from this is being prepared by the Home Office. Inter-personal violence includes domestic violence, sexual assault and stalking. Prevalence rates derived from previous self-completion modules were around three times higher for women and ten times higher for men than those rates derived from face-to-face surveys.

Trends in BCS domestic violence



- Approximately 501,000 violent domestic incidents were reported by those interviewed by the BCS in 2002/03. This accounted for 18% of violent crimes reported to the BCS.

- Domestic violence is characterised by its repetitive nature. Although just over half of victims (56%) were victimised on only one occasion, almost a quarter (23%) were victimised on three or more occasions. This compares with the fact that over two-thirds of the victims of any violent incident reported to the BCS in 2002/03 were victimised on just one occasion.

- The proportion of domestic violence victims attacked on more than one occasion has decreased however from 56% in 2001/02 to 44%. This decrease is mainly due to the proportion of victims suffering on at least three occasions, down from 34% in 2001/02.

- There is little difference in the proportion of incidents requiring medical attention from a doctor across the four main BCS violence categories. 12% of domestic violence incidents resulted in medical attention, compared with 9% of muggings and 11% of both stranger and acquaintance violent incidents. It may be that victims of domestic violence are more reluctant to seek medical assistance than victims of other violent crimes[19].

- In more than 40% of domestic incidents the victim received a minor bruise or black eye, far higher than in the other three BCS violence categories. Domestic violence victims were also more likely to sustain severe bruising, cuts or scratches than victims of the other BCS violence categories, but no more likely to suffer from broken bones or noses.

3. Domestic homicide

Homicide statistics provide an insight into one manifestation of domestic violence. In this section domestic homicide refers to offences committed by the victim's current or former partner. Over the past decade approximately one of every five homicides recorded were committed by a current or former partner of the victim. Each year around 100 women are killed in such circumstances: this is over 40% of all female homicides. An average of 29 men per year were victims of domestic homicide: such killings account for 7% of all male homicides. Research has suggested that while men typically kill as part of an ongoing abuse directed at women, domestic homicides committed by women are nearly always carried out in self-defence[20].

In England and Wales, the annual number of domestic homicides committed has not followed any clear trend over the past decade, with the number of offences recorded ranging between 104 and 150.

4. Victim characteristics

- 0.7% of females questioned by the BCS had been a victim of domestic violence during the previous 12 months, compared to 0.4% of males. This is the only type of BCS violence where women are more likely to be victims than men.

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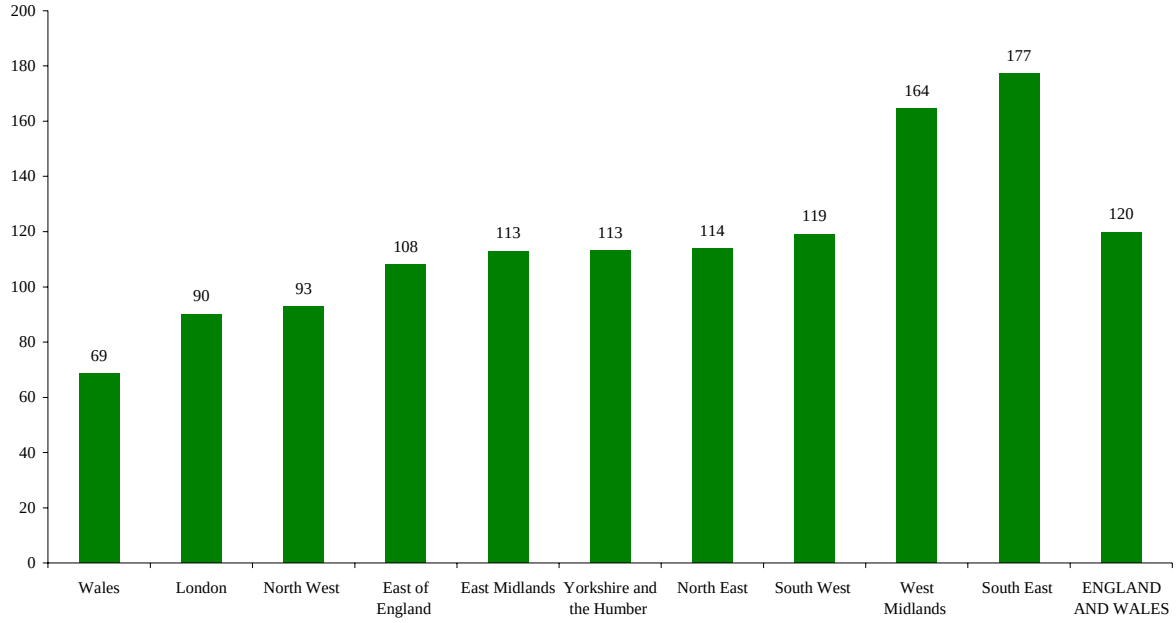
[19] C Mirrlees-Black, *Domestic Violence: findings from a new British Crime Survey self-completion questionnaire*, HORS 191, Home Office 1999

[20] N Websdale, *Understanding Domestic Homicide*, 1999

- The likelihood of being a domestic violence victim decreases with age. Adults of both sexes aged 16-24 are almost twice as likely to be a victim as other age groups.
- According to the BCS women who are separated from their partners have a significantly higher risk of domestic violence (4.2% of those questioned). This is followed by divorced women (1.2%), single (1%), cohabiting (0.9%) and then married (0.2%). It has been suggested that women's attempts to leave violent men are one of the most significant factors in domestic homicide cases[21].

- The chart below shows that BCS respondents in Wales, London and the North West were the least likely to be victims of domestic violence[22]. The BCS results suggest that people in the West Midlands and South East were the most likely to be victims of domestic violence.

Victims of domestic violence per 10,000 population



- Victims of domestic violence are most likely to be the head of a single-parent family (3.3%). This compares to 0.7% of two-parent families and 0.6% of childless households.

- Approximately 1.2% of adults in rented accommodation had been a victim of domestic violence. This group of people are four times more likely to be a victim of domestic violence than those in owner-occupied accommodation.

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21 N Websdale, *Understanding Domestic Homicide*, 1999

22 Police force level figures are not available from the BCS due to the variability of specific offence figures at that level.

- Research has indicated that there are complex relationships between poverty, social exclusion and domestic violence,[23] for example the incidence of domestic violence decreases as household income rises. It is difficult to ascertain whether such correlations are cause or effect.

- Those in employment were as likely to be a victim of domestic violence as unemployed respondents. Economically inactive respondents were far more likely to be victims, but there are many ways in which this could link to vulnerability. Women who fall into the economically inactive category, such as homemakers, may lack the financial resources to leave an abusive partner, face greater social isolation and have less access to support networks.

- The BCS asks respondents how often they visit a pub/wine bar. Respondents who had been to such an establishment at least three times a week, in the month before responding, were twice as likely to be victimised as those who had not. This is not to suggest that an individual is more likely to become a victim if they spend time in a pub/wine bar. These findings may however highlight the coping strategies developed by victims of domestic violence which include use of alcohol, prescribed medication and illegal drugs[24].

C. Policing and prosecution

For many years, much of the violence which took place within the context of a relationship was considered to be a private matter rather than a crime. In the 1980s there was considerable criticism of the policing of domestic violence, with a large body of research showing that few perpetrators of domestic violence were prosecuted, or even arrested.[25] The Government responded by improving guidance to the police, notably in Home Office Circular 1990/60 which stated that complaints of domestic violence should be recorded and investigated in the same way as crimes committed by strangers. In recent years, the Home Office has again overhauled the police response to domestic violence in Home Office Circular 19/2000. This stipulated that "where a power of arrest exists, the alleged offender should normally be arrested", and that officers should be prepared to justify the decision not to arrest.[26] Nevertheless, there is still a widely recognised problem of "attrition", which means that: not all incidents are reported; of those that are, only a proportion result in criminal proceedings; and still fewer result in criminal convictions.

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23 S Walby & A Myhill, *Assessing and managing risk*, 2001

24 K Paradine & J Wilkinson, *Protection and Accountability: The Reporting, Investigating and Prosecution of Domestic Violence Cases*, National Centre for Policing Excellence, CENTREX, Section 1.4.1

25 For a review of this literature, see Carolyn Hoyle, *Negotiating domestic violence Police, Criminal Justice and Victims*, 2000 Chapter 1

26 Home Office, *Domestic Violence, Revised Circular to the Police*, Home Office Circular 19/2000, 12 May 2000, http://www.homeoffice.gov.uk/docs/hoc1900.html

A recent report by HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate examined what could be done to tackle the problem of attrition. It found that at each stage of the police investigation and prosecution process, there was a 50% reduction in the numbers of cases:

> A clear theme within the Government's policy is the emphasis on the criminal nature of offences of domestic violence and the aim to bring more offenders to justice. To that extent the joint inspectorate team looked carefully at the scale and nature of attrition. The key stages identified are incidents to which police are called, potential crime reports, crime reports, arrests, charges, convictions. Between every stage there is roughly a 50% reduction. Inspectors concluded that of the 463 incidents to which police were called, there should have been approximately 260 crime reports with potential offenders. In the event, 118 crimes were actually recorded and charges were made in relation to 21%. The CPS file sample showed that typically 50% of those charged would be convicted (guilty plea or conviction after contested hearing); that is to say 11% of those matters recorded as crime led to a conviction. Whilst in some respects alarming, it should be recognised that positive police action at the early stages may have stopped or prevented violence to the satisfaction of the victim, who in many instances did not want the matter to go further.

The report's recommendations included: [27]

- The development of a common definition by the Association of Chief Police Officers, the Crown Prosecution Service and the Home Office
- Correct "flagging" by police forces of domestic violence incidents, with clear procedures for dealing with them
- A review of the systems for providing front line officers with pervious history information
- Revisiting minimum standards of investigation for domestic violence
- Ensuring experienced prosecutors are consulted where the victim withdraws support for the prosecution
- Producing a national domestic violence training package for CPS staff.

D. Existing legislation

1. Criminal Law

There is no specific criminal offence of "domestic violence". Those offences which are most likely to be used and the maximum penalties available following conviction are set out in the following table:

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[27] Her Majesty's Crown Prosecution Service Inspectorate/ Her Majesty's Inspectorate of Constabularies, *Violence at Home: A Joint Thematic Inspection of the Investigation and Prosecution of Cases Involving Domestic Violence*, February 2004, http://www.hmcpsi.gov.uk/reports/DomVio0104Rep.pdf

Some criminal offences relevant to domestic violence

Crime	***Maximum Penalty***	***Statute***
Murder	life imprisonment (mandatory)	*Murder (Abolition of Death Penalty) Act 1965* section 1
Manslaughter	life imprisonment	*Offences Against the Person Act 1861* section 5
Attempted Murder	life imprisonment	*Criminal Attempts Act 1981* section 4(1)
Threats to Kill	10 years' imprisonment	*Offences Against the Person Act 1861* section 16
Wounding with intent	life imprisonment	*Offences Against the Person Act 1861* section 18
Inflicting grievous Bodily harm	5 years' imprisonment	*Offences Against the Person Act 1861* section 20
Causing actual Bodily harm	5 years' imprisonment	*Offences Against the Person Act 1861* section 47
Common Assault	6 months' imprisonment and a £5,000 fine)	*Criminal Justice Act 1988* section 39
Rape	life imprisonment	*Sexual Offences Act 1956* section 37 and Schedule 2 paragraph 1(a)
Indecent Assault	10 years' imprisonment	*Sexual Offences Act 1956* section 37 and Schedule 2 paragraphs 17 & 18
Threatening behaviour	£1,000 fine	*Public Order Act 1986*, section 5
Causing intentional harassment, alarm or distress	6 months' imprisonment and a £5,000 fine	*Public Order Act 1986*, section4A
Pursuing a course of conduct which amounts to harassment (see below)	6 months' imprisonment and a £5,000 fine	*Protection from Harassment Act 1997*, s2
Putting people in fear of violence (see below)	5 years' imprisonment and an unlimited fine	*Protection from Harassment Act 1997*, s4

2. Civil Law Remedies

Part IV of the *Family Law Act 1996* was designed to improve on the previous civil law remedies against domestic violence, following a report by the Law Commission which said that they were "complex, confusing and lack integration".[28] The background to the introduction of the 1996 Act is described in Research Paper 96/39.[29] It introduced two new remedies, "non-molestation orders" and "occupation orders", and repealed the previous legislation.

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[28] *Family Law: Domestic Violence and Occupation of the Family Home*, Law Com No 207, HC 1 of 1992/93, May 1992, para 1.2

[29] *Family Law Bill [HL] [Bill 82 of 1995/96]: Domestic Violence*, 21 March 1996

A **non-molestation order** may do either or both of the following:[30]

1. prohibit a person from molesting someone who is "associated" with them (a spouse, cohabitant, former spouse or cohabitant, relative, flatmate, etc); and
2. prohibit the molestation of a "relevant child".[31]

"Associated persons" cannot at present cover people in a relationship who have never lived together, and the term "cohabitants"
does not, in this context, include same-sex couples.

"Molestation" itself is not defined in the Act following the recommendation of the Law Commission on this matter, which took the view that the concept is well defined and recognised by the courts.[32] The term goes wider than actual violence to encompass serious pestering and harassment. An order may be expressed so as to refer to molestation in general, to particular acts of molestation or to both.

Before granting a non-molestation order the court must have regard to all the circumstances of the case, including the need to secure the health, safety and well-being of the applicant and of any relevant child.

An **occupation order** may be used, for example, to exclude the respondent (ie. the perpetrator) from the family home and also from the surrounding area in appropriate cases.[33] They fall into five categories, which vary depending on the parties' relationship to each other and whether or not one or both of them is entitled to occupy the property. For each type of order, the applicant and respondent must be "associated" with each other. The same range of possible relationships which applies to non-molestation orders applies to occupation orders.

Where the applicant or any relevant child is likely to suffer significant harm if the order is not made, the court *must* make an occupation order (subject to the proviso that, broadly speaking, an order must not be made if it would do more harm than good). "Harm" is defined as ill-treatment or the impairment of health and, in relation to a child under 18 years, impairment of development. In cases where the court does not consider that significant harm would result from its decision, it has discretion over whether or not to make an order.

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30 Section 42 *Family Law Act 1996*

31 This is defined in section 62(2) – generally a child living with either party, although there are a number of other definitions.

32 *Family Law: Domestic Violence and Occupation of the Family Home*, Law Com No 207, HC 1 of 1992/93, May 1992

33 Sections 33-41 *Family Law Act 1996*

A power of arrest can be attached to all or part of a non-molestation or occupation order. This means that the police can arrest the perpetrator for breach of the order without a warrant. Breaching the order is not at present a criminal offence, but is punishable as a civil contempt. This is discussed on page 26 below.

Section 3 of the *Protection from Harassment Act 1997* also allows for certain civil remedies. These are set out below.

3. Protection from Harassment Act 1997

This Act has been described as an "unusual hybrid", in that while it created offences of harassment under sections 2 and 4 which are subject to the criminal law (which are shown in the table above), it also provides civil remedies for the restraining of and damages for such offences.[34] It was particularly intended to deal with the phenomenon known as "stalking" although its provisions are potentially of much wider application, and it has proved useful in relation to domestic violence.

Section 1 of the *1997 Act* makes a general declaration prohibiting a course of conduct amounting to harassment which, if carried out, would give rise to a criminal penalty under section 2 and may be the subject of a claim in civil proceedings under section 3.

Section 2 of the *1997 Act* states that "a person who pursues a course of conduct in breach of section 1 is guilty of an offence". Harassment is not defined in the Act, although section 7 provides that references to harassing a person include alarming the person or causing the person distress, that a 'course of conduct' must involve conduct on at least two occasions, and that 'conduct' includes speech.

Section 4 of the Act also created a more serious criminal offence, of carrying out a course of conduct which puts people in fear of violence.

Section 5 gives a court sentencing a person convicted of an offence under section 2 or section 4 the power to make a 'restraining order'. This forbids him from pursuing further conduct against the victim (or any other person named in the order) which amounts to harassment, or would cause a fear of violence. The order may have effect for a specified period or until a further order is made. It is a criminal offence punishable by up to 5 years' imprisonment and an unlimited fine for a defendant to breach such an order without reasonable excuse. [35]

Section 3 allows for a person to take civil proceedings in respect of actual *or apprehended* harassment. There is no requirement that any such conduct has already taken place. It would be for a person alleged to have pursued a course of conduct amounting to harassment under section 1 to prove that his conduct was reasonable in the circumstances.

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[34] Roger Bird, *Domestic Violence and Protection from Harassment*, 2110 p109

[35] Section 5(5)

In such civil proceedings the pursuer can seek an injunction restraining the defendant from doing anything which amounts to harassment, and/or damages. Section 3(2) provides for damages to be available for (among other things) 'any anxiety caused by the harassment and any financial loss resulting from the harassment'.

Sub-sections 3(3-6), which make the breach of an injunction a criminal offence (punishable by up to five years' imprisonment, or an unlimited fine, or both) can be seen as blurring the distinctions between the criminal and civil law. The provisions were rather controversial, and did not come into force until over a year after the main part of the Act.[36]

E. Development of Government policy

There have been a number of consultation documents which have dealt with domestic violence in recent years.

a. Living without fear

In July 1999 the Home Office assumed the policy lead on violence against women, which had previously been dealt with by the Women's Unit based at Cabinet Office. The Inter-Ministerial Group on Domestic Violence, chaired by Home Office Minister Baroness Scotland, leads the implementation of the Government's strategy on domestic violence. Ministers from across Government sit on this Group.[37]

Living without Fear - An Integrated Approach to Tackling Violence against Women was published jointly by the Women's Unit and the Home Office in June 1999.[38] It set out the current programme of work underway across government to tackle violence against women, and included a range of examples of current practice intended to support agencies dealing with domestic violence.

The Home Office commissioned a series of research papers between 1999 and 2000 to assess the effectiveness of the existing criminal and civil jurisdictions, and of various types of intervention. The papers, produced for the Policing and Reducing Crime Unit, are entitled, *Reducing Domestic Violence. What Works?*[39] Areas covered included risk management, use of the civil and criminal law, policing, accommodation and perpetrator programmes.

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36 1 September 1998 (SI 1998/1902) – the main part of the Act was brought into force on 16 June 1997 (SI 1997/1498)

37 http://www.womenandequalityunit.gov.uk/domestic_violence/

38 http://www.womenandequalityunit.gov.uk/archive/living_without_fear/index.htm

39 Available at *http://www.homeoffice.gov.uk/docs/brief.html*

b. Justice for All

Chapter 8 of the White Paper *Justice for All*,[40] published in July 2002, sought views on proposals for changes to the current legal framework designed to combat domestic violence.

According to *Justice for All*:

> Stopping domestic violence and bringing perpetrators to justice is a priority. Since late last year, a new Ministerial Group has been starting to take the steps needed to make a real difference. The Group is concentrating on five priority areas for action:
>
> - to increase safe accommodation choices for women and children;
> - to develop early and effective health care initiatives;
> - to improve the interface between the civil law and the criminal law;
> - to ensure a consistent and appropriate response from the police and the CPS; and
> - to promote education and awareness raising.[41]

Various measures not requiring a change in legislation, which had already been put in place, were described in the white paper:

> 8.7 The police and the CPS are committed to best practice in the investigation and prosecution of domestic violence crime. A pro-arrest policy has been introduced across all police forces and the CPS has reviewed its policy and, following extensive consultation, set out how domestic violence cases are prosecuted, including in what circumstances a case may proceed without the need for the victim to give evidence personally. Guidance has also been produced for prosecutors on a range of issues relevant to domestic violence cases, such as the effect on children and the extra difficulties some victims from minority ethnic communities face in reporting these crimes. The CPS now also has a national network of domestic violence specialists who can coordinate prosecution policies and processes across the country.[42]

c. Safety and Justice

The *Safety and Justice* consultation paper, published in June 2003,[43] set out the Government's new strategy for tackling domestic violence, building on the proposals in

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40 Home Office, *Justice for All*, Cm 5563, July 2002 : http://www.cjsonline.org/publications/whitepaper_2002/cjs_white_paper.html

41 Op cit, para 8.6

42 Op cit, para 8.7

43 Home Office, *Safety and Justice: The Government's proposals on Domestic Violence*, Cm 5847, June 2003, http://www.homeoffice.gov.uk/docs2/domesticviolence.pdf

the 2002 *Justice for All* White Paper. The consultation paper was summarised in a leaflet:[44]

> Part 1 of the paper sets out the nature and prevalence of domestic violence, and examines its impact on victims and its wider cost to society. The Government's strategy for tackling it is based on three elements:
>
> - prevention: working to prevent it happening in the first place, and working with victims and offenders to prevent it recurring;
> - protection and justice: increased legal protection for victims and their families; and
> - support for victims to rebuild their lives.
>
> Part 2 looks at the question of prevention. It discusses:
>
> - the action the Government is taking to educate people (especially young people) about domestic violence, and seeks views on how best to change attitudes that tolerate it;
> - work to help agencies and professionals to address risk factors and identify victims as early as possible;
> - the provision of information to victims to help them gain access to support services and legal protection; and
> - the programmes being run by the prison and probation services that aim to prevent domestic violence offenders from re-offending.
>
> Part 3 focuses on improving the legal protection available to victims and the response they receive from the criminal justice system. Among other issues, it examines recent efforts to improve training and awareness across agencies, and sets out a number of ideas aimed at tightening the existing legal framework to the benefit of victims. Specific proposals on which the Government would welcome views include:
>
> - extending the availability of non-molestation and occupation orders under the Family Law Act 1996;
> - criminalising the breach of such orders;
> - increasing the protection courts provide to victims of and witnesses to domestic violence by allowing victims to apply for a measure of anonymity through reporting restrictions;
> - extending the availability of restraining orders under the Protection from Harassment Act 1997 to cover all violent offences; and allowing the courts to make an order where a person is charged, pending trial, or where there is insufficient evidence to convict but the court considers that it is necessary to make an order to protect the victim;
> - making common assault an arrestable offence;
> - establishing a register of civil orders;
> - establishing a register of domestic violence offenders;

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[44] http://www.homeoffice.gov.uk/docs2/domviolsummary.pdf

- referring sentencing in domestic violence cases to the Sentencing Advisory Panel;
- improving the way the law on homicide operates in domestic violence cases;
- establishing multi-agency reviews after domestic violence homicides to learn the lessons on how agencies might have prevented the death; and
- improving liaison between the operation of the civil and criminal courts.

Finally, the chapter explores the issue of child contact arrangements, and sets out recent work the Government has undertaken to ensure that courts take account of allegations of violence when deciding on child contact arrangements.

d. Responses to *Safety and Justice*

The Home Office published a summary of responses to the consultation document in December 2003.[45] Respondents were generally in favour of many of the proposals in the paper. Those relevant to the Bill which were particularly well-received included the extension of the *Family Law Act 1996* to include same-sex couples and couples who had never lived together or been married, and multi-agency homicide reviews. There was support for criminalising the breach of orders, and for restraining orders to be available for all violent offences, and on acquittal, but this was qualified by some civil liberties concerns, and also concerns that criminalising breaches might lead to more undertakings which some respondents felt were inappropriate in domestic violence cases. Many respondents stressed the need for funding and resources for relevant agencies and training for front-line professionals. There was also concern about types of domestic violence omitted from the Home Office definition, including forced marriages, "honour" killings, elder abuse and the parental right to smack their children. Some respondents also wanted to see more about perpetrator programmes and child support services or general advocacy services.[46]

F. The Government's non-legislative proposals

In its document summarising the responses to the consultation, the Government set out a list of non-legislative measures to be taken over the next two years. These included: [47]

- Addressing the specific needs of minority communities, including reviewing the Home Office definition of domestic violence to ensure it is sufficiently wide to reflect the full range of relevant offences
- Agreeing a set of performance indicators

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[45] Home Office, *Summary of responses to Safety and Justice; The Government's proposals on Domestic Violence,* http://www.homeoffice.gov.uk/docs2/domviolresp.pdf

[46] Home Office, *Summary of responses to Safety and Justice; The Government's proposals on Domestic Violence,* http://www.homeoffice.gov.uk/docs2/domviolresp.pdf, pp3-8

[47] Home Office, *Summary of responses to Safety and Justice; The Government's proposals on Domestic Violence,* http://www.homeoffice.gov.uk/docs2/domviolresp.pdf, pp8-9

- A strategic approach to training of all relevant professionals
- Prevention measures such as an awareness raising campaign, work with health professionals and children's centres, and programmes for offenders
- Guidance for practitioners on the sharing of personal information in possible cases of domestic violence
- Work with the Association of Chief Police Officers (ACPO), Crown Prosecution Service (CPS) and others to improve further the police and CPS handling of domestic violence cases.
- Undertaking a full evaluation of specialist domestic violence courts.
- Work on sentencing and supporting victims through the court
- Establishing a register of civil orders
- Delivering new refuge places through the funds assigned by the Government and the Housing Corporation.
- Overhauling the support services available to children at risk because of domestic violence through implementation of the proposals in *Every Child Matters,* and considering how to address support needs specific to children affected by domestic violence.
- Running an awareness-raising campaign, to promote the new 24-hour helpline number as well as raising general awareness.

The new domestic violence helpline - Freephone 0808 2000 247– was launched on 15 December 2003.[48] Further information is available from an ODPM Press Release.[49]

[48] Home Office, *Summary of responses to Safety and Justice; The Government's proposals on Domestic Violence*, http://www.homeoffice.gov.uk/docs2/domviolresp.pdf

[49] ODPM Press Release 2003/0265, *Freephone 0808 2000 247 New 24-hour National Domestic Violence Helpline*, 15 December 2003, http://www.odpm.gov.uk/pns/DisplayPN.cgi?pn_id=2003_0265

G. Changes to the *Family Law Act 1996* –occupation orders, non-molestation orders and cohabitants

Clauses 1-4 make a number of changes to Part IV of the *Family Law Act 1996.* The provisions relate to the two main remedies for victims of domestic violence set out in Part IV, which are non-molestation orders and occupation orders. These were explained on pages 18-20 of this Research Paper above. In brief, non-molestation orders prohibit the respondent from molesting an "associated person", which includes a spouse, partner, former spouse or partner or relative. An occupation order can obtained where significant harm to the applicant or a relevant child is likely, and might require the respondent to leave the home or exclude him or her from a defined area of the home.

1. Clause 1 – breach of non-molestation orders

The consultation paper described the problems the Government sees with the current provisions as follows: [50]

> 46. Enforcement by the police depends on whether the court attached a power of arrest to the original order. If a power was attached, the police may arrest without a warrant and take the respondent back to the court that is the same level of court that made the original order. The number of orders with a power of arrest attached has increased from 15,600 in 1998 to 17,400 in 2001. However, given that the power of arrest is often only attached to specific parts of an order, police officers may be unclear whether they can arrest the respondent or not. Moreover, information on orders and powers of arrest is not recorded centrally, and the arrangements for passing such information between police forces can be inconsistent. If no power of arrest was attached, the victim has to apply to the civil court for an arrest warrant, which can put the victim at risk of further violence until the warrant is issued.

It went on to cite the example of Northern Ireland, where the breach of non-molestation and occupation orders is an arrestable offence. This, the document says, has been generally welcomed.

Clause 1 would make breach of a civil non-molestation order a criminal offence punishable with up to five years in prison; currently it is punishable only as a civil contempt, with a maximum sentence of 2 years' imprisonment, and/or an unlimited fine. The five-year maximum sentence would mean that it would become an arrestable offence under section 24 of the *Police and Criminal Evidence Act 1984*.[51] Under the current

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[50] Home Office, *Safety and Justice: The Government's proposals on Domestic Violence*, Cm 5847, June 2003, http://www.homeoffice.gov.uk/docs2/domesticviolence.pdf , p33

[51] Further information is available in Library Standard Note SNHA/1730, *Classification of Criminal Offences*

system, the judge has discretion whether to attach a power of arrest to the order, and these may be attached only to certain parts of the order.

An individual would be guilty of a criminal offence only if he is aware of the existence of the order, and if he does not have "reasonable excuse" for breaching it. However, he does not actually have to have been served with the order. During the Lords Grand Committee debate on the clause, the Home Office Minister, Baroness Scotland, explained this as follows in response to a probing amendment by the Opposition:[52]

> The Government's intention in framing Clause 1 was to avoid one of the problems identified by many of those who responded to the *Safety and Justice* domestic violence consultation paper. Respondents to "without notice" orders often go to great lengths to avoid the service of such orders.
>
> Orders must be served in person and, by refusing to open their doors to the processors, respondents can continue to harass the applicant while truthfully claiming not to have been served with the order. This makes a mockery of court orders and the protection that they are supposed to provide. As the clause is currently drafted, a respondent who is aware of the existence of an order but who has evaded service or made no effort to ascertain its terms could be held to account for breaching the order.

The notes on the Bill explain that "breach of an occupation order is not to be made a criminal offence as history of violence or molestation is not a prerequisite for the grant of an order."[53] However, clause 1 would place a duty on the court to consider making a non-molestation order when it considers whether to make an occupation order, and this is "designed to ensure that adequate protection is always in place for those persons who need it".

a. Other examples of "fusion" between the criminal and civil law

Other recent legislation has made the breach of certain civil orders a criminal offence, and this has tended to be controversial as it blurs the distinction between the criminal and civil law. Victims' organisations tend to welcome such changes as increasing flexibility in dealing with problems such as harassment or anti-social behaviour, whereas civil liberties organisations and those representing the legal profession tend to raise concerns. This is partly because the standard of proof for civil proceedings, where the matter must be proved *on the balance of probabilities*, is lower than that for criminal cases, where the matter must be proved *beyond reasonable doubt*.

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52 HL Deb 19 January 2004 cc225-6GC

53 *Domestic Violence, Crime and Victims Bill Explanatory Notes Bill 83-EN*, 29 March 2004 , paragraph 27, http://www.publications.parliament.uk/pa/cm200304/cmbills/083/en/04083x--.htm,

This debate arose during the passage of the bill which became the *Protection from Harassment Act 1997*.[54] As set out on page 21 above, section 3 of that Act makes the breach of a civil injunction restraining the defendant from harassment a criminal offence.

Another possible objection to this "fusion" between the civil and the criminal is that it creates a "personal criminal law", where the defendant is punished not for breaking the law of the land but for breaking a law which applies to him personally. This concern was raised in the course of bill which became the *Crime and Disorder Act 1998*, which introduced civil Anti-social Behaviour Orders (ASBOs), the breach of which is also a criminal offence.[55]

b. Reactions to the proposals

The criminalisation of the breach of a non-molestation order has been welcomed by Refuge, a national charity for women and children who experience domestic violence. However, Refuge has raised concerns over the ways such orders relate to child contact orders. They ask whether the possession of an order which includes a child would preclude an order being made for contact in a family or civil court, and whether it would result in the suspension of an existing order.[56] Women's Aid, a national charity working to end domestic violence against women and children, also welcomes Clause 1, but wants this to be extended to occupation orders.[57]

The human rights organisation, Liberty, raises concerns about the trend towards "a blurring of the criminal and civil law", so that criminal sanctions will apply for a breach of non-molestation orders issued on the basis of a civil burden of proof.[58] It also suggests that the effect might be to dissuade a victim from seeking a non-molestation order if she were concerned that her partner might receive a criminal record in consequence. Justice, an independent legal human rights organisation, "does not oppose" the provision, but would have preferred the introduction of a generic anti-violence and harassment order available to all courts with breach of this punishable only by a criminal court, to re-establish the distinction between civil and criminal proceedings.[59]

The Solicitors Family Law Association, which promotes a non-confrontational approach to resolving family disputes, believes that Clause 1 would have a number of detrimental effects, including taking away the sufferer's choice to have the perpetrator dealt with

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54 For further details, see Library Research Paper 96/115, pp 40-41 http://hcl1.hclibrary.parliament.uk/rp96/rp96-115.pdf

55 For further details, see Library Research Paper 98/44, pp 26-28 http://www.parliament.uk/commons/lib/research/rp98/rp98-044.pdf

56 *Refuge response to the Domestic Violence Crimes and Victims Bill*, 8 April 2004

57 Women's Aid Federation of England, *Briefing, for MPs Second Reading (Commons)* April 2004, p4

58 Liberty, *Liberty's second reading briefing on the Domestic Violence, Crime and Victims Bill in the House of Lords* December 2003, paragraph 2

59 Justice, *Domestic Violence, Crime and Victims Bill Briefing for Grand Committee Stage in the House of Lords*, January 2004, paragraphs 6-7

without criminal sanctions and delays in the criminal procedures compared to applications for the civil sanction of committal for contempt. They are also concerned that the law on the required standard of proof will need to be clarified to determine whether this should be the civil or the criminal one.[60]

c. Debate in the Lords

In the Lords Grand Committee debate on the Bill, the Liberal Democrats moved an amendment to leave out Clause 1 and instead to make it compulsory for the court to attach a power of arrest to those provisions which would protect the applicant or a child from significant harm from the respondent. The Liberal Democrat spokesperson, Lord Thomas of Gresford, argued that this would avoid delay and deal with the problem of victims being unwilling to criminalise their partners.[61] For the Government, Baroness Scotland argued that, even with the power of arrest, contempt of court was a less effective sanction than criminalising the breach.[62] The amendment was withdrawn.

2. Clause 2 - cohabitants and former cohabitants

Clause 2 was introduced as a Government new clause at report stage in the Lords[63] in response to amendments moved by the Liberal Democrats.[64] It would repeal section 41 of the *Family Law Act 1996.* This section forms part of the Act's provisions on occupation orders, and applies if the parties are cohabitants or former cohabitants. It states that, where the court is required to consider the nature of the parties' relationships, it must "have regard to the fact that they have not given each other the commitment involved in marriage." Clause 3 (see below) would extend the definition of "cohabitant" to same-sex couples, who, by definition, cannot be expected to have married. Consequently, the Government decided to repeal section 41.

However, unlike the Liberal Democrats' original new clause, the Government's clause goes on to amend section 36 of the 1996 Act, which is the main provision for which the court is in fact obliged to consider the nature of the parties' relationship.[65] Section 36 applies where the court is looking at granting an occupation order to a cohabitant or former cohabitant who otherwise would have no right to occupy the home. Rather than requiring the court to look at the fact that the couple have not married when making an occupation order, clause 2 requires them to take into account "the level of commitment

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60 Solicitors Family Law Association, *Domestic Violence Crime and Victims Bill A Briefing for the Second Reading Debate House of Commons*, June 2004.

61 HL Deb 19 January 2004 c229GC.

62 HL Deb 19 January 2004 c237GC

63 HL Deb 4 March 2004 c874

64 HL Deb 19 January 2004 cc 220-224GC, HL Deb 4 March 2004 cc858-860

65 The Explanatory Notes cite one other provision, which is that the court is also required to have regard to this when considering whether to transfer a tenancy under Schedule 7 of the 1996 Act – see *Domestic Violence, Crime and Victims Bill Explanatory Notes Bill 83-EN*, 29 March 2004 paragraph 29, http://www.publications.parliament.uk/pa/cm200304/cmbills/083/en/04083x--.htm

involved" in that relationship. The Home Office Minister, Baroness Scotland, said that she did not "wish to plant the seed of doubt into the court's mind that the level of commitment, or lack thereof, is no longer important".

Women's Aid is "concerned that courts will still be required to have regard to the relationship and the level of commitment involved in it" in the context of this provision.[66]

3. Same-sex and non-cohabiting couples (clauses 3 and 4)

The consultation document set out the problems faced by same-sex and non-cohabiting couples in relation to occupation and non-molestation orders, and outlined proposals to equalize the position of same-sex couples with that of married couples:[67]

> 42. There are two main problems with the way the orders work in practice:
>
> *Eligibility for orders*
> 43. The "associated person" criteria effectively mean that:
> - people in a relationship who have never lived together do not have access to non-molestation orders;
> - same-sex couples do not count as cohabiting couples, because the Act defines cohabitation in terms of a man and a woman.
>
> In addition, "associated persons", where they are not spouses or co-habitants (past or present), can only have recourse to an occupation order if they are "entitled". Entitlement makes a distinction between those with matrimonial home rights and other categories of applicants - and this creates a difference in the way that same-sex couples are treated as compared with married couples.
>
> 44. Later this summer, the Government is publishing its proposals on a possible civil partnership registration scheme for same-sex couples. This would involve equalising the position of registered same-sex couples with that of married couples in terms of their eligibility for orders.

The Government's summary of responses was as follows:[68]

> Respondents were in favour of these proposals. However, some felt that there was a need to retain the option of enforcement through the civil courts and that the police needed to be properly trained to deal with such breaches.

Clause 3 of the Bill would extend the definition of "cohabitants" for Part IV of the *Family Law Act 1996* - which is set out in section 62(1)(a) - to include same-sex couples. This

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66 Women's Aid Federation of England Briefing, *Domestic Violence, Crime and Victim's Bill Briefing for MPs: Second Reading (Commons)* April 2004

67 Home Office, *Safety and Justice: The Government's proposals on Domestic Violence*, Cm 5847, June 2003, http://www.homeoffice.gov.uk/docs2/domesticviolence.pdf, paragraphs 42-44

68 Home Office, *Summary of responses to Safety and Justice: The Government's proposals on domestic violence*, http://www.homeoffice.gov.uk/docs2/domviolresp.pdf, p3

was agreed to without debate in the Lords Grand Committee,[69] and was not debated at Report or Third Reading.

Clause 4 extends the definition of "associated" persons in Part IV of the 1996 Act. This is a key concept in Part IV, in that eligibility to apply for non-molestation orders is based on the two parties being "associated", and an applicant for an occupation order would also have to show that she or he and the other party were "associated". The term is defined by section 62(3) of the 1996 Act, and the definition is conveniently summarised in the Explanatory Notes:[70]

> Parties to the proceeding may be "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.

Clause 4 extends this definition to include people who have, or have had, "an intimate personal relationship with each other which is or was of significant duration". This would cover people who have never cohabited.

a. Reactions

These provisions have been widely welcomed, both by organisations representing victims of domestic violence and by legal and civil liberties organisations. However, Justice questions whether the concept of "significant duration" is sufficiently precise.[71]

b. Debate in the Lords

In the Grand Committee debate in the Lords, the Conservative spokesperson, Baroness Anelay, moved an amendment to replace "significant duration" with "such significance to justify the making of the order". This drafting was suggested by the Law Society to help ensure that victims in short-lived relationships could be given protection by the Bill.[72] For the Government, Baroness Scotland stated that the court would be able to determine for

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69 HL Deb 19 January 2004 c247GC

70 *Violence, Crime and Victims Bill Explanatory Notes Bill 83-EN*, 29 March 2004 paragraph 29, http://www.publications.parliament.uk/pa/cm200304/cmbills/083/en/04083x--.htm, paragraph 22

71 Justice, *Domestic Violence, Crime and Victims Bill Briefing for Grand Committee Stage in the House of Lords*, January 2004, paragraph 10

72 HL Deb 19 January 2004 c247GC

itself what was a "significant duration" on a particular set of facts.[73] She also drew attention to other remedies, such as the *Protection of Harassment Act* and the general criminal law, for people in short-term relationships. The amendment was withdrawn.

H. Domestic Homicide Reviews

Domestic homicide reviews, to be held when a person over 16 may have been killed by a member of the same household, would serve a similar purpose to arrangements already in place for cases of the death of children. When a child under the age of 18 dies, and neglect or abuse is known or suspected to be a factor, then a Serious Case Review will be held by relevant health and other professionals to see what lessons can be learned. These are held under part 8 of Department of Health guidance.[74] There is no equivalent national system for investigating lessons from domestic homicide although there are some local initiatives. For example, the Metropolitan Police runs a system of Multi-Agency Domestic Violence Murder Review panels, which were set up to examine and explore the support previously offered to victims. [75]

Safety and Justice explained the problem as follows:[76]

> 70. A domestic attack that results in the death of the victim is often not a first attack. Many people and agencies may have known of these attacks – neighbours, for example, may have heard violence, a GP may have examined injuries, the child's teacher may have suspected abuse, the police may have been called, there may have been previous prosecutions, and so on.
>
> 71. It is important to learn as much as possible from domestic violence homicides, to understand where systems failed, why the involvement of agencies or professionals did not lead to effective intervention, and what can be done to put the system right and avoid future deaths. The Government would welcome views on the establishment of multi-agency reviews following domestic violence homicides.

Clause 7 would allow the Secretary of State to order the setting up of a domestic homicide review where the death of a person aged 16 or over has, or appears to have, resulted in violence, abuse or neglect from a relative, partner, former partner or member of his or her household. The review may involve police, local authorities, probation boards, health authorities, primary care trusts, Local Health Boards and NHS trusts. The aim is to identify "the lessons to be learnt from the death". The Bill contains few details

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73 ibid c248GC

74 Department of Health, *Working Together to Safeguard Children*, 1999, http://www.dh.gov.uk/assetRoot/04/07/58/24/04075824.pdf

75 An evaluation is presented in Metropolitan Police, *Findings from the Multi-agency Domestic Violence Murder Reviews in London*, October 2003, http://www.met.police.uk/csu/pdfs/MurderreportACPO.pdf

76 Home Office, *Safety and Justice: The Government's proposals on Domestic Violence, Cm 5847, June 2003*, http://www.homeoffice.gov.uk/docs2/domesticviolence.pdf pp37-8

about the way in which these reviews should be held. The Government's intention is to publish guidance on their establishment and conduct, and this will draw on the guidance used for Serious Case Reviews and the Metropolitan Police guidance for its domestic violence murder reviews.[77]

1. Reactions

Respondents to *Safety and Justice* generally agreed with this proposal.[78] Refuge supports it, recommending that there should be "both conceptual and practical links between domestic violence homicide reviews and child homicide reviews", given the overlap between domestic violence and child abuse.[79] Women's Aid "cautiously welcomes" this, provided that Women's Aid organisations and other domestic violence services are fully involved in these reviews, and that there are sufficient resources.[80]

2. Debates in the Lords

In Grand Committee, Baroness Walmsley for the Liberal Democrats argued that these reviews should be extended to children, and that the clause missed "an opportunity for a more joined up approach to domestic violence, family homicide and suicide":[81]

> I say that for three reasons. First, in many cases both the adults—usually the mother—and children are killed by the same family member within a very short period of time. Secondly, this is often linked to the subsequent suicide of the perpetrator. Statistics on this, unfortunately, are not recorded but the number of cases where such deaths occur are frequently publicised in the media. Only last weekend there was a very sad case in East Anglia where that may have been the situation in the deaths of a mother, a father and one of their children. Thirdly, child deaths are not always investigated through social services Part 8 reviews if there has been no history of child protection concerns. The impact or context of domestic violence is not scrutinised routinely within Part 8 reviews, so it could be that valuable lessons are being lost.

The Home Office Minister, Baroness Scotland, rejected this on the grounds that it would "largely duplicate existing arrangements for deaths of children and cause confusion at local level about which type of review should be used following the death of a child"[82]

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77 Baroness Scotland, HL Deb 2 February 2004 c227GC

78 Home Office, *Summary of responses to Safety and Justice: The Government's proposals on domestic violence*, http://www.homeoffice.gov.uk/docs2/domviolresp.pdf, p3

79 *Refuge response to the Domestic Violence Crimes and Victims Bill*, 8 April 2004, p2

80 Women's Aid Federation of England Briefing, *Domestic Violence, Crime and Victim's Bill Update*, April 2004, paragraph 8, http://www.womensaid.org.uk/policy&consultations/DVBill/DVBill_update_0404_briefing_paper.htm

81 HL Deb 2 February 2004 c 223GC

82 HL Deb 2 February 2004 c 223GC

For the Conservatives, Baroness Anelay raised the question of the timing of the review, especially where a criminal trial was to take place. For the Government, Baroness Scotland said that this would be set out in the guidance.[83] Baroness Anelay went on to ask whether the Goverment intended to include voluntary sector members on the review board.[84] The Minister explained that this, too, would be covered in the guidance.[85]

I. Arrest for common assault

Common assault is defined by case law as "any act – and not a mere omission to act – by which a person intentionally – or recklessly – causes another to apprehend immediate unlawful violence."[86] Thus it does not necessarily involve actual physical violence. Often linked to this is the separate offence of battery, which involves the intentional or reckless application of unlawful force.

Common assault is not an arrestable offence. Section 24 of the *Police and Criminal Evidence Act 1984* ("PACE") creates three categories of arrestable offences, which are:

- offences for which the sentence is fixed by law (such as murder and treason);
- offences which carry a maximum custodial penalty for a first conviction of five years or more (such as robbery and burglary);and
- specified statutory offences, which are set out Schedule 1A of PACE.

While inflicting grievous bodily harm and causing actual bodily harm are arrestable because they have maximum sentences of five years, common assault has a maximum penalty of six months, and is not a specified statutory offence. Thus it is not, and has never been, arrestable.

However, section 25 of PACE permits a police constable in certain circumstances to arrest a person without warrant on suspicion of an offence which is not arrestable. These circumstances, or "general arrest conditions", include where a constable "has reasonable grounds for believing that arrest is necessary to protect a child or other vulnerable person from the relevant person."

Safety and Justice explains the Government's view that the current law results in confusion over police powers of arrest: [87]

> 6. Under section 25 of the Police and Criminal Evidence Act 1984, police officers may arrest where they have "reasonable grounds for believing that arrest is

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83 HL Deb 2 February 2004 c 228GC
84 HL Deb 2 February 2004 c 229GC
85 HL Deb 2 February 2004 c 231GC
86 Archbold *Criminal Pleading Evidence & Practice*, 2004 para 19-166.
87 Home Office, *Safety and Justice: The Government's proposals on Domestic Violence*, Cm 5847, June 2003, http://www.homeoffice.gov.uk/docs2/domesticviolence.pdf, p26

> necessary to prevent the relevant person … causing physical injury to himself or any other person … or necessary to protect a child or other vulnerable person". If, as is not uncommon, the alleged offender has already left the scene and the victim is not visibly injured and is unwilling to proceed, officers have no legal grounds on which to find and arrest the offender. Doing so would require the prior issue of an arrest warrant. Also, police officers are often uncertain about their powers of arrest for a common assault that they have not witnessed.
>
> 7. The Government proposes, therefore, to make common assault an arrestable offence, by adding it to the list of offences where a police officer may arrest without a warrant under section 24 of the Police and Criminal Evidence Act 1984. This would provide the police with significant extra powers in respect of domestic violence and violent offences generally, and remove the current operational confusion.

Clause 8 would extend the list of arrestable offences by adding the offence of common assault to Schedule 1A to the *Police and Criminal Evidence Act 1984*. This will give police the power to arrest a person on suspicion of assault and/or battery without an arrest warrant.

In Grand Committee, the Minister made it clear that this would have application outside cases of domestic violence, for example in policing public disorder:[88]

> Although our focus is on tackling domestic violence, we acknowledge that the clause will have general application. Therefore, this will be of benefit to the police where they are dealing with situations of public disorder, where assaults have taken place in conditions that would not be considered as domestic violence, and where the police would have the same difficulty in identifying whether their general powers of arrest will apply.

1. Reactions

The provision is welcomed by Women's Aid[89], Refuge, [90] the Solicitors Family Law Association[91] and Justice[92]. Liberty is "not opposed" to it, and "appreciates that this change in the law may allow the police to deal with cases of domestic violence with greater efficiency."[93]

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88 HL Deb 2 February 2004 c240GC

89 Women's Aid Federation of England Briefing, *Domestic Violence, Crime and Victim's Bill Briefing for MPs:Second Reading (Commons)* April 2004, p5

90 *Refuge response to the Domestic Violence Crimes and Victims Bill*, 8 April 2004, p1

91 Solicitors Family Law Association, *Domestic Violence Crime and Victims Bill A Briefing for the Second Reading Debate House of Commons*, June 2004

92 Justice, *Domestic Violence, Crime and Victims Bill Briefing for Grand Committee Stage in the House of Lords*, January 2004, paragraph 15

93 Liberty, *Liberty's second reading briefing on the Domestic Violence, Crime and Victims Bill in the House of Lords* December 2003, paragraph 30

However, family law barrister Alicia Collinson, in her critique of Bill, questions the necessity of this extension of police power, and argues that its more general application in relation to public disorder has "very profound ramifications for civil liberties", because no actual assault need take place for the police to make arrests.[94]

2. Debate in the Lords

The Conservative peer Lord Carlisle of Bucklow questioned whether the clause was necessary, pointing out that common assault had never been arrestable, but that assault covering actual bodily harm was, so that any actual physical assault would "probably be covered."[95] He argued that section 25 of PACE gave sufficient powers of arrest. In reply, Baroness Scotland pointed out that the disturbance of wild birds and possession of wild animals and plants were arrestable offences, and argued that while the general arrest conditions of PACE will often give a power of arrest, they will not always do so.[96]

J. Common assault as an alternative verdict

In Grand Committee, Baroness Anelay proposed an amendment intended to resolve a problem which had recently been highlighted in the Court of Appeal. The brief explanation was that there had been a number of cases where prosecutors and judges had overlooked the necessity of including a specific count of common assault if the jury is to be invited to consider that as an alternative verdict. As a result, convictions for common assault when no specific count was on the indictment had had to be quashed by the Court of Appeal and the defendant had gone "scot free". She gave a detailed explanation of how the problem had arisen, and the cases in which it had arisen, culminating in a case before the Court of Appeal in November 2003. Rose LJ described it as:

> … yet another case in which an experienced Crown Court Recorder, unassisted by any of the counsel appearing before him, fell into error because he was unaware, until too late (that is at the time of sentencing) of the decision of this Court in Mearns [1991] 1 QB 82, 91 Cr App Rep 312, which is referred to in Archbold. In that case, this Court held, in the terms of the accurate headnote:
>
> > "A defendant tried on indictment could not be found guilty, as an alternative to the counts in the indictment, of a summary offence to which section 40 of the Criminal Justice Act 1988 applied, unless a count specifically charging him with such an offence was included in the indictment; in the absence of such a specific count an offence within section 40 of the Act of 1988 did not fall within the jurisdiction of the court of trial within the meaning of section 6(3) of the Criminal Law Act 1967."

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94 Alicia Collinson, *Tough Love: A Critique of the Domestic Violence, Crime & Victims Bill 2003*, 2004, p64.

95 HL Deb 2 February 2004 c236GC

96 HL Deb 2 February 2004 c2389GC

It had been submitted that *Mearns* was wrongly decided. But it was a decision binding on the court, and:

> Accordingly there are, as it seems to us, only 3 routes by which it could be reconsidered: by Parliament by way of legislation; by the House of Lords on appeal from this Court; and by a five-judge constitution of this Court. As it seems to us there are far more pressing and important matters to be addressed via all of these three routes, particularly as no difficulty arises if a count of common assault is added to the indictment in an appropriate case. This is what Mearns has required for the last 13 years. The sooner that all concerned are alive to this possibility, and act upon it, the better.[97]

Baroness Anelay thought that the Bill provided an ideal opportunity to put the matter right. Although she appreciated that a remedy was in the hands of prosecutors who should get the matter right, omissions did sometimes occur, resulting in an expensive waste of costs and a denial of justice to the public.[98]

Clause 9 in its present form was inserted by government amendment which was agreed at Lords Third Reading. Baroness Scotland explained that it went wider than the original proposal because there was no reason in logic to distinguish between common assault and the other summary offences which, by virtue of Section 40 of the *Criminal Justice Act 1988*, are capable of being added to an indictment in the Crown Court. Whether there would be any practical value in the extension of Section 6(3) beyond common assault was not clear, but there was a chance that cases might arise where it would be beneficial, and the clause did do what was proposed for common assault, which was its main purpose.[99] Baroness Anelay was puzzled at the extension because the other offences (assaulting a prison custody officer, assaulting a secure training centre custody officer, taking and driving away, driving while disqualified and low-value criminal damage) were not, as assault was, likely alternatives to offences which would be charged on indictment.

K. Restraining orders

As was set out on page 20 above, the *Protection from Harassment Act 1997* gave courts powers to make restraining orders to prohibit the offender from a wide range of conduct to protect the victim or others from harassment or fear of violence. However, this power applies only where a court is sentencing someone convicted of an offence under section 2 (harassment) or 4 (putting people in fear of violence) of the Act. *Safety and Justice* set out the Government's intention to extend the power:[100]

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97 *R v Clifford*, 27 November 2003, [2003] EWCA Crim 3630

98 HL Deb 2 February 2004 c235GC

99 HL Deb 25 March 2004 c828

100 Home Office, *Safety and Justice: The Government's proposals on Domestic Violence*, Cm 5847, June 2003, http://www.homeoffice.gov.uk/docs2/domesticviolence.pdf, p35

> 55. The power to issue restraining orders is only available when the court is sentencing for offences under the 1997 Act. Given how useful these orders have been in protecting victims in domestic violence cases, there are strong arguments for extending this power to cover a wider range of offences.
> 56. **The Government therefore proposes to:**
> - **make restraining orders available when courts sentence for any offence of violence;**
> - **make restraining orders available to criminal courts where a person is charged pending a trial; and**
> - **make restraining orders available to criminal courts when there is insufficient evidence to convict but the court considers that it is necessary to make a restraining order to protect the victim.**

Some responses to the document raised concerns about the use of such orders where a person had been acquitted, as eroding the presumption of innocence.[101] There is already a power for courts to "bind over" any person where a breach of the peace is anticipated, and that power can be exercised on acquittal as well as conviction.

1. Clauses 10 and 11

Clause 10 (1) would amend the *Protection from Harassment Act 1997* so that courts would be able to make a restraining order where a defendant was convicted of *any* offence, not just an offence of harassment or putting people in fear of violence. Any person mentioned in the order would be entitled to give evidence at the hearing (clause 10(2).

Clause 10(4) would go further, by allowing courts to make a restraining order where a person had been acquitted of an offence, where the court believed a restraining order was necessary to protect a person from harassment.

Clause 11 makes equivalent provisions for Northern Ireland. This clause was added to the Bill by a Government amendment at the Bill's Report Stage in the Lords.[102]

2. Reactions

Women's Aid welcomes this provision, and also supports giving the right to make representations to court about the terms of the order.[103] Refuge also supports it, although comments that "it is important that any procedure is compatible with the European

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[101] Home Office, *Summary of responses to Safety and Justice: The Government's proposals on domestic violence*, http://www.homeoffice.gov.uk/docs2/domviolresp.pdf, paragraphs 27-8

[102] HL Deb 11 March 2004 cc1386-1390

[103] Women's Aid Federation of England Briefing, *Domestic Violence, Crime and Victim's Bill Briefing for MPs:Second Reading (Commons)* April 2004, p5

Convention on Human Rights and it is for government and its lawyers to devise a scheme which protects women, children and the rights of the individual."[104]

However, Liberty, while sympathetic to the Government's intentions, "has serious concerns about the further blurring of the distinction between the civil and criminal law and the undermining of the presumption of innocence".[105]

> … a restraining order after an acquittal would inevitably undermine the not guilty verdict by allowing a mechanism whereby the court could treat the acquitted individual as a wrongdoer. Although the formal verdict would be not guilty, there would be a clear implication of guilt by association with the imposed restraining order.

Justice has similar concerns, arguing that while the order is preventative rather than a penalty, "the consequences of breaching an order are very serious indeed. As a matter of principle if a person is acquitted of an offence there should be no negative consequences".[106]

The Solicitors Family Law Association believes that clause 10 should be amended so that the making of a restraining order, where the offence arises out of domestic violence, should be dealt with "by a court properly trained and qualified in all aspects of family issues", and that this would require a definition of domestic violence which would be useful in its own right.[107]

The Joint Committee on Human Rights considered the provision in its Third Report of 2003/04, concluding that the provisions (then in clause 8) were likely to be justifiable under the European Convention on Human Rights:[108]

> These provisions engage the right of the defendant to respect for private life under ECHR Article 8.1, but also serve to protect the Article 8.1 rights of potential victims of harassment. The court would be bound by its obligation under section 6(1) of the Human Right Act 1998 to act in a manner compatible with Convention rights, including Article 8 and the right to a fair hearing under Article 6, when deciding whether to make, vary or discharge an order. In our view, the provisions of clause 8 are likely to be justifiable under ECHR Article 8.2 as being in accordance with the law and necessary in a democratic society for the

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[104] *Refuge response to the Domestic Violence Crimes and Victims Bill*, 8 April 2004, pp1-2

[105] Liberty, *Liberty's second reading briefing on the Domestic Violence, Crime and Victims Bill in the House of Lords* December 2003, paragraphs 31-33

[106] Justice, *Domestic Violence, Crime and Victims Bill Briefing for Grand Committee Stage in the House of Lords*, January 2004, paragraph 17

[107] Solicitors Family Law Association, *Domestic Violence Crime and Victims Bill A Briefing for the Second Reading Debate House of Commons*, June 2004

[108] Joint Committee on Human Rights, Third Report, *Scrutiny of Bills: Progress Report*, HL 23/HC252 2003/04,

protection of the rights of others, and the procedure is unlikely to violate Article 6 standards.

3. Debate in the Lords

Concerns were raised about the breadth of the proposed powers to impose restraining orders on acquittal. The Liberal Democrat peer, Baroness Thomas of Waliswood, moved an amendment in Grand Committee to limit the power to cases where the defendant had been acquitted of an offence related to domestic violence, rather than any offence.[109] The Conservative spokesperson, Baroness Anelay, pointed out that this would require a statutory definition of domestic violence,[110] and the Minister argued that this would "create a lottery of protection, depending on the circumstances of the case and the relationship between the parties rather than the need for protection of the victim".[111]

The issue was raised again at Report Stage, with Lord Thomas of Gresford pointing out that the acquittal could be for a driving offence, and that this was "far too wide",[112] but the minister explained that the Government was not prepared to put the necessary definition domestic violence in the bill when it could soon be made obsolete by the Domestic Violence Inter-Ministerial Working Group's work on a definition. Baroness Anelay expressed concern about the fact that any behaviour could be prohibited by an order (providing the court considered it necessary to protect a person from harassment), and asked whether the interests of the acquitted defendant or the alleged victim would be put first, for example in a case where the prohibition might damage the acquitted person's right to earn their living.[113] Baroness Scotland replied that the same wording is used for restraining orders on conviction in *the Protection from Harassment Act 1997*, and that this had been "well understood".[114]

The Conservative spokesperson, Baroness Anelay, asked why the power could not apply to either party, like the existing power of the court to "bind over".[115] Baroness Scotland replied that it would still be open to the court to bind over the victim or any other witness, and still use this power to deal with the defendant as a "measure of preventative justice".[116]

Conservative and Liberal Democrat peers were also concerned that the Bill did not make clear that a civil standard of proof was to be applied by the court making a restraining order. They feared that this might cause confusion in, for example, a magistrate's court,

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[109] HL Deb 2 February 2004 c241GC
[110] HL Deb 2 February 2004 c243GC
[111] HL Deb 2 February 2004 c245GC
[112] HL Deb 9 March 2004 c 1239
[113] HL Deb 2 February 2004 c 247-8GC
[114] HL Deb 2 February 2004 c 250GC
[115] HL Deb 2 February 2004 c251 GC
[116] HL Deb 2 February 2004 c252GC

which normally deals with criminal cases.[117] The Conservative spokesperson, Baroness Anelay pressed this point to a division at Report Stage, but her amendment was negatived.[118] For the Government, Baroness Scotland said that there was no need to spell this out on the face of the bill, because criminal courts are used to making civil restraining orders under the *Protection from Harassment Act 1997*.[119]

One proposed amendment which the Government did act upon concerned the power of a court, when dealing with a defendant for a breach of a restraining order, to revoke the original order and replace it with a new order. An amendment to provide for this was moved by the Opposition spokesperson, Baroness Anelay, on report,[120] and the Attorney General, Lord Goldsmith, promised to consider it. On Third Reading, a Government amendment, differently worded but designed to address this issue, was agreed to,[121] and now stands as clause 10(3).

L. Some domestic violence measures not included in the Bill

A number of organisations representing victims of domestic violence have called for certain additions to be made to the Bill. These include: a statutory definition; additional safeguards for child contact arrangements; changes to the immigration rules for victims of domestic violence; and provisions on additional resources.

1. Statutory definition of domestic violence

As has already been mentioned, a number of organisations have called for a single definition of domestic violence to be used by all agencies[122] and some have argued that it should be a statutory one, included in the Bill. Women's Aid calls for one which would be based on the *New Zealand Domestic Violence Act 1996*. It argues that "adopting a definition which recognises that domestic violence includes physical, sexual and psychological violence, including intimidation, harassment and threats, and that it can affect other family members including children, will address the significant misunderstanding that still exists about the nature and dynamics of domestic violence."[123] The Women's National Commission, the Government's independent advisory body on women's issues, states that women they consulted felt it crucial that the definition "includes physical, sexual and psychological violence" and within this definition, "perpetrators are not limited to intimate partners".[124]

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117 See HL Deb 2 February 2004 cc246-2260 and
118 HL Deb 9 March 2004 c1230
119 HL Deb 9 March 2004 c1229
120 Hl Deb HL Deb 9 March 2004 c1214
121 HL Deb 25 March 2004 c830
122 See for example, Equal Opportunities Commission, *Safety and justice: The Government's proposals on domestic violence*, September 2003, paragraph 19
123 Women's Aid Federation of England Briefing, *Domestic Violence, Crime and Victim's Bill Briefing for MPs:Second Reading (Commons)* April 2004, p5
124 Women's National Commission, *Response to the Domestic Violence, Crime and Victims Bill*, p2

This issue was raised on second reading in the Lords by the Liberal Democrat peer, Baroness Thomas of Walliswood, who pointed out that "different parts of central government use different definitions which could lead to difficulties when they are asked to collaborate in dealing with the problem."

In response, Baroness Scotland said that while the Government was working on a single definition, a statutory one was not necessary for this Bill, and could be too restrictive:[125]

> The noble Baroness, Lady Thomas of Walliswood, supported the provisions, for which I warmly thank her, and raised issues about the definition of domestic violence, asking why it had been left as it was. The Government recognise the difficulties caused by the different definitions used by the Home Office and other key agencies. We are working with partners towards a single definition. We will ensure that the definition is as broad as possible and that it takes on board the responses that we have received on the consultation paper, including those from a wide range of minority communities. However, a statutory definition of domestic violence is not needed for the purposes of the Bill, and 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. If we look back at what we classified as domestic violence even 10 years ago, we know that we have advanced. We need that breadth to ensure that all are covered.

The issue was also discussed when the Bill was in Grand Committee in the Lords, when Baroness Thomas moved an amendment (later withdrawn) to include a definition based on the New Zealand definition.[126] Baroness Scotland made it clear that, while the Government rejected a statutory definition, the Domestic Violence Inter-Ministerial Working Group was considering "a working definition for all practitioners and others who participate in this field.the work".[127] She acknowledged that it was "important that we get a clear definition so that we are all singing from the same hymn sheet."[128]

2. Child contact issues

A number of organisations are concerned that the bill does not sufficiently address children's need for protection in contact arrangements. Refuge argues for: a "rebuttable presumption of no contact with the perpetrator in cases where there is domestic violence"; a review of the use of child contact centres; and mandatory specialist domestic violence training for those working in the family court system.[129] Women's Aid also believes children are not safe under the present law, and that children are being ordered to have contact or residence with violent fathers. It calls for: courts not to grant residence or

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[125] HL Deb 15 December 2003 c1015
[126] HL Deb 19 January 2004 c207-219GC
[127] HL Deb 9 March 2004 c1223
[128] Ibid
[129] Refuge, *Response to the Domestic Violence Crimes and Victims Bill*, 8 April 2004, p3.

unsupervised contact to the violent parent unless it is satisfied that it can be arranged safely; a mandatory risk assessment for use in all family proceedings in cases involving allegations of domestic violence; and changes to the *Family Law Act 1996* to prevent perpetrators from using recovery orders to locate and remove a child from the victim without risk assessments or court hearings.[130]

An amendment to build safeguards into contact arrangements was moved by Labour peer Baroness Thornton in Grand Committee.[131] The purpose was to ensure that where the court was deciding on contact, and there were allegations of ill treatment by one of the parties towards the child or another person, the court would determine if the allegation was proved, and if it was, would not make any order granting the abusive partner custody, or contact (unless the child wanted contact and the court could be sure it would be safe). Baroness Thornton explained that the amendment had the support of children's charities, who were concerned that some children were unable to voice their concerns and continue to have contact with a parent who has abused them. Baroness Scotland replied that this issue had been considered during the passage of the *Adoption and Children Bill* in 2002, and that the Government had said then and still believed "that an automatic presumption of no contact would not be in the child's interests."[132]

Another issue which was raised was that of recovery orders. One of the circumstances in which these can be issued is where it appears that a child has been unlawfully taken away from the person who has care of them. In Grand Committee,[133] and again on Report, the Liberal Democrat peer Baroness Walmsley moved an amendment to ensure that before a court returns a child to an applicant who claims their partner has abducted them, police checks must be made to see if the applicant is on the register of domestic violence perpetrators.[134] The establishment of such a register was one of non-legislative proposals set out in *Safety and Justice*. Baroness Scotland disagreed with the amendment, arguing that respondents have the right to appeal and can seek variations of the order, and that "the provisions of the Children Act and the guidelines on how the court should deal with the allegations of domestic violence ensure that the welfare of the child is paramount and that allegations of domestic violence are properly taken into account by the court when deciding contact issues."[135]

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130 Women's Aid Federation of England Briefing, *Domestic Violence, Crime and Victim's Bill Briefing for MPs:Second Reading (Commons)* April 2004, pp1-2

131 HL Deb 28 January 2004 cc 169-178GC

132 HL Deb 28 January 2004 c177GC

133 HL Deb 21 January 2004 cc314-328

134 HL Deb 4 March 2004 cc874-880

135 HL Deb 4 March 2004 c879

3. Immigration issues

The Immigration Rules require most foreign spouses and partners to complete a two-year 'probationary period' before they can apply for indefinite leave to remain (ILR).[136] If they leave their partner during that period, ILR will normally be refused.

However, the Government introduced a 'concession' in 1999 for those who left their partner during the probationary period and could prove, by way of a court conviction or similar, that the relationship ended because of domestic violence. This concession allowed them to remain in the country on ILR despite the fact that the marriage had ended. Following a review of the way the domestic violence concession worked, the types of evidence caseworkers at the Immigration and Nationality Directorate can consider as 'proof' of domestic violence have been extended, and the policy has been formalised as part of the Immigration Rules.[137]

Guidance on how this policy works is contained in the Home Office's Immigration Directorates'
Instructions.[138]

Spouses and partners who are still in the probationary period are not allowed to have recourse to public funds, though they are allowed to work. If they apply for ILR before their current leave expires, their existing leave, with all the conditions attached to it, is automatically extended while the Home Office is considering the application. This prevents victims of domestic violence from accessing housing or welfare benefits if they leave a violent spouse, unless and until they are granted ILR (to which no conditions can be attached).

Although local authorities have a statutory power under section 17 of the *Children Act 1989* to make appropriate provision for children to ensure that their needs are being met (e.g. being adequately fed and housed and cared for), this is subject to interpretation. Some apparently use section 17 to pay for the housing and subsistence costs for women with children to live in a refuge whilst others discharge their duty by taking the children into care.[139] There are currently several refuges who will accept limited numbers (usually not more than one at a time) of women without recourse to public funds.[140]

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[136] The probationary period used to be one year for spouses, but was increased to two years for those who applied from April 2003.

[137] See Home Office press notice 321/2002, *Victims of domestic violence get more help with immigration change*, 26 November 2002: http://www.ind.homeoffice.gov.uk/news.asp?NewsID=207

[138] Home Office *Immigration Directorates' Instructions* chapter 8 section 1 paragraph 5 http://194.203.40.90/default.asp?PageId=3971

[139] Eleri Butler, *Briefing on the Key Issues Facing Abused Women With Insecure Immigration Status to Entering the UK to Join Their Settled Partner*, Women's Aid, December 2002: http://www.womensaid.org.uk/policy/briefings/immigration.htm.

[140] BBC Health *Hitting Home - Practical Help: Your legal rights*: http://www.bbc.co.uk/health/hh/practical11.shtml

Women's Aid[141] calls for an exemption to the "No Recourse to Public Funds" provision for victims of domestic violence who are subject to immigration control. Southall Black Sisters makes the following proposals in a detailed brief on this issue:[142]

> We propose that the domestic violence immigration rule, which currently allows some women subject to immigration control and domestic violence indefinite leave to remain in the UK, be extended to all women in this position, and that all types of evidence of domestic violence should be accept as sufficient proof. We also propose that the no recourse to public funds rule be reformed so that all victims of domestic violence are entitled to the financial support and safe accommodation they require to leave an abusive relationship irrespective of their immigration status.

4. Resources

On report, Conservative spokesperson Baroness Anelay moved an amendment that before any provision of the Bill comes into force, a certificate should be laid before Parliament that all necessary resources have been made available for implementation. This was negatived on division.[143]

A number of organisations have raised various concerns about funding. Women's Aid and the Women's National Commission both call for "nationally funded and local delivered domestic violence support and advocacy services" and designated funding for children's domestic violence services in refuges and in the community in every area.[144] Refuge also has concerns about legal costs:[145]

> Refuge is also concerned that remedies offered by the legal system:
>
> - Should be accessible and affordable; it is unacceptable that those requiring protection should be expected to 'pay' for it – around £2,000 for a non-molestation order
> - And that victims receive specialist advocacy services, including legal advice, from the first 999 call through to conclusion of the case. It is vital that this service be established using the expertise of domestic violence specialists, who have a firm understanding of the dynamics of intimate partner abuse and its essentially gendered nature.

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[141] Women's Aid Federation of England Briefing, *Domestic Violence, Crime and Victim's Bill Briefing for MPs:Second Reading (Commons)* April 2004, p3

[142] Southall Black Sisters, *Domestic Violence, Immigration and No Recourse to Public Funds A briefing to amend the Domestic Violence, Crime and Victims Bill*, April 2004

[143] HL Deb 4 March 2004 cc848-857

[144] Women's Aid Federation of England Briefing, *Domestic Violence, Crime and Victim's Bill Briefing for MPs:Second Reading (Commons)* April 2004, p2; Women's National Commission, *Response to the Domestic Violence, Crime and Victims Bill*, p1

[145] Refuge, *Response to the Domestic Violence Crimes and Victims Bill*, 8 April 2004, p4

III "Familial homicide"

A. Overview

There has been much anguish and controversy about prosecutions of parents who might have caused the deaths of their own young children. In some high-profile cases, mothers have been convicted of murdering their babies and spent years in prison before their convictions have been set aside by the Court of Appeal. The court made extremely strong criticisms of the expert evidence upon which two convictions were based. In those cases, the primary stark question had been whether the children had been killed at all. Their deaths could have been due to natural causes. [146]

In other equally high-profile cases, it has been clear that children's deaths were not due to natural causes, and that they must have been killed by one or other of their parents. But there was no evidence to show which was responsible, so neither could be convicted of murder. It is that concern which this Bill is seeking to address. The terms "familial homicide" is sometimes used to describe that situation, and sometimes to describe the new offence proposed in the Bill (although the phrase does not appear in the Bill). Clause 5 would create a new offence of causing or allowing the death of a child or vulnerable adult, under which defendants could be convicted, without it being shown who actually caused the death. A controversial clause which was removed by the Lords at Third Reading might, in combination with clause 5, have made it more possible to secure convictions for more serious offences as well. Clause 6 is a curious remnant, specific to courts-martial, doing the same as the lost clause would have done. It had been added at Report, but was not removed.

These clauses stem from work begun in mid-2002 by the Law Commission, which accelerated its normal consultation process in response to growing pressure plus the potential availability of the *Criminal Justice Bill 2002-03* as a legislative vehicle. That work had been inspired by the work of the National Society for the Protection of Children ("NSPCC") "Which of you did it" Working Group, which had grown from an NSPCC seminar held in July 2002. An informal consultation paper was circulated by the Law Commission in December 2002, followed by the publication of a Consultative Report in April 2003,[147] and a final Report with a draft Bill in September 2003.[148] The NSPCC published the final report of its working group in December 2003, shortly before publication of the *Domestic Violence, Crime and Victims Bill*.[149]

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[146] For further details see Library Standard Note SNHA/2834, "*Three cot deaths must be murder"* 18 May 2004

[147] Law Commission, *Children: Their Non-accidental Death or Serious Injury (Criminal trials) A Consultative Report*, Law Com No 279, April 2003, http://www.lawcom.gov.uk/files/lc279.pdf

[148] Law Commission, *Children: Their Non-accidental Death or Serious Injury (Criminal trials) A Consultative Report*, Law Com No 279, April 2003, http://www.lawcom.gov.uk/files/lc279.pdf

[149] NSPCC *Which of you did it? Problems of achieving criminal convictions when a child dies or is seriously injured by parents or carers*, December 2003

The Law Commission's Consultative Report formed the conceptual framework for the detailed provisions in its draft Bill. But the clauses in the *Domestic Violence Crime and Victims Bill* differ significantly from those in the Law Commission's draft.

B. The problem

The problem being addressed is one which has been of public concern for a long time. Judges and others have expressed regret when the unpalatable result of judicial rulings has been that people who were responsible for young children have been "literally getting away with murder".

> For many years the NSPCC has been greatly concerned by cases where children die or are seriously injured at the hands of their parents or carers. Even though the evidence narrows the field of suspects down to a small group of potentially guilty parties, all too often no-one is convicted of these dreadful crimes. This is clearly not achieving justice for children.
>
> Each time another horrific tale hit the headlines, the NSPCC wrote to the relevant government departments to express our frustration with this area of the law, which we believe is failing children.
>
> We have always been clear that we are not seeking unsafe convictions based on insufficient evidence. Rather we wish to find a way to get to the evidence that would be available if the defendants were to tell the truth.[150]

A classic case, which led to an important judgment of the Court of Appeal, was *R v Lane and Lane*.[151] A 22-month old child died soon after admission to hospital. A post mortem examination revealed that the cause of death was a fractured skull, the pathologist being of opinion that the injury had resulted from a blow or other violent attack during the day before the child died, between 12 noon and 8.30 pm. The suspects were the child's mother and stepfather. During that period each of them had been absent from the home leaving the child in the care of the other parent and there had been periods when they were both in the house together. They both denied responsibility, and told lies in police interviews. Both were charged with manslaughter. The judge rejected a defence submission that there was no case to answer at the end of the prosecution case, and both were convicted.

Their appeals were allowed and the convictions were quashed. At all times the prosecution had been unable to show when the injury was inflicted, by whom it was

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[150] NSPCC *Which of you did it? Problems of achieving criminal convictions when a child dies or is seriously injured by parents or carers*, December 2003, p3

[151] *R v Lane and Lane* (1985) 82 Cr App R 5

inflicted, or how many people were present. Neither parent had offered any explanation. But –

> … lack of explanation, to have any cogency, must happen in circumstances which point to guilt; it must point to a necessary knowledge and realisation of that person's own fault. To begin with, one can only expect an explanation from someone who is proved to have been present. Otherwise it is no more consistent with that person either not knowing what happened or not knowing the facts from which what happened can be inferred, or with a wish to cover up for someone else suspected of being the criminal. There may be other reasons.

After reviewing the evidence, the Court of Appeal said:

> The evidence against each appellant, taken separately, at the end of the prosecution's case did not establish his or her presence at the time when the child was injured, whenever that was, or any participation. Neither had made any admission; both had denied taking part in any injury; both had told lies but lies which did not lead to the inference of that defendant's presence.
>
> The conclusion therefore is that the learned judge ought to have ruled in favour of the appellants on their submission of no case to answer.

The court also allowed the appeals on the alternative ground of misdirection by the judge. The jury should not have been invited to draw an inference that, in the absence of an innocent explanation, the parents were jointly responsible. There had been no justification for inferring the presence of both defendants or active participation by the non-striking parent. Evidence of general custody and care did not establish presence; it was only a step towards proof. Failure to give an acceptable explanation of what happened does not fill the gap in the evidence. In any event, failure to give an acceptable explanation may be due to one or more of any number of reasons. When it was stated as the judge had stated it, it was really putting the burden of proof on the defence. But Croom-Johnson LJ went on to say:

> The result, distressing though it may be, is that a serious crime committed by someone goes unpunished. But we take comfort from the words of Lord Goddard CJ in Abbott. Although the strict application of the wording of section 1 of the Children and Young Persons Act 1933 to the facts of this case falls outside this judgment, we suggest that some consideration might be given to increasing the maximum penalty which may be imposed in cases that do fall within it.

Similar sentiments have been expressed by the court in other cases. For example, in quashing manslaughter convictions in another appeal, where the fatal head injury could have been caused by a single blow to the child's back or by throwing or slamming the child against a hard surface, the court stated:

> We have felt forced to come to the unwelcome conclusion that there was nothing in the evidence at the close of the prosecution case which indicated that one of the appellants rather than the other was responsible for inflicting the fatal injuries.

> Each of them had the opportunity. ... Nor can we find any evidence upon which the jury might have concluded that the two of them were acting in concert ... [152]

The essence and prevalence of the problem were succinctly put by the NSPCC working group in their report:

> Each week three infants suffer serious injury or death when in the care of adults who should be protecting them. The statistics show that less than a third of cases reported to the police result in an adult actually being prosecuted to conviction. In most of these case, the persons who had care of the child at the time the child suffered injury are easily identified, yet prosecutions regularly fail or are not even undertaken. Far too often the reason is the lack of evidence to prove which of two, or even a small number of suspects, actually caused the injury or death.[153]

The consensus appears to be that "doing nothing is not an option", but there is no consensus about exactly what needs, or ought to be done to resolve the dilemma.

C. The Law Commission proposals

The Law Commission's Consultative Report described a number of cases in which the problem had arisen, and how some partial solutions had been found under the existing law, although the courts' attempts to solve the dilemma have sometimes met with strong criticism, suggesting that they amount to miscarriage of justice. The report went on to explain the options for reform, with the reasons why several had already been rejected.[154]

1. Partial solutions available under the current law

a. Inferring joint enterprise

This inference appears to rely on there being evidence that both defendants were with the victim throughout the relevant time. There have been convictions in several cases where it has been shown that the injuries were inflicted during a defined period when the parents were jointly in charge of the child. It has been held that the jury may draw inferences where both of the defendants have admitted to conduct which is similar to the conduct which eventually causes the child's death. But Professor Glanville Williams had considered that –

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

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[152] R *v Aston and Mason* (1992) 94 Cr App R 180.

[153] NSPCC, *Which of you did it? Problems of achieving criminal convictions when a child dies or is seriously injured by parents or carers*, December 2003 p11

[154] Law Commission, *Children: their non-accidental death or injury*, Consultative Report, Law Com No 279, April 2003

was "extraordinary" to uphold the conviction where both defendants had given all the evidence that might be expected of an innocent person.[155]

b. Prosecutions for cruelty or neglect

The maximum penalty for child cruelty under the *Children and Young Persons Act 1933* was increased from two to ten years in 1988,[156] possibly as a result of the court's comments in *R v Lane and Lane*.

c. Using one suspect as a prosecution witness

The prosecution has a discretion, and may choose to proceed against only one of the suspects. There is no authority for the proposition that both suspects must be charged but neither is it suggested that the problem could be addressed by a practice of invariably charging one suspect and relying on the other to give evidence.

2. Options rejected by the Law Commission

The options which had already been rejected were:

- that a legal burden should be imposed upon the defendant to provide an explanation for a child's death or injury, failing the discharge of which he or she will be guilty of murder or manslaughter.
- that an evidential burden should be imposed upon the defendant to provide an explanation for a child's death or injury, failing the discharge of which he or she will be guilty of murder or manslaughter.
- that it should be an offence punishable by a criminal penalty for a defendant to fail to provide an explanation for the child's death or serious injury.
- that the offence of manslaughter should be extended beyond its present scope to enable convictions for manslaughter in this type of case.
- that a pre-trial statement made by one defendant should be admissible as evidence against the other in order to determine whether there is a case to answer.[157]

3. Recommendations

The Law Commission made firm recommendations, accompanied by a draft Bill, in their final report published in September 2003.[158] They had concluded that there was ample evidence, from disparate sources, that the present rules of evidence and procedure which apply in criminal trials represent a significant obstacle to the effective investigation into and identification and punishment of those who are guilty of the most serious offences

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[155] Law Com No 279 para 131
[156] *Criminal Justice Act 1988* s45
[157] Law Com No 279 Part V
[158] Law Commission, *Children: Their Non-accidental Death or Serious Injury (Criminal trials)*: Law Com No 282, September 2003

against the most vulnerable members of society. Alternative offences, for which the present rules and procedures do permit convictions, did not appear satisfactorily to reflect the responsibility for the death of a child, either through the labelling of the offence which attaches to the conduct or in the severity of the penalties available. They recognised that the most contentious of the provisional recommendations concerned matters of evidence and procedure. They were gratified to note that, in addition to the significant level of support which had been expressed for such an approach, two consultees who had previously expressed reservations found that these had been sufficiently addressed so as to enable them to give their support. Those were the Crown Prosecution Service and Judge David Radford. The Law Commission devoted one part of their report to recording, and responding to, the significant body of opinion which remained unconvinced by these recommendations.

At the outset, the Law Commission stressed two preliminary points. In his response to the consultation, Professor David Ormerod had expressed the need to recognise the two distinct aims which the project might have.

> 1.16 One would be to craft reforms in order to allow more cases to be left to the jury, with the aim of convicting more people who cause physical harm to a child (with the emphasis being placed on the causative link). This aim would have in its sights the resolution of one particular aspect of the problem which has been highlighted, namely that the present procedures have the effect that "those who might be responsible for causing the death or serious injury are not having their behaviour subjected to scrutiny by a jury". This would maintain the current focus of the law in seeking to establish who caused the physical harm to the child.
>
> 1.17 A second, alternative, or possibly additional, aim of reform would be to craft changes to the substantive law in order to "convict of some different type of offence all those adult carers who had responsibility for the welfare of the child at the time of the injury/ death". The basis for this would be that the defendant was guilty of a "wrong" underpinning the offence, that of failing adequately to ensure the safety of the child. As Professor Ormerod stated:
>
> > The fundamental difference would be that unlike in [the first alternative] the concern would not be to be convicting a greater proportion of those who caused harm, but to convict a greater proportion of those whose child suffers non-accidental injury.
>
> 1.18 It is important to recognise this distinction, as it must always be borne in mind that any new offences which are enacted for the fulfilment of Professor Ormerod's second purpose must be justifiable in and of themselves. New offences should not be proposed simply as a means to induce defendants into giving evidence, although this may be a beneficial side effect. Although, inevitably, there will be some interaction between these alternative aims of reform, the procedural dimension should remain separate and distinct from reform of the substantive law. New offences should not be used solely as a remedy to resolve the procedural problems associated with obtaining convictions for another type of offence. Therefore, although a new substantive offence may

> have collateral procedural advantages, in that a defendant who would previously have been unwilling to give evidence may be persuaded to do so, we emphasise that a new offence must be justifiable on its own terms before we would recommend it.

The Law Commission recommended modifying the substantive law by the creation of two new offences, and three "evidential and procedural" changes. The proposed offences were:

- an aggravated form of the existing offence of child cruelty under section 1 of the *Children and Young Persons Act 1933* where the offence results in or contributes significantly to the child's death. In these circumstances the offence would carry a maximum sentence of 14 years' imprisonment as opposed to its current maximum of 10 years. This was in clause 1 of the draft Bill and there is no equivalent in the *Domestic Violence Crime and Victims Bill*.

- a new offence of "failure to protect a child", which would be committed if three cumulative conditions were satisfied. These were that:

  > (1) a person "R", who is responsible for and has a specified connection with a child is aware, or ought to have been aware, that there is a real risk that one of a list of specified offences might be committed against the child;
  > (2) R fails to take such steps as it would be reasonable to expect him or her to take to prevent the commission of the offence; and
  > (3) an offence in that list is committed in circumstances of the kind that R anticipated or ought to have anticipated.

This was in clause 2 of the draft Bill, which specified a maximum custodial penalty of 7 years. The specified offences, in a schedule, were murder, manslaughter, GBH, ABH, administering poison, rape and indecent assault. The draft clause also defined the category of persons who could be convicted of this new offence:[159]

> (3) This subsection applies if R –
> (a) is at least 16 years old;
> (b) has responsibility for C; and
> (c) is connected with C.
>
> (4) R is connected with C if –
> (a) they live in the same household;
> (b) they are related; or
> (c) R looks after C under a child care arrangement.

[159] Clause 2

> (5) R and C are related if they are relatives within the meaning of Part 4 of the Family Law Act 1996.
>
> (6) R looks after C under a child care arrangement if R –
>
> (a) looks after C (whether alone or with other children) under arrangements made with a person who lives in the same household as, or is related to, C; and
>
> (b) does so wholly or mainly in C's home.
>
> (7) It does not matter whether R looks after C for reward or on a regular or occasional basis.

The evidential and procedural recommendations were threefold:

> (1) We recommend that there should be a statutory statement of responsibility, applicable to those responsible for the child at the time when he or she sustained the injury or was killed, which requires that responsible person to give to the police or to the court such account as he or she can of how the death or injury came about. The statutory responsibility will not oblige the person to answer questions but the fact that he or she has this responsibility may be taken into account by a jury when considering what inference it may draw from a defendant's failure to give such account.
>
> (2) In certain cases, we recommend that the judge must not decide whether the case should be withdrawn from the jury until the close of the defence case.
>
> (3) If a defendant in such a case has the statutory responsibility but fails to give evidence, then the jury should be permitted to draw such inferences as may be proper from such failure without first having to conclude that they could have convicted the defendant on the evidence alone and without drawing any such inference.

D. Clause 5: new offence of "causing or allowing" the death

Clause 5 of the Bill, under the different heading "Causing or allowing the death of a child or vulnerable adult", has some similar features to the Law Commission's "failure to protect a child" offence, but also some very significant differences. The *Explanatory Notes* set out the Government's view of its effect:

> 35. Subsection (1) sets out the circumstances under which a person is guilty of an offence of causing or allowing the death of a child or a vulnerable adult. It limits the offence to where the victim has died of an unlawful act, so it will not apply where the death was an accident, or where for example a child may have suffered a cot death. 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. The household member must have failed to take reasonable steps to protect the victim. What will constitute 'reasonable steps' will depend on the circumstances of the person and their relationship to the victim. Subsection (2)

provides that in determining the reasonableness of the steps which the defendant could have been expected to take to prevent the harm to the victim, the court should have particular regard to the extent to which the defendant has been subjected to or fears domestic violence.

37. The victim must also have been at significant risk of serious physical harm. The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household. 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.

38. The effect of subsection (3) is that where, for example, there are two defendants and it is established that one must have caused the death and the other must have failed to take reasonable steps to prevent it, the prosecution does not have to prove which is which.

39. Subsection (4) provides that only those who are 16 or over may be guilty of the offence, unless they are the mother or father of the victim. Members of the household under 16 will not have a duty of care or be expected to take steps to prevent a victim coming to harm. In particular, a child under 16 will have no duty to prevent their parents from harming a sibling. The parents of a child will be expected to take reasonable steps to protect their child even if they themselves are under 16.

40. Subsection (5)(a) provides that a person who visits the household frequently and for long periods can be regarded as a member of the household for these purposes. This will apply whatever the formal relationship of the person to the victim. Subsection (5)(b) covers situations where the victim might have lived in different households at different times. But only the members of the household where the victim suffered fatal harm could be guilty of the offence.

41. Subsection (6) makes it clear that a defendant can be charged with failing to take reasonable steps to protect the victim, even where the victim died as a result of the act of person who lacks criminal responsibility. There is a safeguard to ensure that a person who lacks criminal responsibility cannot be charged with the criminal act of causing the death by virtue of the definition in this section if he could not otherwise be charged with an offence.

One unusual feature of the offence is that a conviction would amount to a finding that the defendant may actively have caused a wrongful death, so it goes further than either the Law Commission's "failure to protect" or its other proposal, of "cruelty contributing to death". It could therefore be classified as an offence of homicide, although a defendant who did not actively cause a death could be convicted of the same offence. The other principal differences from the Law Commission draft clause 2 are:

- Clause 5 applies to "vulnerable" adults as well as children.

- Clause 5 applies only when the victim has died as a result of an "unlawful act" (as defined).
- The clause 5 definition of "unlawful act" takes into account the possibility of the act not amounting to a criminal offence only because of the young age or insanity of the person who did it.
- The offence under clause 5 could be committed either by the defendant doing the fatal act himself or by his failure to take reasonable steps to protect the victim. The prosecution does not have to prove, and the conviction will presumably not show which.
- The maximum penalty under clause 5 is 14 years' imprisonment, rather than seven.
- Clause 5 expressly provides (by Lords' amendment) that the court is to have particular regard to the extent to which the defendant has been subjected to domestic violence or is in fear of it, in determining the reasonableness of the steps the defendant could have been expected to take.
- Unlike the draft clause, clause 5 does not have a supplemental clause requiring voluntary intoxication to be disregarded in determining whether the defendant ought to have been aware of the risk and what steps it would have been reasonable to expect him to take.
- An offence under clause 5 could be committed by a person under 16, but only if that person is the mother or father of a child victim.
- Clause 5 and the draft clause take different approaches to the connection which has to be shown between the defendant and the victim. Clause 5 requires that the defendant (and the person who did the fatal act) must have been "a member of the same household" as the victim and have had frequent contact with him: a person is to be regarded as a member of a particular household even if he does not live in it "if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it". The draft clause would have applied to a defendant who had "responsibility" for the child and was "connected" to the child, meaning that either they lived in the same household, or they were related, or that the defendant was looking after the child under a child care arrangement (which could be for reward and could be on a regular or occasional basis). It did not require that the person who committed the relevant offence should also be connected to the child.

Another difference is that, while in both versions the draftsman has used letters of the alphabet to label the players, "D" and "V" have replaced "R" and "C".

E. Reactions to the proposed new offence

The Law Commission received over 30 responses to its consultative report, in which new offences were first proposed. They then made some modifications to their proposals before producing their draft Bill. Some reactions to the different offence proposed in the *Domestic Violence, Crime and Security Bill* are given below. Most of those who commented on the offence also commented on the combined effect of the new offence

(which is still in the Bill) and the clause which was removed. These are discussed separately, at the end of this part of this paper.

a. Criminal Bar Association

The concerns of the Criminal Bar Association, which represents the views of the practising members of the independent criminal Bar in England and Wales, were that:

> a) there should be a defence for a person who acted or failed to act out of fear of the other to the extent that they feared physical, mental or financial violence or were helpless to intervene by virtue of their own vulnerability
> b) the minimum prosecutable age (other than parents) should be 18 instead of 16
> c) the term "family" should be used instead of "household", simplifying the convoluted definition of "household"
> d) the provisions should allow for [each] defendant's culpability to be identified, which is important for sentencing purposes.[160]

b. Justice

Justice saw the offence as a version of joint enterprise.

> Clause [5(3)] of the Bill does not require the Crown to prove which co-defendant caused the victim's death and which co-defendant knowingly and unreasonably failed to protect the victim from a foreseeable risk which then materialised. In other words, the Crown does not have to specifically prove which defendant committed the unlawful act and which defendant failed to prevent the child's death. The consequence of this approach diminishes or arguably removes the responsibility from the Crown to discharge the burden of proof in respect of an essential ingredient of the offence, namely, the actus reus, by reference to the defendant. This would appear to be a surreptitious attempt to introduce liability through joint enterprise, an approach which has been already considered and dismissed as unsuitable in this area of law by the Law Commission. Given the rarity of convictions against the number of prosecutions for offences of this type, we accept that there are clear public policy reasons to adopt the approach contained in clause 4(2). However, we cannot agree that this is best achieved by absolving the Crown of its fundamental duty to prove all the elements of the offence against an individual.
>
> A further consequence of this approach is that a jury may convict the defendants on the basis that they are sure one or both of them had something to do with the child's death while retaining some doubt over what it specifically is the defendants did or unreasonably failed to do. Since the Prosecution is under no obligation to prove which defendant did what, there is a real risk that a jury

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[160] Criminal Bar Association, *Domestic Violence, Crime and Victims Bill – CBA Response*, February 2004, http://www.criminalbar.com/reports/Feb04b.cfm

would convict defendants in circumstances which, under the present law, would result in their acquittals.[161]

c. Liberty

Liberty noted that, crucially, under clause 5(3), if there are two or more people charged, and it is established that one of them must have caused the death and the other(s) failed to prevent it, the prosecution would not have to prove which was which, so that the *Lane* situation need not arise. They supported the creation of the offence although they believed that it could be improved.[162]

d. Women's Aid

Women's Aid's concern was that a woman experiencing domestic violence may be charged along with the perpetrator on the death of a child, for not taking reasonable steps to protect her child. They say research shows there is a close connection between domestic violence and child abuse: in 40- 70 % of cases, the same perpetrator is abusing both the mother and any children; domestic violence is also present in 75% of cases on the Child Protection Register. Their recommendation is an amendment so that a person who is a victim of domestic violence should not be regarded as having caused or allowed a child or vulnerable adult to be injured or killed (as the case may be) unless there is clear evidence that this person actively contributed to the injury or killing of a child or a vulnerable adult.[163]

e. Victim Support

Victim Support said that it was unable to comment on these clauses, which related to defendants. But they wanted to raise the concern that if one of the pair charged jointly had experienced abuse from the other. They therefore welcomed the amendment which is now clause 5(2) requiring the court to have particular regard to that.[164]

F. Debates in the House of Lords

In the House of Lords, the Government was invited to explain its reasons for departing, in a number of ways, from the Law Commission recommendations. Particular issues debated included:

- the extension to vulnerable adults as victims
- the exclusion of cases where a victim suffers harm which does not result in death

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[161] Justice *Response to the Domestic Violence Crime and Victims Bill*: Sections 4 & 5, January 2004

[162] Liberty, *Briefing for Second Reading of the Domestic Violence Bill*, December 2003

[163] Women's Aid Federation of England Briefing *Domestic Violence, Crime and Victims Bill* Update - April 2004

- the meanings of "household" and "frequent contact"
- the effect of voluntary intoxication
- whether a new duty of care was created
- whether a new statutory responsibility should be created
- the creation of a single offence which could be committed in two different ways
- whether special cautions would have to be given to suspects
- what "reasonable steps" could be expected of a domestic violence victim (on which a Conservative amendment, with Liberal Democrat support, made a relevant addition).

1. Vulnerable adults

In Grand Committee Baroness Anelay asked the Government to explain why they departed from the Law Commission's proposals that were confined only to children, bearing in mind that there appeared to have been no consultation equivalent to that which the NSPCC had conducted and that while the age of a child could readily be established even after death, the same would not necessarily be true of establishing the vulnerability of an adult.[165]

In their Consultative Report, the Law Commission had touched on the problem of vulnerable adults, saying:

> Our work in this area has been focused on children because it has been informed by the exposure by the NSPCC of the scale of the problem concerning children. Further, there already is a mass of legislation catering for the particular vulnerability of children to abuse and death upon which we have been able to build our recommendations. We do not presently feel able to make similarly fully informed judgments about vulnerable adults. Were we asked to do so we would investigate.[166]

Baroness Scotland of Asthal explained that the Government had consulted Action on Elder Abuse and Carers UK, that the British Council of Disabled People had welcomed the measures, and that Mencap and RADAR had also been contacted. She said that the Government knew of at least one case where a vulnerable adult had died in domestic circumstances and the prosecution had been unable to prove which close family member had been responsible. The Government would be failing in its duty when faced with such cases if it did not take the opportunity to amend the law. As to the definition of "vulnerable adult" , no complex legal definition was needed. This was a matter of common sense, properly and safely to be left to the courts.[167] In response to a question from Lord Carlisle of Bucklow, she said that the Government had not, at this stage,

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[164] *Domestic Violence, Crime and Victims Bill - briefing by Victim Support for House of Lords Grand Committee* January 2004

[165] HL Deb 21 January 2004 c329GC

[166] Law Commission, *Children: Their Non-accidental Death or Serious Injury (Criminal trials) A Consultative Report,* Law Com No 279, April 2003, Law Commission, para 4.39

[167] HL Deb 21 January 2004 c334GC

sought to extend the measure to public institutional care, where supervisory and regulatory controls applied. If it were later found that provisions needed to be extended, there would be consultation.[168]

2. Serious harm

In Grand Committee Baroness Walmsley pointed out that both the Law Commission and the NSPCC had also been concerned about cases where children had been seriously harmed. Arguably, a child who was left with severe brain damage had suffered as great an injustice as one which had been killed. She suggested that it was unacceptable to leave no remedy for those cases. Baroness Scotland responded that offences involving the death of a victim had always been viewed in our legal system as particularly serious and meriting unique treatment. This offence was breaking new ground. Extension to serious harm cases might be considered in the future, when it had been seen how the new offence worked in practice. She also pointed out that "serious harm" would require careful definition. Moreover, where the victim was still alive, the victim might be able to give evidence, and others would have more incentive to give evidence, to ensure future protection of the victim.[169]

3. Meaning of "household" and "frequent" contact

Baroness Scotland explained that the Law Commission's definition of who could be caught within the offence had been considered too narrow, because it might exclude cases which should be caught, such as a violent boyfriend or other disagreeable person who was a frequent visitor but not a permanent resident. She said that frequent contact, and proximity to a child or vulnerable adult in its own home should lead to a responsibility, whether or not the person wished to have that responsibility. [170]

In Grand Committee, Baroness Anelay said that the absence of a definition of "frequent contact" meant that the clause was fraught with difficulty.[171] At Report she returned to her concern, which was that frequent contact can simply mean that a person visits the house on a regular basis but is not in a position to be aware that there is a problem in the condition of the child or vulnerable adult.[172] She referred to the position in communities where the mode of dress would mean that the child's arms and legs would be covered and therefore it might be difficult, if not impossible, for someone to tell whether that person had been physically abused.

Baroness Scotland said that the phrase "frequent contact" was intended to encapsulate the responsibility of the close members of the household without being too limiting. It was

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[168] HL Deb 21 January 2004 c333GC
[169] HL Deb 21 January 2004 c340GC
[170] HL Deb 21 January 2004 c347GC
[171] HL Deb 21 January 2004 c344GC
[172] HL Deb 9 March 2004 c1145

necessary to be very wary that family relationships in modern times were much more fluid and flexible than they had been in the past, and might become more so in future.[173]

4. Voluntary intoxication

The Law Commission draft Bill had included provision to exclude voluntary intoxication from consideration when the question of the defendant's awareness of risk or the reasonable steps he or she could be expected to take were being considered. Baroness Scotland explained that the caselaw on the effect of voluntary intoxication, and the specific wording of the Bill, made such a provision unnecessary.[174]

5. Duty of care

In Grand Committee, Baroness Anelay said:

> When I read the clause as constructed, it did not leap off the page at me that subsection (4) was creating a duty of care. When, in her briefing, the Minister said that that was what it was all about, I did not consider the subsection to highlight that. Therefore, I wanted to ask the Government why they adopted this drafting and not something … which would have made it perfectly clear to all of us that that was what subsection (4) was all about.[175]

In response, Baroness Scotland said that the importance of the Bill as a whole was that there was a responsibility for being part of a household, so a duty should be placed in the Bill. But it did not equate to a duty of care as normally understood. It was a duty which bit in very limited and closely defined circumstances. People in the household should accept some responsibility, but it would not be seen as a specific duty of care "which carried a large amount of legal baggage in its train".[176]

At Report, some further concern was expressed at the use of the words "knew or ought to have known", which seemed to introduce an objective test. Lord Donaldson thought that the words were essential:

> I should have thought that there was no transfer of civil law into criminal law if the relevant offence is being responsible for the death of a child against a background where the person concerned knew or ought to have known.
>
> On a less theoretical basis, I strongly suspect that if "ought to have" is left out, there will be a large number of wide-eyed defendants saying, "Oh dear, oh dear. Of course I never foresaw this. It is all a great tragedy". Of course, they foresaw it. "Ought to have" sweeps that in.

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[173] HL Deb 21 January 2004 c348GC
[174] HL Deb 21 January 2004 c368GC
[175] HL Deb 21 January 2004 c360GC
[176] HL Deb 21 January 2004 c363GC

> … I think that there are many conscientious juries who might be really bothered about the difference between their obviously knowing, their almost certainly knowing and, what is really the same thing, the fact that they ought to have known. To that extent, that is really an essential part of this.[177]

6. Statutory responsibility

The Law Commission proposals had included a statutory responsibility (breach of which carried no penalty) to assist the police and the courts. The proposal had attracted little adverse comment. Baroness Scotland explained why the Government had not included it.

> The Law Commission's work on this subject has been enormously helpful and has moved this whole area on a great deal. The commission saw its proposed statutory responsibility as an important part of the scheme linked very closely to the drawing of adverse inferences and the postponement of the "case to answer" decision that they also proposed. We have also developed proposals for adverse inferences and the postponement of the "case to answer" decision, which we shall shortly discuss in more detail, but—it is a very important "but"—we have linked this closely to the circumstances of the new offence rather than founding these in a statutory responsibility. We therefore think that our package of proposals will be effective in tackling the core cases at which they are targeted and that a statutory responsibility may not add substantially to this package.[178]

7. A single indivisible offence

At Report, Lord Donaldson of Lymington supported Baroness Anelay's proposed amendment which would have replaced "causing or allowing" a death (which she considered to be ambiguous and confusing for juries) with being "responsible". She asked:

> How can the prosecution ask a jury to find that the defendant caused or allowed an event to take place? The two are different in meaning and the degree of culpability is, prima facie, quite different in degree.

Lord Donaldson added:

> It is important to underline the fact that this is a single, indivisible offence. Much of the discussion in Grand Committee seemed in a rather novel way to regard it as two offences rolled into one; that a person could be guilty of the two offences and that a jury could be asked to say which. That was never intended—at least, I assume that it was not—and Amendment No. 10 makes clear that that was the case.[179]

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[177] HL Deb 9 March 2004 c1157
[178] HL Deb 21 January 2003 c362GC
[179] HL Deb 9 March 2004 c1147

Rejecting the amendment Baroness Scotland said that subsection (2) made it explicit that the prosecution does not have to prove which alternative in Clause 4(1) applies. It needs only to show that the defendant must either have caused the death himself or allowed it culpably to have happened. "Causing or allowing the death" was therefore an accurate description. Her view was that –

> The offence makes clear who is responsible for the death of a child. Both a person who abuses or neglects a child and a person who fails to take reasonable steps

There was some dissatisfaction with the explanation. Lord Donaldson asked:

> As I understand it, the noble Baroness is saying that, if as a lawyer you work your way through Clause 4, it becomes clear that this is a single offence with two alternative legs. I agree. But is she also saying that, where experienced practitioners such as the noble Lord, Lord Thomas of Gresford, say that it would be a real help to those drafting indictments and directing juries to have it all in one introductory sentence or even part of a sentence, you cannot move?[180]

Lord Campbell of Alloway returned to the issue at Third Reading, and moved an amendment designed to ensure that it would be apparent whether any defendant was prosecuted for or had been found guilty of actually causing, or only failing to prevent, a death. He denied that it was a wrecking amendment. Lord Donaldson pointed out that that was contrary to the approach of the clause. Baroness Scotland adopted his analysis and added that to insist that the basis of the conviction must be known would defeat one of the main purposes of the offence. The amendment was rejected on a division (145/34).[181]

8. Cautions

At Report, Lord Campbell of Alloway moved an amendment which would have placed a statutory obligation on the police to give a special caution to a suspect when investigating the proposed new offence. He explained that it was needed because a person who was a member of the relevant household would be exposed to the double jeopardy of an inference of guilt on either limb, without knowing on which limb he was convicted.[182]

Lord Donaldson was forthright in suggesting that the better solution would be to remove the next clause, so there would be no need for a special caution:

> My Lords, I think that this amendment is most unfortunate, because it assumes that Clause 5 will be accepted by the House, and Clause 5 is a monstrosity. There

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[180] HL Deb 9 Mar 2004 c1152
[181] HL Deb 25 March 2004 c 812
[182] HL Deb 9 March 2004 c1170

> is no justification for this amendment unless Clause 5 survives. The ordinary position is that if someone is being questioned under caution, they are told that if they do not answer the question an inference of guilt might be drawn. So it might. It would be an inference of guilt of an offence under Clause 4. I return to my original point. Clause 4 is a single responsibility offence. One cannot use Clause 4 to inquire whether the accused killed or did not do the things he ought to have done—there is no need to elaborate them again—in paragraph (d). It cannot be done.
>
> It is Clause 5 that starts grafting on something that is contrary to every normal canon of law. There is justification for the amendment only if that clause sticks. I therefore respectfully suggest that the thing to do is not to press this amendment now. However, let us get rid of Clause 5.[183]

9. The "reasonable steps" expected of domestic violence victims

In moving an amendment in Grand Committee (to insert a subsection which is now clause 5((2)) Baroness Anelay referred to concerns which had been raised by Liberty, Refuge and Southall Black Sisters. Women (and older children) who were themselves subject to domestic violence, might be fearful or unable to leave a violent partner (or parent), which would necessarily have a bearing on what steps they were able to take to protect children.[184] She brought it back at Report, saying that it was important to recognise that the amendment reflected the greatest concern that had been expressed to noble Lords by organisations outside the House which are devoted to protecting and seeking to protect the victims of domestic violence, both adults and children.[185]

Baroness Scotland acknowledged:

> Anyone living in a violent household is likely to be frightened and dispirited and there will be cases where the defendant is vulnerable, because of violence or for other reasons, and there is very little they could do to protect themselves, let alone protect the victim. They might be the victims of domestic violence themselves, or the defendant might be young and uncertain, unfamiliar with the social services, frightened of the police, mistrustful of teachers or doctors or others in authority, and simply not know where to turn.

But she resisted the amendment, saying:

> We knew that we had to take all this into account when formulating the offence.
> (…)
> The question of what steps were reasonable for a victim of domestic violence is, of course, ultimately an issue for the jury, albeit that the prosecution will have to

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[183] HL Deb 9 March 2004 c1171
[184] HL Deb 21 January 2004 c354GC
[185] HL Deb 9 March 2004 c1161

> identify the steps that the defendant could have reasonably taken as part of the Crown case.
> (…)
> When you single out a particular group in this way you inevitably give the impression that other vulnerable groups are less important. [186]

Baroness Anelay explained that she thought there was, in a domestic violence Bill, a special case for saying there should be consideration of those who suffer from domestic violence. The subsection was added on a 149/130 division at Report.[187]

Subsection (2) now provides:

> For the purposes of subsection (1)(d)(ii), in determining the reasonableness of the steps which D could have been expected to take, the court shall have particular regard to the extent to which D has been subjected to domestic violence or is in fear of being subjected to domestic violence.

G. The clause which was taken out

Clause 5 of the Bill as introduced was removed at Third Reading in the House of Lords. It was probably the most controversial clause in the Bill, and had been debated at length. While the clause creating a new offence attracted descriptions such as "innovative" albeit "controversial", the additional clause, which would have modified the conduct of trials where there were also charges of homicide, was more than once described as "monstrous". There seemed to be no doubts that the clause would make it possible to secure homicide convictions against some defendants who would otherwise have no case to answer. What was questioned was whether it could be right to introduce new procedures which would only apply when a particular category of defendant was facing homicide charges. Those procedures were seen as erosion of the right of silence, of the presumption of innocence, and of the burden on the prosecution to prove its own case.

The Joint Committee on Human Rights, after expressing initial reservations, appears to have been satisfied that the clause would not be incompatible with the right to a fair trial, because there was sufficient protection against a homicide conviction based solely or mainly on the basis of an inference from silence.

At the final stage, the House of Lords concluded that the new offence on its own was a proportionate response to the mischief which had been identified, but the new procedure went too far. They were not persuaded by the government arguments that suspects were avoiding convictions for murder on a technicality (a tactical advantage which should be removed) and that convictions for the new offence were not sufficient for cases where it would be possible to prove homicide.

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[186] HL Deb 9 March 2004 c1163
[187] HL Deb 9 March 2004 c1165

1. The text of the omitted clause

As the clause does not appear in the current Bill, the full text is set out below, for convenience.

Evidence and procedure

(1) Where—

(a) a person is charged in the same proceedings with an offence of murder or manslaughter and with an offence under section 4 in respect of the same death, and

(b) in relation to the offence under section 4, the court or jury is permitted, by virtue of section 35(3) of the Criminal Justice and Public Order Act 1994 (c. 33), 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 on the charge of murder or manslaughter (even if there would otherwise be no case for him to answer on that charge).

(2) Where—

(a) a person is charged with an offence of murder or manslaughter, and
(b) he or another person is charged in the same proceedings with an offence under section 4 in respect of the same death, the question whether there is a case to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence at trial.

(3) The reference in subsection (2) to the question whether there is a case to answer includes a reference to the question whether, for the purposes of paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (c. 37) (applications for dismissal), the evidence against the person in question would be sufficient for him to be properly convicted.

(4) An offence under section 4 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 51A 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).

The Explanatory Notes said:

> The procedural measures are designed to operate alongside this new offence. The procedural measures will have effect where the new offence is charged alongside murder or manslaughter against one or more defendants. Where the prosecution establish a case to answer on the new offence the court will not consider the question of whether there is a case to answer on the charge of murder or manslaughter until after the conclusion of the defence case. They also make provision for inferences from the defendant's silence at trial to be drawn in respect of the murder and manslaughter charges.[188]

So the clause would have made two changes to the conduct of trials where defendants were charged with the new offence as well as murder/manslaughter. These would have applied in trials where there was only one defendant as well as when there were two or more.

2. Human rights considerations

Article 6 of the *European Convention on Human Rights* provides:

> Right to a fair trial
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The Law Commission rejected some of the options they had considered, on human rights grounds. They explained why they considered that the package they proposed would be compliant. The proposal to extend the circumstances in which adverse inferences might be drawn from a defendant's silence required particularly careful scrutiny. The Law Commission's reasoning was usefully summarised in the Joint Committee's report:

> 2.4 The Law Commission recognized that these recommendations had implications for the right of a defendant to a fair hearing in the determination of criminal charges (ECHR Article 6.1) and the right to be presumed innocent until

[188] *Domestic Violence, Crime and Victims Bill [HL] Explanatory Notes, Bill 006-EN*, paragraph 14, http://www.publications.parliament.uk/pa/ld200304/ldbills/006/en/04006x--.htm

proved guilty according to law (Article 6.2). The Commission pointed out that the European Court of Human Rights had held that the drawing of adverse inferences from the silence of an accused could violate ECHR Article 6, but that it would depend on the circumstances. The Court in Murray v. United Kingdom stressed that the right to remain silent provides protection against improper compulsion by the authorities which might lead to miscarriages of justice. The Law Commission disclaimed any intention to impose improper compulsion, to facilitate miscarriages of justice, or to "water down" the fairness of the trials in cases like these. In order to ensure that the trial would remain fair and that the risk of a miscarriage of justice would not be enhanced, the Law Commission recommended that there should be strict safeguards, and set out the safeguards expressly in the draft Bill appended to the Commission's final Report.

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;
c) 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;
d) 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;
e) 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 be indicative of guilt.[34] 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[35] and other cases, prohibits a conviction where an inference from failure to give evidence is the only or main evidence of guilt.[189]

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[189] Joint Committee on Human Rights, Fourth Report of Session 2003-04, *Scrutiny of Bills: Second Progress Report* HL 34/HC 303, February 2004, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/34/3402.htm

When they first reported on the Bill, the Joint Committee on Human Rights gave their initial view of the human rights implications of the *Domestic Violence, Crime and Victims Bill*, saying that they had raised with the Government their view that there was a risk of incompatibility with the right to a fair hearing under ECHR Article 6.1.[190] However, when they reported further, they concluded, in the light of the Government response, that the Government was entitled to say that there was not a significant risk of incompatibility. Safeguards, included by reference to the *Criminal Justice and Public Order Act 1994*, should be sufficient.[191] The reasoning was:

> 2.7 The Bill adopts the Law Commission's recommendation that there should be no decision as to whether the defendant has a case to answer (in effect, whether the case should be left to the jury) until after the conclusion of all the evidence in the case.
>
> 2.8 However, in several respects clause 5 of the Bill departs from the model proposed by the Law Commission.
> (…)
> b) Secondly, clause 5 would allow a decision-maker to draw inferences from silence only when a person is charged with an offence contrary to clause 4 of the Bill as well as with murder or manslaughter in respect of the same death.
>
> c) Thirdly, clause 5 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. Instead, clause 5 would apply only where the existing rules for drawing inferences from silence, in sections 35 and 38 of the Criminal Justice and Public Order Act 1994, are applicable. This would limit the scope of the inference from failure to give evidence in two ways:
>
> i) under the 1994 Act, as interpreted by the Court of Appeal (Criminal Division) in R. v. Cowan, the judge has no power to invite the jury to draw an inference of guilt from a defendant's failure to give evidence unless the situation is one which clearly calls for an explanation from the defendant (a limitation which the Law Commission criticized and excluded from its draft Bill);
>
> ii) under section 38(3), a defendant cannot be convicted solely on the basis of the inference of guilt from failure to give evidence.
>
> THE EFFECT OF CLAUSE 5 ON CONVENTION RIGHTS
>
> 2.9 The Explanatory Notes to the Bill claim that the effect of clause 5 would be that "a defendant may not be convicted solely or mainly on the basis of an

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[190] Joint Committee on Human Rights, Third Report of Session 2003-04, *Scrutiny of Bills: Progress Report*, HL 23/HC 252, January 2004, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/23/2302.htm

[191] Joint Committee on Human Rights, Fourth Report of Session 2003-04, *Scrutiny of Bills: Second Progress Report* HL 34/HC 303, February 2004, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/34/3402.htm

inference from silence". If this is correct, the law would be compatible with the requirements of ECHR Article 6 in relation to inferences from silence, as laid down by the European Court of Human Rights.

2.10 On the other hand, the words in parentheses in clause 5(1) would allow an inference to be drawn in relation to a charge of murder or manslaughter "(even if there would otherwise be no case for him to answer on that charge)". This phrase is designed to ensure that the decision of the Court of Appeal (Criminal Division) in R. v. Cowan would not apply to a charge of murder or manslaughter to which clause 5 applies. In that case, the court held (in relation to the drawing of an adverse inference from silence under section 35 of the Criminal Justice and Public Order Act 1994) that the prosecution must have established a case for the defendant to answer, in the sense of a strong enough case to justify the judge in leaving it to the jury, before the defendant has any need to consider giving evidence, and so before it can be proper to draw an inference of guilt from the defendant's failure to give evidence. As noted above, the Law Commission criticised this condition, and recommended that it should not apply in cases of non-accidental injury to and death of children. The Government's reply to our question makes it clear that the Government agrees with the Law Commission's criticism of the requirement for there to be a case to answer before an adverse inference may be drawn. The words in parentheses accordingly make it clear that, in relation to cases where people are charged both with an offence contrary to clause 4 and murder or manslaughter, the prosecution need not establish a case for the defendant to answer in relation to the charge of murder or manslaughter before an inference of guilt can properly be drawn from a defendant's silence.

2.11 The effect is that a judge, when deciding under clause 5 whether to leave a charge of murder or manslaughter to the jury, would be able to take account of an inference from silence alongside the prosecution's evidence. The same applies to a court or jury when assessing the defendant's guilt or innocence. It follows that there will always be some significant evidence which tends to fix the defendant with responsibility for the death before an inference can be drawn. No decision to leave a case to the jury or to convict could be based entirely on the inference from failure to give evidence (because of section 38(3) of the 1994 Act), but a conviction could be based on the inference taken together with less evidence than would suffice to allow the inference to be drawn at all in an "ordinary" case under section 35 of the 1994 Act.

2.12 However, the Government points out in its response to us that the prosecution would have had to establish a case to answer in relation to the charge of causing or allowing the death of a child or vulnerable adult (contrary to clause 4) before the inference from silence could be used to help to establish a case to answer in respect of the charge of murder or manslaughter. In this important respect, there is a protection against conviction of murder or manslaughter wholly or mainly on the basis of an inference from silence. In jury trials, it will be impossible to be sure that a conviction is not based wholly or mainly on an inference of guilt drawn from a failure to give evidence, in breach of the right to a fair hearing under ECHR Article 6.1 and the right to be presumed innocent until proved guilty according to law under Article 6.2. Nevertheless, the trial judge will not be able to invite a jury to draw an adverse inference unless there is a case for

> the defendant to answer on a charge of causing or allowing the death to occur, and that is a suspicious circumstance which, taken together with the other safeguards attaching to inferences from silence, should be sufficient, in our view, to rein in any tendency a jury may have to draw an inappropriate inference from silence in relation to the charge of murder or manslaughter.

As is apparent from comments made by critics in and outside Parliament, not all others have been convinced of the clause's compliance, or its fairness. Among those who had seen the Joint Committee report, attention has been drawn to the lack of guarantee that a conviction will never be based wholly or mainly on an inference of guilt drawn from a failure to give evidence.

3. Reactions to the proposal

a. ACPO

ACPO (the Association of Chief Police Officers) welcomed the two clauses as going some way towards closing a legal loophole with the inability of the available legislation to deal adequately with suspects who are either responsible for the death themselves or are aware of who was responsible and have failed to act to protect the victim. They made no comment on the technique chosen.[192]

b. NSPCC

Although the NSPCC does not appear to have published a response to the Bill, their general support may be inferred from their working group report, which was published after the Law Commission Report, just before the Bill was introduced in December 2003. They said:

> 3. Substantive law reform
> The issue of reform of the substantive law in this area was the most difficult the working group had to deal with. While current law is failing to meet the challenge of the problem, reform must not take the form of a 'quick fix' that leads only to unfairness and confusion…
>
> 3.1 Inferences from silence
> The group's starting point was that there is a compelling moral case that a carer who assumes responsibility for a child has a duty to account for any serious injury that has happened to the child to the best of his or her ability. The working group can see no reason why that duty should not be enshrined in statute. However, it is not desirable that an offence of failing or refusing to answer questions when called upon to do so by investigators should be created.

[192] ACPO, *ACPO support for government legislation on familial homicide*, March 4, 2004, press release 32/04

> All this is not to concede that a failure to give an explanation for a child's injuries should be without consequences. A suspect in any criminal investigation is not obliged to answer the questions of interrogators, although a jury may, in certain circumstances, be invited to draw adverse inferences, but only to support other evidence sufficient to constitute a prima facie case, if he does.
>
> There is a need for the enactment of provisions similar to those in Sections 34 and 36 of the Criminal Justice and Public Order Act 1994, so as to provide that, when it is established that a person, whether alone or with others, had responsibility for the care of a child who suffers injury, he or she is under an obligation to account for the period during which the injury was suffered. An unjustified failure to explain would lead to the risk of an adverse inference being drawn.
>
> Recommendation 7:
> New legislation should be drafted to require those who had responsibility for the care of a child who suffers injury to account for the period when the injury was sustained. Adverse inferences could be drawn where the carer fails to give an account.
>
> 3.2. Lane and Lane
> Members of the working group were unanimous in the view that "across the board" reversal of the decision would be unsatisfactory and may lead to serious injustice in cases where the special circumstance of the existence of responsibility for a vulnerable dependent child do not exist.
>
> The group would welcome, albeit with caution, consideration of whether legislation should be introduced to provide that where each of two people who may have injured a young child has a duty of care towards that child, their opportunity to have committed the assault would give rise to a "case to answer". This would place each carer in the position of having to choose whether to present evidence in his or her defence instead, as at present, requiring the court to withdraw the case from the jury.
> (…)
> Recommendation 8
> Consideration should be given to the potential for new legislation, which would provide that where someone has a duty of care towards a child they may have injured, there will be a case to answer.[193]

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c. The Criminal Bar Association

The Criminal Bar Association strongly opposed the clause, giving the following reasons:

> (a) We regard it as wholly inappropriate for one type of offence to attract different rules of procedure designed to secure convictions. In this respect, we

[193] NSPCC, *Which of you did it?* November 2003, pp14-15

echo the concerns of the CBA Working Party set up to respond to the Law Commission Consultation Paper ;

(b) With regard to the proposal that where the prosecution establish a case to answer on the new offence, the Court will not consider the question of whether there is a case to answer on the charge of murder or manslaughter until after the conclusion of the defence case, such a development would be truly unfair. This is based on the misconception that the role of the criminal trial is to investigate the circumstances of the death, rather than that the purpose of a criminal trial is to determine whether the prosecution have proved guilt.

Such an obligation on a defendant is inherently incompatible with the presumption of innocence which is found not only in Article 6(2) of the Convention, but which has been a feature of the common law for as long as anyone can remember. It is built on the proposition that it is not for the defendant to tell the Court what happened, but for the prosecution to prove that what happened amounted to criminal conduct on the part of the defendant;

(c) As for inferences from the defendant's silence, to be drawn in respect of the murder and manslaughter charges, it is to be presumed that a Clause 4 offence, and murder/ manslaughter on the same indictment, would be viewed as alternatives, rather than separate offences in respect of which the defendant stands to be convicted.

Our view is that reliance on an inference to be drawn from a defendant's failure to give evidence or refusal to answer a question is wrong in principle, where otherwise than in this most serious of situations, a defendant would not be in similar jeopardy.

Persons facing the most serious of allegations should be able to make an unfettered decision as to whether to speak.

Further, if the intention of Clause 5(1) is to allow a person to be convicted on the inference alone, we regard this as a major infringement of the defendant's right to a fair trial. Such a proposal amounts to pursuit of the guilty. There are, of course, many reasons why a defendant might choose not to give evidence, many of them incompatible with guilt. An "if the defendant was innocent he would say so" approach is inconsistent with the relevant provisions of the CJPOA 1994. Moreover, Clause 5(1) does not reflect the intention as expressed in the Explanatory Notes issued by the Home Office (Note 38, p. 8). The notes make it clear that Clause 5(1) is subject to Section 38(3) CJPOA 1994, where it is stated that the defendant may not be convicted solely or mainly on the basis of an inference from the defendant's silence. Clause 5(1) does not make this clear, and appears to suggest the opposite. Overall, therefore, this aspect of the Bill is wholly objectionable.

(…)

14. We would strongly urge the Government to think again with regard to Clause 5(2). In principle, it is wrong for the Government to propose removal of a vital stage at which a defendant is entitled to test the prosecution case, let alone that trial procedure should be varied depending upon the nature of the offence(s)

alleged, and in particular where offences of the gravest seriousness are under consideration.

d. Justice

Justice gave a detailed explanation of why they found the Law Commission's approach (which "moved the goalposts") unacceptable, because inconsistent with the demands both of logic and justice. Their response to the Bill has to be read with their earlier response to the Law Commission proposals, as they saw the Bill as achieving the same result in a slightly different way. Thus, although the Bill did not impose a statutory responsibility to give an account, the pressure resulting from the consequences that could flow from not providing an explanation came perilously close to a statutory duty to provide an account. Justice said:

> 35. The statutory responsibility to give an account is in our view unjustifiable. It ignores the basic principle that mere custody does not establish presence. Further, enshrining such responsibility as a matter of criminal law transforms moral compulsion into a degree of legal compulsion and hence offends the right of silence and the burden of proof. In any event a statutory responsibility is also unnecessary. How does a statutory responsibility to give an account assist the prosecution to get past the 'half time' stage, which after all was identified as the real problem in these cases?
>
> 36. Postponing the submission of no case to answer stage is the Law Commission's main response to the problem. However, in reality the Law Commission are not proposing merely to postpone the Galbraith analysis, but to depart from it. The recommendation extends the former parameters determining which factors the judge may consider when deciding whether to withdraw the case from the jury. It enables the judge to hear the defence case to see if it can cure the defects in the case of the prosecution. The question is whether such a reform is consistent with European Human Rights jurisprudence.
>
> 37. It is in our submission apparent that such a step would deprive the defence of the right to a fair trial. The reason is that the prosecution would be allowed to proceed even though it does not have a prima facie case against the defendant. A prima facie case cannot justifiably be inferred simply from the fact that a defendant who has a responsibility to give an account does not do so. As a matter of principle, the prosecution must be able to demonstrate that the defendant has a case to answer and it should not be permitted to use the defendant's case to that end. Otherwise, part of the burden to prove the case is on the defendant, something that can only be contra the presumption of innocence.[194]
>
> Clause 5 (1) … means that a jury would no longer be directed that they had to be satisfied that that there was a sufficiently compelling case for the defendant to

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[194] Justice, *Response to the Law Commission Consultation: 'Children: Their Non-Accidental Death or Serious Injury (Criminal Trials)'* 2003

> meet before drawing an adverse inference from his failure to give evidence. In R. v. Cowan [1996] 1 Cr.App.R. 1, it was argued that section 35 watered down the burden of proof. Lord Taylor C.J. (at 4) described this argument as "misconceived". The first reason for this was that "the prosecution have to establish a prima facie case before any question of the defendant testifying is raised" (p. 5). Lord Taylor C.J. described the need for a case to answer as an essential (p. 7) (Lord Taylor had said this during the passage of the [1994] Bill). In R. v. Birchall [1999] Crim.L.R. Lord Bingham C.J. said there had to be a case sufficiently compelling to call for an answer before an adverse inference was drawn. In Murray v. U.K. the ECtHR said that an important protection was that an adverse inference from a failure to give evidence could only be drawn if the prosecution case clearly called for an explanation (47). This is now reflected in the JSB specimen direction number 39.
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> Please also see R. v. Parchment [2003] 9 Archbold News 2, CA. [where Mantell LJ said "In circumstances where there is no evidence, or the evidence is weak, it is the more important that the limited function of an omission to state something in interview is spelt out to the jury."]
>
> This is a disturbing provision that drives a coach and horses through the burden of proof and the right to silence. The provision undoubtedly waters down the burden of proof and fails to confine an adverse inference within proper limits.
>
> The unmitigated unfairness to a defendant in these circumstances is only compounded when it is looked at in conjunction with section 5(2) which postpones the stage at which a submission of no case to answer is made, to until after the close of the defence case. This begs the question of what will happen where one co-defendant chooses to exercise his right to silence, while the other co-defendant provides an account. What direction, if any, could save them from the obvious injustice. It is submitted that no appropriate direction could. The effect of the Bill is that a judge must leave a case to a jury where there is no or little evidence in the hope that the defendant will make up the difference by incriminating himself or by not giving evidence.[195]

e. Liberty

Liberty feared that a desire to secure conviction will result in convictions for murder when silence arises from nothing more than fear. It also offered reasoned objections to this clause, which it considered fundamentally flawed:

> It might appear reasonable that an adverse inference from a defendant's silence can be used to secure conviction when otherwise there may not be a case to answer. Deferring the question of whether there is a case to answer until the end of the case (as opposed to after the end of the prosecution case as is normal) would also appear acceptable. However, there are serious fair trial implications. It

[195] Justice *Response to the Domestic Violence Crime and Victims Bill:* Sections 4 & 5

> might appear that our objections are based in 'lawyers' arguments' rather than an appreciation of the reality of child death cases. In the contrary, we would emphasise that these fair trial protections exist to ensure that, for example, a woman who is afraid to give evidence against a violent man does not find her silence leading to a conviction for murder.
> (…)
> 15. The bald implications of this proposal is that weak cases which do not otherwise amount to a case to answer would be left to a jury. Child homicide is always highly emotive and juries can be predisposed to convict. Hence, this is an extremely dangerous suggestion.
>
> 16. We doubt that this is compatible with the right to a fair trial under Article 6 of the Human Rights Act 1998 (The Right to a Fair Trial). The European Court of Human Rights has been at pains to construct a framework of requirements for a fir trial in which an inference of guilt may be "proper". These include that the circumstances are such as to call for an answer, and that the only sensible explanation for silence is guilt.
>
> 17. The essential point which the bill overlooks is that the privilege against self-incrimination (the right of silence) is a necessary corollary of the burden of proof.
> (…)
>
> 18. A number of questions illustrate the unworkability of this proposal. What objective evidential threshold is required before the court can additionally rely on the lack of explanation to complete a case to answer? The "half-time" test is whether a reasonable jury, properly directed, could convict. So, in child homicide cases alone, it appears the court have to embark on a two-stage exercise. Firstly, a finding that there is some evidence (short of a case to answer) that D caused the death and, secondly, a further finding that a reasonable jury could nevertheless convict if they relied on an inference from silence. This does not make sense. The jury itself could only rely on such an inference if satisfied that the case against the defendant calls for an answer. However, the proposal is meant to apply where there is no case to answer.
>
> 19. The bill attempts to sidestep these problems in subsection (2) by postponing any consideration of whether there is a case to answer until the end of the defence case. Again, this is intended to remove the ability of a defendant to obtain an acquittal at the conclusion of a weak prosecution case. Our analysis of the combined effect of the proposals leads us to conclude that, in practice, postponement will effectively remove that safeguard whether or not the defendant gives evidence.

Liberty's briefing went on to explain why postponement would have that effect. A submission of no case made by a defendant who gave evidence, would fail because it would almost always be possible to say that a reasonable jury *could* treat the defendant's evidence as supporting the prosecution. A submission made by a defendant who did not give evidence would fail, because he would find that the case against him now must include the additional component of a possible inference of guilt.

f. Possible other scenarios

It may be helpful to build on those briefings and consider what the effect would be given sample scenarios. The following analysis is suggested.

If a sole defendant were charged with murder or manslaughter, there would be no change. If the prosecution make no case to answer, there is no reason for the defendant to give evidence.

If a sole defendant were charged with the new offence as well as murder/manslaughter, he might choose to give evidence although there is no case to answer on murder/manslaughter, to avoid conviction for the new offence because there is a case to answer on it. Then, his own evidence with cross examination might lead to a conviction for murder/manslaughter because of the bar on making a no case submission until the end of all the evidence, including his. Also, a permitted inference from silence may have weighed against him.

If two defendants were charged with murder/manslaughter only, again there would be no change.

If two defendants were charged with the new offence as well as murder/manslaughter, either or both may, like a sole defendant, choose to give evidence to avoid conviction of the new offence, with the same adverse consequences for themselves as there would be for a sole defendant. The added factor would be that the case to answer against one defendant may be made as a result of evidence given by the co-defendant. This may well be seen as the most likely scenario. Again, the case against either defendant may be strengthened by an inference from his own silence (either in not giving evidence at all, or refusing to answer a question).

Another theoretically possible permutation would be the trial of one defendant for murder/manslaughter with a co-defendant being tried for the new offence.

4. Debates in the House of Lords

The clause was debated at length at all stages in the House of Lords before being removed on a division, 128/110 at Third Reading. Those who voted against the clause, on Lord Thomas of Gresford's amendment, included the former Law Lord, Lord Simon of Glaisdale, and the former Master of the Rolls, Lord Donaldson of Lymington.

Baroness Scotland explained the purpose of the clause. She said:

> The noble and learned Lord, Lord Donaldson, asked why we needed Clause 5. I shall deal with that now because the explanation will make the matter clearer. We need it because we have created a new offence in Clause 4 that will deal with the mischief with which we have erstwhile been unable to grapple sufficiently well. We still need Clause 5 to enable the appropriate conviction to be secured against the more culpable party. We do not wish for a person who is responsible for a

> murder or the commission of manslaughter simply to have a Clause 4 offence established against them if it is not the proper offence with which they should be convicted on the evidence produced to the court. Clause 4 is not intended as a substitute where murder or manslaughter can be established.
>
> (…) The measures included in Clause 5 aim to allow more charges of murder or manslaughter to be left to the jury safely in those very difficult cases.
>
> Once the case goes past half-time one may then be faced with a situation where one or either defendant decides that he or she does not wish to be dealt with as being equally responsible for causing the death, and one or either of the defendants gives evidence. So whereas at the close of the prosecution case it was not clear that there was significant evidence that one defendant was guilty of the murder of the child, by the end of the defence case it does become clear.
>
> One is left with a situation where the judge and the jury have heard evidence on which one or other of the parties properly could be found guilty of the murder but, at half time, on a technicality, that charge of murder or manslaughter has already been withdrawn from the jury. The postponement of the case to answer to the conclusion of the defence case will not jeopardise the fairness or otherwise of the case that may be left to the jury. There is no change in relation to evidence for murder or manslaughter.[196]

In moving the amendment, Lord Thomas said:

> What is so objectionable is that Clause 6 creates a new way in which murder or manslaughter can be proved. Even if there is no case for him to answer in relation to murder or manslaughter, under Clause 6(2) a person may be convicted simply by remaining silent. That means that a juryman who conscientiously applies himself to his oath will convict a person of murder or manslaughter, not on the evidence because by the terms of the definition there is no case to answer—there is no evidence upon which a jury could safely convict of murder or manslaughter—but on a hunch, a guess. That is contrary to centuries of history of the English criminal law. For a juryman to be asked to guess as between, shall we say, two people which one is guilty of murder or manslaughter simply because that person does not give evidence or has failed to reply to questions put to them by the police, and to convict a person in that way, is contrary to that juryman's oath.
>
> I pointed out on Report that when we are dealing with a death in a household and the police are met with silence it is not the same as other cases where there is silence. Silence from a person who is being questioned by the police or facing a trial in a domestic situation may well not indicate guilt. It may indicate his love and affection towards the person he knows has committed the offence. It may emanate for all kinds of reasons which are peculiar to that household. It may

[196] HL Deb 28 January 2004 c GC164

> emanate from the fact that he or she fears the person whom they know to have committed the offence. Love, fear, loyalty, family solidarity are all reasons from which it would be unsafe to draw the inference of a person's guilt where there is no other evidence, as Clause 6(2) states, upon which the juryman in carrying out the burden of his oath could properly come to the conclusion that that person is guilty.[197]

Baroness Anelay of St Johns added her wholehearted support, and said:

> Clauses 6 and 7 go beyond what can be acceptable in dealing with the offence that has occurred. (…) I fully support the view put forward by the noble Lord, Lord Thomas of Gresford, that Clauses 6 and 7 risk overturning a vital principle of our justice system.

Lord Carlisle of Bucklow also added strong support. He understood the Minister to be saying that the case against the defendant might change:

> I understand her argument to be that although there is at first no evidence that one person committed the murder rather than the Clause 5 offence, nevertheless, by their silence and other evidence that may be given, there may at the end of the case be a case to answer that did not exist at the halfway stage.
>
> If that is the argument, surely all one need do in the clause is delay the time at which the submission can be made to the end of the whole of the evidence, as the clause does. There is absolutely no need whatever for anything else.[198]

Lord Donaldson also spoke forcefully against the clause.

> Ever since I was called to the Bar, and for many years before that, it was the way in which the burden was kept on the prosecution that it had to prove a case to answer; it had to produce enough evidence so that the jury could properly convict simply on the evidence, if they were convinced by it. It is for that reason that it has always been possible at the end of the prosecution case to say to the judge, "Well, there isn't enough evidence" and the jury could not convict at that stage. That is an essential safeguard and I believe that—although it may not be wholly covered by the wording—it is wholly covered by Article 6, paragraph 2 of the European Convention, which says:
>
> > "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".
>
> Of course, the let-out for the Minister would be to say, "We are altering the law". But, I do not believe that that was what was contemplated by the convention. So up to this moment, the clause would be contrary to law. A good deal of play was

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[197] HL Deb 25 March 2004 c816
[198] HL Deb 25 March 2004 c 818

> made earlier by the references that one sees in the clause to an ability to draw inferences, which is approved of and permitted by the Criminal Justice and Public Order Act of 1994. There is a new and sensible offence that addresses the real need of a "don't know" case, so that when the prosecution proves that the defendant or defendants failed to take such steps as were reasonably foreseeable in relation to the facts of the case, and that the act was caused by that failure, and that the accused ought to have foreseen the need for them, if the accused does not choose to say "Well, I did not foresee it and I could not have been expected to foresee it", or, "I did, in fact, try to take those actions but it did not work"—if the accused does none of those things, then of course there is a reasonable inference. It would not require the 1994 Act to produce that result. Any jury could then draw that inference.
>
> However, we are now being asked, as noble Lords have described, to allow inferences to be drawn when, contrary to the system of justice as we have known it for a very long time, there is no evidence on which a jury could convict at the end of the prosecution case. It seems that this is trying, in an oblique way, to reverse the rule which gave rise to all the problems in the "don't know" cases, because it was in those cases that the counsel, on behalf of the accused, were standing up at the end of the prosecution case to say "There is no evidence as to which of these people committed the offence. You may well say that one or other must have done, but unless you can show who, you can't convict". No one has ever suggested that there is anything wrong with that. What they have said is that, "We cannot allow that situation to continue; we have to tackle it from a different angle". That is what Clause 5 does, and does very efficiently.[199]

He went on to say that he understood the genesis of the clause, but protests had been made on all sides of the House. These had not been entirely from lawyers, although it was natural to hear more from lawyers as they had been brought up in that tradition of fairness, in accordance with the law. It was not an abstract concept, but had been honed by many years of experience. Faced with the protests, he was surprised that the Minister had resisted.

Baroness Scotland sought to give reassurance that the clause did not go beyond that which is acceptable, or “risk our vital position on justice”, and that the legal loophole that exists in these "Which of you did it?" cases must be closed. She said:

> we need the new offence but also the procedural measures that we are proposing. The new offence will ensure that a case will come before the courts and be put to the jury. However, without the procedural measures, which would allow evidence to emerge during the course of the trial, even if the evidence that would support a higher charge emerged and the jury was able to determine beyond any reasonable doubt who killed that child or vulnerable adult, the higher charge may no longer be available. As a matter of justice to the dead victim and to his or her family, we

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199 HL Deb 25 March 2004 c820

> need to be able to try the suspected killer for murder or manslaughter and sentence him or her appropriately. If we do not have Clause 6, we shall not be able to do that and we shall be left with a lesser charge and a lesser sentence. The Government do not feel that that is acceptable or justifiable by any standards.
>
> The rules and procedures of our courts exist to protect the innocent from wrongful conviction; and may that always be the case. However, they also exist to reveal the truth and to convict the guilty. At present, in the cases about which we are talking, the rules and procedures work wholly in favour of the defendants.

She drew attention to the Joint Committee on Human Rights having given the proposal "a clean bill of health".[200] But Lord Campbell of Alloway, who voted against the clause, and is a member of the Joint Committee, reminded the House:

> [The Committee's] remit is to examine only whether a provision is contrary to the convention. We are not concerned whether it is contrary to the convention; we are concerned with whether it is contrary to our concept of criminal law. The two are totally different concepts, unless there is a collision and a conflict.

Baroness Scotland concluded by urging the House to consider again, referring to the spectre of the court at the end of the trial finding itself impotent to convict and sentence a person for a more serious crime which had been proved against him/her because the person had been discharged on that count at half time.

But the House of Lords divided on the amendment, voting to remove the clause from the Bill, by 128 to 110.[201]

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[200] HL Deb 25 March 2004 c823
[201] HL Deb 25 March 2004 c826