These notes refer to the Domestic Violence, Crime and Victims Act 2004 (c.28) which received Royal Assent on 15 November 2004

DOMESTIC VIOLENCE, CRIME AND VICTIMS ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Criminal Justice

Section 10: common assault to be an arrestable offence

50. *Subsection (1)* extends the list of arrestable offences in England and Wales by adding the offence of common assault to Schedule 1A to the Police and Criminal Evidence Act 1984.

51. The effect is to give the police the power to arrest an individual on suspicion of assault and/or battery without an arrest warrant.

52. *Subsection (2)* extends the list of arrestable offences for Northern Ireland by adding the offence of common assault to Article 26(2) of the Police and Criminal Evidence (Northern Ireland) Order 1989.

Section 11: Common assault etc as alternative verdict

53. *Section 9* enables an alternative verdict to be returned under section 6(3) of the Criminal Law Act 1967 in respect of common assault and the other summary offences listed in subsection (3) of section 40 of the Criminal Justice Act 1988.

Section 12: Restraining orders: England and Wales

54. This section extends the circumstances in which a restraining order can be made under the Protection from Harassment Act 1997 following criminal proceedings. *Subsection (1)* extends the courts' power to make a restraining order on conviction for any offence, rather than only on conviction for offences under the 1997 Act.

55. Section 2 of the Protection from Harassment Act 1997 created a summary only offence of harassment; section 4 created an offence, triable either summarily or on indictment, that is committed where a person's course of conduct causes another reasonably to fear on at least two occasions that violence will be used against him.

56. *Subsection (2)* provides that when a court is considering making a restraining order after conviction (or acquittal: see paragraph 59 below), the defence and the prosecution may bring any evidence before the court that would be admissible in civil proceedings under section 3 of the Protection from Harassment Act 1997. Section 3 of the Act sets out the procedure for obtaining an injunction to prevent harassment in civil courts.

57. *Subsection (3)* gives any person mentioned in the order the right to make representations to the court when an application is made to vary or discharge the order. This in turn, along with Rules of Court, will ensure that victims are notified of any application to vary or discharge an order. *Subsection (4)* allows a court when dealing with a person

for the offence of breach of a restraining order under section 5 of the 1997 Act to vary or discharge the order in question irrespective of whether it was the court that made the original order.

58. *Subsection (5)* introduces a new section, section – 5A – which provides for restraining orders on acquittal. Courts can consider making a restraining order when a person has been acquitted of an offence, where the court believes a restraining order is necessary to protect a person from harassment.

59. Section 5A(2) applies section 5(3) to (7) of the 1997 Act to orders made under this section. Orders can be made for a specified period or until further order and the prosecution, defendant or anyone mentioned in the order can apply for it to be varied or discharged. By virtue of 5(6) it is an offence to do anything prohibited by the order without reasonable excuse. The maximum penalty is 5 years' imprisonment on trial on indictment.

60. Section 5A(3) to (5) provides that an order made on acquittal can be appealed against in the same way as an order made on conviction. Where a conviction is quashed on appeal, the Crown Court will be able to make a restraining order if satisfied that it is necessary to do so to protect any person from harassment.

Section 13: Restraining Orders: Northern Ireland

61. This section extends for Northern Ireland the circumstances in which a restraining order can be made under the Protection from Harassment (Northern Ireland) Order 1997 following criminal proceedings, in line with the equivalent provisions for England and Wales.

Section 14: Surcharge payable on conviction

62. This section provides for a surcharge to be payable on conviction by inserting two new sections, section 161A and section 161B, in the Criminal Justice Act 2003.

63, Subsection (1) of section 161A imposes a duty on the court to order payment of a surcharge, except when the court makes an absolute discharge or mental health disposal, (subsection (4)), or where the case is of a type prescribed by the Secretary of State in an order under subsection (2). The intention is that the power in subsection (2) to make such an order would be used if the operation of the provisions were to show that some categories of defendant were being unfairly penalised by the surcharge.

64. Subsection (3) of section 161A deals with the relationship between the surcharge and a compensation order. The court is required to give priority to a compensation order as subsection (3) provides that if the court considers that the offender should pay compensation but has insufficient means to pay the surcharge as well, it must reduce the surcharge accordingly.

65. Section 161B provides for the Secretary of State to set the amount of the surcharge by order. *Subsection (2)* of *section 14* amends the provisions in section 164 of the Criminal Justice Act 2003 on fixing of fines to ensure that the court does not reduce a fine on account of the surcharge unless the person has insufficient means to pay both. *Subsection (3)* ensures that the surcharge will be treated as a fine for the purposes of collection and enforcement.

66. *Subsection (4)* provides that the provisions in the Courts Act 2003 on the collection and enforcement of fines will apply. *Subsection (5)* provides that the Secretary of State may by order amend the way in which the relevant provisions of the Courts Act apply to the surcharge.

Section 15: Increase in maximum on-the-spot penalty for disorderly behaviour

67. *Section 15* amends section 3 of the Criminal Justice and Police Act 2001 to increase the maximum amount of on-the-spot penalties for disorderly behaviour. This ensures that the amount of the penalty representing the surcharge is taken into account by changing the maximum amount that can be prescribed as a penalty for disorderly behaviour from a quarter of the maximum fine to one quarter of the maximum fine plus one half of the surcharge payable.

Section 16: Higher fixed penalty for repeated road traffic offences

68. *Subsections (1) and (2)* amend section 53 of the Road Traffic Offenders Act 1988 to enable a higher fixed penalty to be provided for, in an order under section 53, where a person already has points on his licence of has been disqualified from driving in the past three years.

69. *Subsection (3)* amends section 84 of the Road Traffic Offenders Act 1998 so that regulations can be made dealing with the situation where a conditional offer has been made of a fixed penalty notice, and the driver is subsequently identified as a person to whom in fact a higher fixed penalty applied under section 53(3) because he is a person who within the past three years had points on his licence or was disqualified from driving. It allows the fixed penalty clerk to issue a separate notice requiring the offender to pay the extra amount.

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

70. This section makes provision for the prosecution to apply for part of a trial on indictment in the Crown Court to proceed in the absence of a jury. A successful application would need to satisfy the Court of three conditions.

71. The first condition is that there are so many counts in the indictment that a trial by jury involving all of those counts would be impracticable (*subsection (3)*).

72. The second condition (*subsection (4)*) is that the court considers that those counts which would be able to be tried with a jury can be regarded as samples of other counts in the indictment, which could accordingly be tried without a jury. For this purpose, a count may not be regarded as a sample of other counts unless the defendant in respect of each count is the same person (*subsection (9)*).

73. The third condition is that it is in the interests of justice for part of the trial to proceed in the absence of a jury (*subsection (5)*).

74. In deciding whether to make an order for part of the trial to proceed in the absence of a jury, the judge will also be required to consider whether there is anything that could reasonably be done to facilitate a jury trial of all of the counts. However, in doing so the judge is not to regard as reasonable any measure which might lead to the possibility of a defendant in the trial receiving a lesser sentence than would be the case if that step were not taken.

Section 18: Procedure for applications under section 17

75. This section prescribes the procedure for determining applications for part of a trial to proceed in the absence of a jury under s*ection 17*. This provision is likely to be supplemented by rules of court. According to s*ection 20*, rules of court may make provisions which are necessary or expedient for the purposes of *sections 17 to 19*. *Section 18* makes clear that any such application will be determined at a preparatory hearing that has been ordered (whether particularly for that purpose or not) under the relevant provisions in the Criminal Justice Act 1987 and the Criminal Procedure and Investigations Act 1996. The parties to the preparatory hearing must also be given the opportunity to make representations with respect to the application.

76. The effect of *subsection (5)* is that an appeal will lie to the Court of Appeal for both prosecution and defendant against the determination made by the court at a preparatory hearing on any application for part of a trial to take place without jury under s*ection 17*.

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

77. *Subsection (1)* provides that if, in a case where an order under section 17 has been made, the defendant is found guilty by the jury of a sample count, the counts of which it is a sample may be tried without jury.

78. *Subsection (2)* provides that where a court orders part of a trial to be conducted without a jury under s*ection 17(2)*, the trial will proceed in the usual way, except that the functions which would otherwise have been performed by a jury will be performed by the judge sitting alone; and *subsection (3)* provides for references to the jury in other enactments to be interpreted as references to the court.

79. Where part of a trial is conducted without a jury, and a defendant is convicted, *subsection (4)(a)* requires the court to give its reasons for the conviction.

80. *Subsections (5) and (6)* provide that the time limits governing applications for leave to appeal to the Court of Appeal against conviction in cases where part of the trial is conducted without a jury will begin to run from the end of the proceedings, and not from the end of the part of the trial which is tried with a jury.

81. *Subsection (7)* disapplies these provisions in respect of hearings under section 4A of the Criminal Procedure (Insanity) Act 1964.

Section 20: Rules of court

82. This section makes clear that rules of court may be made governing the procedure to be followed, and the time limits which will apply, in respect of applications under s*ection 17*.

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

83. This section provides that in their application to Northern Ireland *sections 17 to 20* have effect subject to the modifications in *Schedule 1*. Under *Section 18(1)* (as modified by *Schedule 1*), an application under *Section 17* must be determined at a preparatory hearing within the meaning of the Criminal Justice (Serious Fraud)(Northern Ireland) Order 1988 (this is the Northern Ireland equivalent of a preparatory hearing under the Criminal Justice Act 1987) or a hearing specified in, or for which provision is made by Crown Court rules. The reference to Crown Court rules is necessary as Part III of the Criminal Procedure and Investigations Act 1996 ("the 1996 Act") does not extend to Northern Ireland.

84. *Section 18A* (as substituted by *Schedule 1*) makes provision for appeals in respect of hearings under Crown Court rules. Section 18B (as substituted by Schedule 1), which deals with reporting restrictions, applies sections 41 and 42 of the 1996 Act to hearings and appeals under Crown Court rules.

85. *Subsection (2)* provides that sections 17 to 20 do not apply in relation to trials to which section 75 of the Terrorism Act 2000 applies. Section 75 applies only to Northern Ireland and provides for mode of trial on indictment of scheduled offences to be a court sitting without a jury. These are commonly known as "Diplock Courts" after the Diplock Commission which found that the jury system as a means of trying terrorist crime was under strain and highlighted the danger of perverse acquittals or intimidation of jurors. Scheduled offences are defined in section 65 of and Schedule 9 to the Terrorism Act 2000 as being offences which qualify for special treatment because they are terrorist offences related to the special situation in Northern Ireland.

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

86. *Section 22* amends section 4 of the Criminal Procedure (Insanity) Act 1964 to provide that the judge, rather than the jury, determines the issue of whether a defendant is fit to plead.

Section 23: Procedure for determining fitness to plead: Northern Ireland

87. *Section 23* amends the Mental Health (Northern Ireland) Order 1986 to achieve the same effect for Northern Ireland as in *section 22*.

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

88. *Section 24* provides a new range of disposals for the court when it has made a finding of unfitness to plead and that the defendant did the act charged or has found the defendant not guilty by reason of insanity under the Criminal Procedure (Insanity) Act 1964. They allow for the defendant to receive treatment and support if the court thinks that this is appropriate.

89. *Subsection (1)* substitutes a new section 5 and inserts a new section 5A of the Criminal Procedure (Insanity) Act 1964. The new section 5 sets out the court's options on a finding of unfitness or insanity. The court has three options. The first option is to make a hospital order under section 37 of the Mental Health Act 1983 (which can also be accompanied by a restriction order under section 41 of that Act). The second option is to make a supervision order and the third option is to order the defendant's absolute discharge.

90. If the court wishes the defendant to be detained in hospital, the appropriate order will be a hospital order. To make a hospital order, the court must have the evidence required by the 1983 Act: that the defendant is mentally disordered and requires specialist medical treatment. This means that there must be medical evidence that justifies his detention on grounds of his mental state. The making of a restriction order alongside a hospital order gives the Secretary of State certain powers in relation to the management of the defendant in hospital, such as the requirement that the Secretary of State consent to the defendant being given leave or discharged. Restriction orders are made in cases where the defendant poses a risk to the public (see section 41(1) of the 1983 Act). The power of the court to make a hospital order and a restriction order under the 1983 Act represents a change from the current position, whereby the court makes an order for the defendant's admission to hospital under Schedule 1 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, without any requirement to hear medical evidence, and specifies whether it thinks restrictions are appropriate. Once the court has made an admission order, the Secretary of State has two months to issue a warrant for the defendant's admission to hospital. The defendant is then treated for the purposes of his management in hospital as if he had been given a hospital order (and if appropriate a restriction order) under the 1983 Act.

91. The two principal differences under the new system will be that the Secretary of State no longer has a role in deciding whether or not the defendant is admitted to hospital and that a court can no longer order the defendant's admission to a psychiatric hospital without any medical evidence.

92. Existing provision in section 5(3) of the 1964 Act and paragraph 2(2) of Schedule 1 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 requires the court to admit the defendant to hospital subject to restrictions where he was charged with an offence for which the sentence is fixed by law (i.e. murder). The new section 5 does the same but the court is only obliged to make a hospital order with a restriction order on a charge of murder if the conditions for making a hospital order are met. If the conditions are not met, for example if the reason for the finding of unfitness to plead related to a physical disorder, the court has the option of making one of the other orders.

93. The new section 5A makes provision about the detail of these orders. Subsections (1) and (3) of new section 5A modify the 1983 Act so that the provisions on hospital orders (which are normally given after conviction of an offence) apply equally to those given a hospital order following a finding of unfitness or insanity. The one difference is that a court will be able to require a hospital to admit a person found unfit to plead or not guilty by reason of insanity, whereas it has no such power in respect of those convicted of an offence.

94. Subsection (2) of new section 5A extends the powers under the 1983 Act to remand an accused person to hospital for a report or treatment and to make an interim hospital order so that the court can exercise these powers where a person has been found unfit to plead or not guilty by reason of insanity and the court is considering which disposal would be appropriate.

95. Subsection (4) of new section 5A replicates existing provision in paragraph 4 of Schedule 1 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and allows the Secretary of State to remit for trial a person who is found unfit to plead and given a hospital order with a restriction order and who subsequently recovers.

96. Subsection (5) of new section 5A introduces a new Schedule 1A to the 1964 Act, which makes provision about the supervision order. The new Schedule 1A is inserted by *subsection (2)* of s*ection 24* and *Schedule 2* to the Act. The supervision order will replace the existing supervision and treatment order, provision for which is made in Schedule 2 to the 1991 Act. The new supervision order differs from the old supervision and treatment order in that it enables treatment to be given under supervision for physical as well as mental disorder and in that it cannot include a requirement for a person to receive treatment as an in-patient. It is designed to enable support and treatment to be given to the defendant to prevent recurrence of the problem which led to the offending. There is no sanction for breach of either the new supervision order or the existing supervision and treatment order; the orders simply provide a framework for treatment.

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

98. *Subsection (3)* of s*ection 24* makes the same changes to the disposals available to the Court of Appeal when substituting a finding of insanity or unfitness to plead for another finding. *Subsection (4)* of s*ection 24* removes the power of the Court of Appeal to order a person's admission to hospital where it substitutes a verdict of acquittal for a verdict of not guilty by reason of insanity and there is medical evidence that the person is mentally disordered. It will still be possible to admit such a person to hospital under the civil powers in the 1983 Act.

99. *Subsection (5)* of *Section 24* repeals the provisions of the 1964 and 1991 Acts which are being replaced.

Section 25: Appeal against order made on finding of insanity or unfitness to plead etc

100. This section inserts new sections 16A and 16B into the Criminal Appeal Act 1968. The new section 16A provides a right of appeal to the Court of Appeal against a supervision order or hospital order made by virtue of *section 24*. New section 16B enables the Court of Appeal to quash those orders and substitute or amend them in any way available to the court below.

Section 26: court-martial provisions

101. This section introduces *Schedule 3*. *Schedule 3* substitutes new provisions for sections 116 of the Army Act 1955 and the Air Force Act 1955, and for section 63 of the

Naval Discipline Act 1957. It also amends the Courts-Martial (Appeals) Act 1968 by substituting new sections 16, 23, and 25, inserting new sections 25A and 25B, and making other amendments. *Schedule 3* replaces schedule 2 to the Armed Forces Act 1996, which has never been commenced.

102. The purpose of the amendments in *Schedule 3* is to reflect in the procedure of courts-martial and the Courts-Martial Appeal Court the changes made to civilian court procedure by sections 22, 24 and 25.

Section 27: Powers of authorised officers executing warrants

103. This section inserts a new section 125BA into the Magistrates' Courts Act 1980, which provides for a new Schedule 4A (set out at *Schedule 4* to the Act). The new section and Schedule extend the powers of civilian enforcement officers and approved enforcement agencies when executing warrants issued by magistrates' courts in criminal proceedings. These authorised officers will have the power to enter premises in order to search for a person who is the subject of a warrant, or in order to seize goods in satisfaction of an unpaid fine. Where they take a person into custody they will have the power to search him for items that might be used to cause physical injury or to facilitate an escape. Authorised officers will be entitled to use reasonable force in exercising these powers. The powers are to be exercised only so far as it is reasonable to do so. They are intended to be equivalent to the powers available to a police officer when executing a warrant of arrest.

Section 28: Disclosure orders for purpose of executing warrants

104. This section inserts new sections 125CA and 125CB into the Magistrates' Courts Act 1980. New section 125CA provides for the making by magistrates' courts of disclosure orders where necessary for the purpose of executing warrants in connection with the enforcement of fines and community sentences. A disclosure order will be made on application to the court by a person entitled to execute the warrant (typically a civilian enforcement officer or approved enforcement agency). The disclosure order will require a third party to supply to the court specified information about the offender who is the subject of the warrant. The information will be that needed to establish the whereabouts of the offender so that the warrant can be executed; namely the offender's name, date of birth, national insurance number and address. New section 125CB provides for the legitimate dissemination of information obtained under a disclosure order in order to execute the warrant, and makes unauthorised disclosure of such information an offence.

Section 29: Procedure on breach of community penalty etc

105. This section introduces *Schedule 5*, which amends those provisions of the Powers of Criminal Courts (Sentencing) Act 2000 and the Criminal Justice Act 2003 that dictate the location of the magistrates' court where proceedings for breach of a community penalty must be taken. The existing provisions have the effect of restricting such proceedings to a court in a single petty sessions area in each individual case. Where the offender has moved away from that area, the cost and inconvenience of transporting him to court on arrest can be considerable. The purpose of the amendments is to ensure, so far as possible, that breach proceedings are taken in a court in the area where the offender is living at the time of the breach.

106. Each of paragraphs 2 to 8 of *Schedule 5* applies to a different type of community sentence. In each case the amendments have two effects. Firstly, a summons or warrant to secure the attendance of an offender who is in breach of the community sentence can be issued by any magistrates' court. Secondly, such a summons or warrant will direct the offender to attend or be brought before a court in the area where he lives, if this is known. If his place of residence is unknown then the summons or warrant will direct the offender to attend a court in the area that would previously have been specified had the amendments not been made.

107. Paragraph 9 of *Schedule 5* amends Schedule 13 to the Criminal Justice Act 2003, disapplying the other amendments in the case of a breach of a suspended sentence order that has been transferred to Scotland or Northern Ireland. This amendment is required because of the particular wording of Schedule 13 to the 2003 Act; the same result is achieved in respect of the other types of community sentence without express provision.

108. Paragraph 10 of *Schedule 5* extends the amending power conferred by section 109(5)(b) of the Courts Act 2003 to ensure that *Schedule 5* continues to have effect after section 8 of that Act comes into force, replacing petty sessions areas with local justice areas.

Section 30: Prosecution appeals

109. *Section 30* makes an amendment to section 58(13) of the Criminal Justice Act 2003 to ensure that the prosecution appeals provisions in Part 9 of that Act are available, as it was intended they should be, in cases tried without a jury under Part 7 of that Act. The existing definition in section 58(13) of the point beyond which the prosecution's right of appeals cannot be exercised is inappropriate where there is no jury. (Paragraph 62 of Schedule 10 to the Act inserts into the Criminal Justice Act 2003 an order-making power allowing appropriate modifications to be made to Part 9 of that Act to take into account two-stage trials under *section 17*.)

Section 31: Intermittent custody

110. The provisions of s*ection 31* and *Schedule 6* ensure that those serving a sentence of intermittent custody become eligible for home detention curfew at an equivalent point in their sentence to those serving a sentence of custody plus. *Schedule 6* also inserts a new section 264A which makes separate provision for those serving consecutive sentences of intermittent custody. As before, its effect is to ensure equivalence between the sentences of intermittent custody and custody plus.