# Pressure grows for reform of murder law

<http://www.politics.co.uk/news/2010/9/8/pressure-grows-for-reform-of-murder-law>

The pressure for Britain's murder law to become more flexible is growing, after the second director of public prosecutions (DPP) in a row came out in favour of reform.

Keir Starmer told the BBC he would welcome a change so that the law recognised first and second degree murder, as it does in the United States.

First degree murder with intent to kill would carry a life sentence, while second degree murder, with intent to cause grievous bodily harm and manslaughter would both carry a discretionary life sentence.

Some legal experts argue that the present law prevents juries from ascribing relative levels of culpability, with some holding back on a murder sentence because of their view of the defendant's intent.

"It is not just a question of people who are not guilty being convicted, there is a risk that people who are guilty will be acquitted of murder," said Sir Ken McDonald, Mr Starmer's predecessor and another proponent of reform

"My sense is that a lot of juries who instinctively kick against the idea that someone should be convicted of murder with a mandatory life sentence, if they intend less than killing.

"It should be fair, it should be firm and it should be explicable. I don't think that we are presently achieving those qualities in our homicide law."

Sir Ken argued that a change in the law would come in useful when engaged in joint enterprise cases - common in gang related crimes - where all parties to an act are charged with the crime. The law allows for the lookout during a murder to also be charged with murder, despite not killing anyone themselves.

Sir Ken said: "I think if you had those sorts of categories, it would be much easier to look at a joint enterprise case and describe particular roles and particular degrees of culpability to individual defendants, rather than sweeping up perhaps large numbers of people who in some cases might have been fairly peripheral to the enterprise.

A 2006 review into murder proposed a three tier system of first degree, second degree and manslaughter but the government stopped short of implementing its findings, and introduced new laws of provocation and some changes to the law on diminished responsibility instead.

The coalition government said it is considering recommendations on the issue.

# Homicide reforms would be ‘nightmare’ for juries, says top law lord

## Lord Phillips of Worth Matravers tells ministers that their plans to reform murder and manslaughter laws would achieve fairness, but at the expense of simplicity. And he is 'uneasy' about Government plans that would rule out sexual infidelity as a partial defence to murder.

<http://www.telegraph.co.uk/news/newstopics/lawreports/joshuarozenberg/3394793/Homicide-reforms-would-be-nightmare-for-juries-says-top-law-lord.html>

Britain’s senior judge launched a scathing attack last night on some of the Government’s proposed reforms to the law of homicide in England and Wales.

In a lecture to students from the University of Essex, Lord Phillips of Worth Matravers summarised the directions to a jury that would be required in a case where someone had been killed during a fight between two gangs.

“I believe that in many factual scenarios it would be a nightmare to sum up to the jury in accordance with the proposed statutory provisions," the senior law lord and former Lord Chief Justice of England and Wales told his audience as they tried to make sense of the directions.

“Particularly questionable is the repeated requirement for the jury not merely to consider what actions the defendant foresaw but what the defendant foresaw as the intentions of the person or persons responsible for those actions. In the context of fast-moving disorder, such questions are simply not realistic.”

If the law was to be changed at all, said Lord Phillips, then this had to be done in a way that simplified the jury’s task — even if it left the judge to decide the precise level of culpability when sentencing the defendant. Although it was not his role to draft legislation, he suggested a much simpler definition of homicide in the context of a joint criminal venture.

Turning to the defence of provocation, which reduces murder to manslaughter, Lord Phillips said the Government was proposing to go further than the Law Commission in proposing that an act of sexual infidelity would not, in itself, allow a person to rely on provocation. Harriet Harman, who was Minister for Women when the announcement was made earlier this year, had explained that the law should not allow men to escape murder charges by blaming the victim.

"I must confess to being uneasy about a law which so diminishes the significance of sexual infidelity as expressly to exclude it from even the possibility of amounting to provocation," Lord Phillips said. "Nor have ministerial statements persuaded me that it is necessary to go that far."

The Justice Minister Maria Eagle had said: "For men and women who kill their partners, these changes will mean that the letter of the law finally catches up with judges and juries who, in recent years, have been less prone than people think to let men off lightly and punish women harshly. However, in order to be fair they have had to stretch the law to its limits. With these changes, the law will be clearer."

But Lord Phillips had "some difficulty" with the proposition that the law was letting men off lightly. "The current law requires provocation to be conduct that would cause a reasonable man to act as the defendant acted. "If juries are declining to hold that infidelity meets this test, I cannot understand why it should be suggested that they are stretching the law to its limits."

Speaking at the London offices of the global law firm Clifford Chance, Lord Phillips argued that the law could have been made much easier to understand if ministers had not insisted, when briefing their law reform advisers, on keeping the mandatory sentence of life imprisonment for murder.

“The law could have been made much clearer and more coherent had the Law Commission been able to propose that determinate sentences should be imposed for murder,” he said.

In 2005, the commission proposed three different offences of homicide in place of the present two. First degree murder, where there was an intention to kill, would still carry an automatic life sentence. But this sentence would be discretionary in cases of second degree murder — where the killer was not aware that there was a serious risk that injuring the victim would lead to a death — and in manslaughter.

“The Government has not adopted the Law Commission’s approach of attempting to reform the structure of the law of homicide so that it is rational and fair,” said Lord Phillips.Instead, it had decided to look first at complicity, provocation and diminished responsibility.

“I think it is a great pity that the Government is looking, in isolation, at these particular aspects of the law of homicide without looking at the overall structure,” the senior law lord concluded.

*First published November 7, 2008.*

**Mandatory life-sentence for murder**

<http://www.cps.gov.uk/legal/s_to_u/sentencing_-_mandatory_life_sentences_in_murder_cases/>

**The law as it stands:**

**Background**

All offenders convicted of murder need to have a minimum term set. This is the minimum time that the offender will serve before he is eligible for parole.

Up until November 2002, the Home Secretary set the minimum term, but this practice ceased following the decision in *Anderson v Secretary of State* [2003] 1 AC 837 that declared the practice unlawful. As a consequence all prisoners who had already been notified of a minimum term by the Home Secretary had the right to ask the High Court to review it. The High Court could confirm it or lower it, but not increase it (paragraph 3, Schedule 22 Criminal Justice Act 2003).

It also meant that between 25 November 2002 and 18 December 2003 no minimum terms were set, and offenders were sentenced to life imprisonment without knowing their earliest date of release. This resulted in approximately 700 serving life prisoners who had not had a minimum term set. Those cases were referred to the High Court by the Home Secretary under paragraph 6, Schedule 22 Criminal Justice Act 2003 for a minimum term to be set administratively by a High Court Judge.

The provisions of the Criminal Justice Act 2003 now apply to all cases where the date of offence is on or after 18 December 2003.

For offences dated before 18 December 2003, complex transitional arrangements apply.

## The Role of the Prosecutor

The Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise provides that prosecuting advocates should be in a position to assist the court by outlining those factors that bring the case within the suitable starting point and drawing the court's attention to relevant aggravating and mitigating circumstances, appropriate authorities, or sentencing guideline cases and any victim personal statements given by the victim's family.

It is the prosecuting advocate's duty to point out errors of law, such as, in these circumstances, if the court were to fail to give its reasons for departing from the starting point. The prosecuting advocate will need to be alive to the possibility that the minimum term may be unduly lenient, and be in a position to provide urgent advice.

### The Statutory Framework subsection 269 - 277 Criminal Justice Act 2003

Note: This applies to cases where the date of offence is on or after 18 December 2003.

In accordance with section 269 of the Criminal Justice Act 2003 all courts passing a mandatory life sentence are required to order the minimum term the prisoner must serve before the Parole Board can consider release on licence, unless the seriousness of the offence is so exceptionally high that the early release provisions should not apply in other words, a 'whole life order'.

The court must take into account the seriousness of the offence (or the combination of the offence and any one or more offences associated with it) and any time served in custody on remand (section 269(3)). In considering the seriousness of the offence judges must have regard to the general principles set out in Schedule 21, Criminal Justice Act 2003 - (section 269(5)(a)).

The court must first allocate a starting point based on the examples given in Schedule 21, then consider any aggravating or mitigating factors, plus the effects of the defendant's previous convictions, any plea of guilty and whether the offence was committed on bail. The court has a duty to state in open court, in ordinary language, its reasons for arriving at the minimum term, including which starting point in Schedule 21 it selected and why (section 270).

It is important to note that the judge retains discretion to determine the minimum term. Whilst he must have regard to the statutory guidance he needs only do so to the extent he considers appropriate, and is not bound to follow it (see R v Sullivan and others [2004] EWCA Crim. 1762 at paragraph 11). However, the court must state its reasons for departing from the guidance (section 270(2)(b)).

In R v Davies [2008] EWCA Crim 1055. The Court stated that, when deciding whether aggravating features exist to increase the appropriate starting point for the minimum term of a mandatory life sentence, the judge should apply the same standard of proof as that applied by a jury in reaching its verdict. The distinction between the factors that call for a 30 year starting point and those that call for a 15 year starting point are no less significant than that which has to be considered by a jury when distinguishing between alternative offences, and it would be anomalous if the same standard of proof did not apply in each case.

## Starting Points

Schedule 21 sets out the basic starting points.

a) For adults aged 21 years old and over there are 4 starting points:

* a whole life order;
* 30 years;
* 25 years (effective from 2 March 2010); and
* 15 years.

b) For 18 - 20 year olds there are three starting points:

* 30 years;
* 25 years (effective from 2 March 2010); and
* 15 years.

c) For youths there is one 12-year starting point.

Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010 (SI 2010/192) inserted a new paragraph into Schedule 21 which represents another "general principle" (involving the use of a knife) to which the court must have regard when making the determination.

R v Kelly (Marion) [2011] EWCA Crim 1462 held that judges should avoid a compartmentalised and mechanical approach to the provisions of Schedule 21. Judges should "have regard" to the principles set out in Schedule 21 but not follow it rigidly.

### Offenders aged 21 years or over

Where the offender is 21 or over at the time of the offence and the court takes the view that the murder is so grave that the offender should spend the rest of his life in prison, a 'whole life order' is the appropriate starting point. The early release provisions in section 28 of the Crime (Sentences) Act 1997 will then not apply. Such an order should only be specified where the court considers that the seriousness of the offence is **exceptionally** high. Such cases include:

a) the murder of two or more persons where each murder involves a substantial degree of premeditation, the abduction of the victim, or sexual or sadistic conduct;   
b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation;   
c) a murder done for the purpose of advancing a political, religious or ideological cause; or   
d) a murder by an offender previously convicted of murder.

Where the offence is not so serious as to warrant a whole life order but the seriousness of the offence is **particularly** high the appropriate starting point is 30 years. The following examples are given:

a) the murder of a police or prison officer in the course of his duty;   
b) a murder involving the use of a firearm or explosive;   
c) a murder done for gain (in the course of a robbery or burglary, or done for payment);   
d) a murder intended to obstruct or interfere with the course of justice;   
e) a murder involving sexual or sadistic conduct;   
f) the murder of two or more persons; or   
g) a murder that is racially or religiously aggravated or aggravated by sexual orientation.

Where the offender the offender took a knife or other weapon to the scene intending to (a) commit any offence, or (b) have it available to use as a weapon, and used that knife or other weapon in committing the murder the normal starting point is 25 years. This increased minimum term does not apply in relation to a life sentence imposed for an offence of murder committed before 2 March 2010.

For all other offences the appropriate starting point is 15 years.

### Offenders 18 - 20 years old

Where the offender commits a murder that is so serious that it would require a whole life order if committed by an offender aged 21 or over, the appropriate starting point will be 30 years.

As in the case of adults (see above) where the offence is not so serious as to warrant a whole life order, but the seriousness of the offence is particularly high, the appropriate starting point is 30 years.

Similarly, for murders committed after 2 March 2010, involving the use of a knife or other weapon in the circumstances set out above, the appropriate starting point is 25 years.

For all other offences the appropriate starting point is 15 years.

### Offenders under 18 years old

For an offender who is a youth when he/she committed the offence the appropriate starting point is 12 years detention at Her Majesty's pleasure.

### Aggravating and Mitigating Factors

Having set a starting point the court must take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point (paragraph 8, Schedule 21).

Under paragraph 9, detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point) or in the making of a whole life order.

Aggravating factors that may be relevant include:

a) a significant degree of planning or premeditation;   
b) the victim was vulnerable because of age or disability;   
c) mental or physical suffering inflicted on the victim before death;   
d) the abuse of a position of trust;   
e) the use of duress or threats against another person to facilitate the commission of the offence;   
f) the victim was providing a public service or performing a public duty; and   
g) concealment, destruction or dismemberment of the body.

Mitigating factors include:

a) an intention to cause serious bodily harm rather than kill;   
b) lack of premeditation;   
c) the offender suffers from a mental disorder or disability (not falling within section 2(1) of the Homicide Act 1957) which lowered his/her degree of culpability;   
d) the offender was provoked in a way not amounting to a defence of provocation;   
e) the offender acted to any extent in self-defence;   
f) a belief by the offender that the murder was an act of mercy; and   
g) the age of the offender.

The court should also consider any previous convictions, whether the offence was committed on bail and if the offender pleaded guilty.

The court should take into account any period the offender has spent on remand in connection with the offence or a related offence. The offender will get no credit for time served on remand unless it is taken into account when setting the minimum term. The court should normally subtract the time for which the offender was remanded from the punitive period it would otherwise impose in order to reach the minimum term.

### Transitional Cases

Note: Sentence on or after 18 December 2003, for an offence pre-dating 18 December 2003

Where a convicted murderer is sentenced on or after 18 December 2003 for an offence that took place before that date the Crown Court will set the minimum term, pursuant to section 269 Criminal Justice Act 2003, and according to the new statutory framework.

The trial judge will consider the seriousness of the offence by applying Schedule 21, and the aggravating and mitigating factors. However, because the offence pre-dates the statute, the judge must apply an additional test (paragraph 9, Schedule 22 Criminal Justice Act 2003).

This is to ensure that an offender cannot receive a sentence greater than he could have received at the time that he committed the offence, and so as not to fall foul of article 7 of the European Convention on Human Rights as incorporated into domestic law by the Human Rights Act 1998.

R v Duncan Jackson [2011] EWHC 1628 (QB) held that a defendants' rights under Article 7 would only be infringed if the minimum term fixed was longer than the tariff which could have been set as opposed to what would have been more likely set if he had been sentenced shortly after the offence was committed.

This additional test is found in paragraph 10, Schedule 22 Criminal Justice Act 2003. It states that the court may not set a minimum term greater than one that the Home Secretary would have set before December 2002, or make a whole life order unless the Home Secretary would have done so before that date. In other words, the court is required to determine a minimum term according to the new framework, then go on to determine what the decision of the Home Secretary would have been to ensure that the minimum term is no greater than this.

How to predict the Home Secretary's decision was considered in R v Sullivan, R v Gibbs, R v Barry Elener, R v Derek Elener [2004] EWCA Crim. 1762. [2005] 1 Cr. App. R. (S.) 67 where the Court of Appeal ruled that, as a point of future practice, the judge should apply the Practice Statement of 31 May 2002.

## Appeals

Section 271 of the Criminal Justice Act 2003 provides defendants with a right of appeal against the duration of the minimum term.

Similarly, section 36 of the Criminal Justice Act 1988 now applies to minimum terms set under section 269(2), giving the Attorney General the power to refer cases to the Court of Appeal on the basis of being unduly lenient.

In section 36 of the Criminal Justice Act 1988, a new subsection 3(A) has been inserted. This states that in an appeal of an unduly lenient minimum term, the Court of Appeal shall not make any allowance for the fact that the person to whom the minimum term relates is being sentenced for a second time. Apart from this specific reference to the so-called 'double jeopardy' rule, the procedures and time limits for such a reference are the same as with any other qualifying offence, and Areas will need to ensure compliance.

**Issues relating to the mandatory life sentence for murder**

<http://www.bbc.co.uk/news/uk-15464874>

Life sentences 'to be mandatory for more crimes'

Mandatory life sentences will for the first time be extended to crimes other than murder under plans set out by Justice Secretary Ken Clarke.

Anyone convicted of a second serious sexual or violent crime in England and Wales would get an automatic life term.

A new offence for 16 and 17-year-olds of threatening with a knife would also carry a mandatory custodial term.

Labour's Sadiq Khan welcomed the knife measure but said other changes could see dangerous offenders freed.

Mr Clarke is proposing to scrap indeterminate sentences, introduced by Labour, which prevent offenders being freed until the parole board has ruled they no longer pose a danger to the public. Describing them as "failed", he said he wanted to bring in "more certain sentences".

"We've got 6,000 people languishing in prison, 3,000 of whom have gone beyond the tariff set by the judge, and we haven't the faintest idea when, if ever, they are going to get out," he told BBC Radio 4's Today programme.

"It's a gross injustice, a bit of a stain on our system."

Work and Pensions Secretary Iain Duncan Smith said the government should increase the number of prison places if the new sentencing policy resulted in more people being sent to jail.

Speaking on BBC One's Question Time programme, he said the government "has to allocate the resources" if there is a need for more places.

**'Near murderous'**

Meanwhile Mr Khan, the shadow justice secretary, said the plan "does not address the problem of unreformed offenders who have completed their sentence being released to commit crime and inflict harm on the public".

He added: "Under this government's plans, offenders who are a danger to the public could still be released from prison. They are taking an unnecessary risk with public safety."

Mr Clarke said the new automatic life sentences would apply to somebody who had committed two "probably near murderous attacks".

The Ministry of Justice (MoJ) confirmed the changes would not apply retrospectively to current prisoners, but Mr Clarke told the BBC he would consult on rule changes that could make it easier for prisoners currently serving indeterminate sentences to be released.

Mr Clarke said the parole board "hardly ever releases anybody", adding: "The parole board ought to have a positive reason for wanting people to stay in rather than them having to prove it's safe to let them out."

Justice campaigners said they were concerned about the proposals, revealed a day after Mr Clarke told MPs that judges should have discretion over sentencing and said mandatory sentences were not the British way.

On Tuesday, Mr Clarke told MPs mandatory sentencing was "rather an American thing" and to have a situation in which, for example, a 13 was automatically imprisoned without a judge being able to use his discretion would "rather go against how we normally approach the sentencing of juveniles".

Asked whether he had changed his mind since then, Mr Clarke said he had not, although some people had tried to "carefully select little bits of what I said" to suggest a U-turn.

He said he remained "flatly against" the idea of mandatory jail terms for under 16s, but was creating the new offence for 16 and 17 year-olds which would result in automatic detention.

**'Clear message'**

Those convicted under the knife crime proposals, announced on Wednesday evening, would face four-month detention and training orders. Automatic jail terms are already planned for adults.

"Clearly any extension of this sentence to children requires very careful consideration," said Mr Clarke. "However, we need to send out a clear message about the seriousness of juvenile knife crime."

MoJ figures suggest between 200 and 400 teenagers aged 16 and 17 could be jailed every year for using a weapon to threaten others.

Frances Crooke, chief executive of the Howard League for Penal Reform, said she was "worried" about the proposals for mandatory life terms.

"We have nearly 12,000 life sentence prisoners - that's more than Russia, Poland, German and France all added together," she said.

"We are using the mandatory life sentence and discretionary life sentences like confetti already and it is causing huge problems in prisons."

Juliet Lyon, director of the Prison Reform Trust, said: "Subject to good sentencing guidelines, what's wrong with allowing the courts to make sure that the sentence fits the crime?"

Meanwhile, Desmond Hudson, chief executive of the Law Society, which represents solicitors, warned that expanding mandatory life sentences to cover more offences was not the way to replace the indeterminate sentences.

"Both measures will erode the sentencing judge's discretion to find the most appropriate penalty," he said.

Further planned changes to the sentencing regime in courts include:

* Extending the category of the most serious sexual and violent offences to include child sex offences, terrorism offences and "causing or allowing the death of a child" so that the new provisions will apply to them
* The Extended Determinate Sentence (EDS) - all dangerous criminals convicted of serious sexual and violent crimes will be imprisoned for at least two-thirds of their sentence, ending the release of these offenders at the halfway stage
* Offenders convicted of the most serious sexual and violent crimes in this category will not be released before the end of their sentence without parole board approval
* Extended licence period - criminals who complete an EDS must then serve extended licence periods where they will be closely monitored and returned to prison if necessary
* Courts have the power to give up to an extra five years of licence for violent offenders and eight years for sexual offenders on top of their prison sentence

The new measures will be debated in the House of Commons next week and, if passed, will be added to the Legal Aid, Sentencing and Punishment of Offenders Bill which is currently going through Parliament.

Magistrates condemn government plan to extend mandatory sentences

<http://www.guardian.co.uk/politics/2011/oct/27/kenneth-clarke-two-strikes-life-sentencing>

Kenneth Clarke's proposals seek to extend mandatory life sentences to an offence other than murder for the first time. Photograph: David Jones/PA

Magistrates have hit out at the government's plan to extend the use of US-style mandatory sentences, including to juveniles, warning ministers that there will always be "rare or exceptional circumstances" in which they are not appropriate.

John Bache, the chairman of the Magistrates Association youth courts committee, said that while he agreed that removing knives from the streets was of paramount importance, the Magistrates Association was against mandatory sentences.

He said that, whatever the offence committed, youths lacked "the maturity of thought of adults and must be treated accordingly".

Bache's comments came in response to the proposal to introduce a mandatory four-month detention and training order for any 16 or 17-year-old caught using a knife in a threatening manner.

The proposal is part of a raft of [sentencing](http://www.guardian.co.uk/law/sentencing) changes that MPs will be asked to approve as amendments to [Kenneth Clarke](http://www.guardian.co.uk/politics/kenneth-clarke)'s legal aid, sentencing and punishment bill next week.

The other changes to the justice secretary's legislation include a "two strikes and you're out" mandatory life sentence for anyone convicted of a second serious sexual or violent crime and a move to extend mandatory life sentences to cover crimes other than murder for the first time.

The first "most serious sexual or violent offence" that will be covered by the "two strikes" policy will have to have carried a prison sentence of at least 10 years for the second conviction to trigger a life sentence.

The proposal to extend the mandatory life sentence for a first offence other than murder will include child sex offences, categories of terrorism and "causing or allowing the death of a child".

Clarke told the BBC the two strikes policy would apply to somebody who had committed two "probably near-murderous attacks".

The justice secretary appeared to suggest that the decision to extend the coverage of the mandatory life sentences to offences other than murder, such as child sex, would affect about 20 cases a year.

Ministry of Justice figures suggest the new mandatory minimum sentence for juvenile knife crime could affect a further 200 to 400 cases a year. A detailed impact assessment for the package is to be published shortly. The changes will not be applied retrospectively.

The surprise announcement marks a return to a more traditional "lock 'em up" approach to law and order by the coalition, and deals a further blow to Clarke's hopes of a more liberal penal policy that would stabilise the prison population.

The package represents a major extension of the use of US-style minimum mandatory sentences into the British legal system and comes after a fierce cabinet battle.

Clarke is reported to have repeatedly clashed with the home secretary, [Theresa May](http://www.guardian.co.uk/politics/theresamay), over the issue, with the matter believed to have only been settled by the intervention of [David Cameron](http://www.guardian.co.uk/politics/davidcameron) on Wednesday. Clarke appears to have won a concession that children under 16 will not be affected.

Clarke made clear his opposition to the use of mandatory sentences at a hearing of the Commons home affairs committee on Tuesday, indicating that he preferred to give judges discretion to set sentences based on the facts of the cases for nearly all crimes but murder.

He also made clear his view that a minimum mandatory sentence for juveniles under 18 was not part of the traditions of the British criminal justice system.

The sentencing regime announced on Wednesday includes replacing the much-criticised indeterminate sentence for public protection (IPP) – which has left 6,500 prisoners without a set release date – with fixed-term sentences. Dangerous criminals will in future serve at least two-thirds of the new sentence.

The new sentencing regime detailed by the Ministry of Justice includes:

The new sentencing regime includes:

• A four-month mandatory custodial sentence for aggravated knife possession for 16 and 17-year-olds, but not for younger children. Those convicted of using a knife or offensive weapon to threaten and endanger will be given a four-month detention and training order. Adults are to face an automatic six-month sentence for the same offence.

• The "two strikes and you're out" mandatory life sentence for anyone convicted of a second very serious sexual or violent offence.

• The extended determinate sentence (EDS) for dangerous criminals convicted of a serious and violent sexual crimes, who will serve at least two-thirds, scrapping the current consideration of parole at the halfway point. Release for those in the most serious category serving this sentence will require the approval of the parole board, and those paroled will be under recall licence for at least 10 years.

• An extended licence period. Those who have served an EDS will have to serve a further period on licence – an extra five years for sex offenders and eight years for violent offenders – during which they can be recalled to prison if necessary.

Clarke said he expected more dangerous offenders to get life sentences, adding: "The new regime will restore clarity, coherence and common sense to sentencing and give victims a clearer understanding of how long offenders will actually serve in prison.

"We have already announced that we are bringing in an automatic prison sentence for any adults who use a knife to threaten and endanger.

"Clearly any extension of this sentence to children requires very careful consideration. However, we need to send out a clear message about the seriousness of juvenile knife crime, so we are proposing to extend a suitable equivalent sentence to 16 to 17-year-olds, but not to younger children."

Clarke told BBC Radio 4's Today programme he wanted to replace the "failed" IPP sentences with a more certain regime, adding: "We've got 6,000 people languishing in prison, 3,000 of whom have gone beyond the tariff set by the judge, and we haven't the faintest idea when, if ever, they are going to get out.

"It's a gross injustice – a bit of a stain on our system."

**Public Survey of the Mandatory Life Sentence for Murder**

<http://www.nuffieldfoundation.org/news/public-survey-mandatory-life-sentence-murder>

28 October 2010

New research suggests that public support for the mandatory sentence of life imprisonment for murder is much more limited than has traditionally been assumed.

Furthermore, public opinion on the sentencing of murderers seems to be based on a limited understanding of the current system, according to the survey by Professor Barry Mitchell, of Coventry University Law School, and Professor Julian Roberts, from the Law Faculty at the University of Oxford.

The researchers, funded by the Nuffield Foundation, found no evidence of widespread public support for automatically sentencing all convicted murderers to life imprisonment, although the level of public support increased for more serious cases of murder.

These findings confirm previous research by Professor Mitchell that the public believe different scenarios warrant different sentences; given the choice in a range of cases, they would support applying different sentences. Although at present it is unclear how far there is a consensus about what constitutes a particularly serious murder.

The vast majority of people incorrectly assume the murder rate in England and Wales has increased over the past decade, or at the very least has stayed the same, when it has actually begun to decline somewhat. A large proportion of those surveyed underestimated the length of time that most murderers spend in prison before being released on life licence.

If the law is to broadly correspond to public opinion, serious consideration should be given to restructuring the law of murder so that the mandatory life sentence is retained only for particularly serious cases. A recommendation along these lines was made by the Law Commission in 2006, but no action was taken by the Labour government.

The coalition government has committed to publishing a Green Paper on sentencing and rehabilitation in the coming months.

Professors Mitchell and Roberts also called for greater awareness and better understanding of the state’s response to murder, in an effort to produce greater confidence in the criminal justice system.

[Download *Public opinion and sentencing for murder: An empirical investigation of public knowledge and attitudes in England and Wales*](http://www.nuffieldfoundation.org/sites/default/files/files/Public%20Opinion%20and%20Sentencing%20for%20Murder_Mitchell&Robertsv_FINAL.pdf)

**ENDS**

For further information contact Frances Bright, Communications Manager on 020 7681 9586 (out of hours 07891 730937)

**Notes**

**1.** The full report, *Public opinion and sentencing for murder: An empirical investigation of public knowledge and attitudes in England and Wales* by Barry Mitchell and Julian Roberts is attached. It will be published online at [www.nuffieldfoundation.org](http://www.nuffieldfoundation.org) on Friday 29 October 2010.

**2.** There were two stages to the research: face-to-face interviews with 1,027 people, and six focus groups.

**3.** The Nuffield Foundation is charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. It has funded this project, but the views expressed are those of the authors and not necessarily the Foundation.

**4.** Murder cases in England and Wales currently require the judge to pass a sentence of life imprisonment for convictions of murder. Discretion is given to the judge to recommend how long the murderer must spend in prison before s/he can apply for release on licence.

**5.** In November 2006 the Law Commission recommended changes to the murder law that would reduce the scope of the offence (which the Commission called “murder in the first degree”) and thus reduce the cases which would continue to attract a mandatory life sentence (*Murder, Manslaughter and Infanticide*, Law Com No 304 (2006) para 9.5, London TSO).

**6.** The Justice Secretary Kenneth Clarke announced plans for a Green Paper on sentencing and Rehabilitation on 30 June 2010 [www.justice.gov.uk/sp300610a.htm](http://www.justice.gov.uk/sp300610a.htm)

**PUBLIC OPINION AND SENTENCING FOR**

**MURDER**

[**http://www.nuffieldfoundation.org/sites/default/files/files/Public%20Opinion%20and%20Sentencing%20for%20Murder\_Mitchell&Robertsv\_FINAL.pdf**](http://www.nuffieldfoundation.org/sites/default/files/files/Public%20Opinion%20and%20Sentencing%20for%20Murder_Mitchell&Robertsv_FINAL.pdf)

*An Empirical Investigation of Public Knowledge and Attitudes in*

*England and Wales*

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Report for the Nuffield Foundation

**Background to the law and sentencing of homicide in England and**

**Wales**

Prior to the Homicide Act 1957, all persons convicted of murder in England and Wales

were sentenced to death. The 1957 Act introduced a distinction between “capital” and

“non-capital” murders, with the consequence that only the former continued to attract the

death sentence; non-capital murderers were subject to a mandatory sentence of life

imprisonment. The death penalty for murder was wholly abolished by the Murder

(Abolition of Death Penalty) Act 1965 after it became apparent that the distinction

between capital and non-capital cases was unsatisfactory. Since then, trial judges have

been required to impose a life sentence on all persons convicted of murder. It was

assumed that anything less than automatic indefinite imprisonment would undermine

public confidence in the criminal justice system. Until now this assumption has never

been tested, however. One of the principal goals of the current research project was to

explore the consequences on public opinion of abolishing the mandatory life sentence for

murder.

1 See, for example, Select Committee of the House of Lords, *Report on Murder and Life Imprisonment,*

*volumes 1 – 3,* HL Paper 78 (1989) London: HMSO; and Committee on the Penalty for Homicide, *Report*

(1993) London: Prison Reform Trust.

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The mandatory life sentence effectively consists of two distinct stages. The first is now

known as the “minimum term” – formerly referred to as the “tariff” – which is a period of

imprisonment that is intended to reflect the seriousness of the murder. In the vast majority

of cases this term must be served in full, though it is possible for a prisoner to be released

(on licence) before the expiry of the minimum term in very exceptional circumstances.

When the minimum term has expired, the offender can be considered for release on

licence, but whether release occurs will depend on the perceived risk that s/he poses to

the public. In other words, release on licence is not automatic on expiry of the minimum

term; a murderer will be detained in prison until s/he no longer poses an unacceptable

danger to the public.

Until quite recently, the Home Secretary was responsible for setting the minimum term

and deciding whether to release a murderer if recommended to do so by the Parole Board.

But following rulings in the European Court of Human Rights, these responsibilities were

removed from the Home Secretary. In *R (Anderson) –v- Home Secretary2* the Court held

that the Home Secretary’s power to fix the minimum term was incompatible with article

6(1) of the European Convention on Human Rights (the right to an independent and

impartial tribunal), and in *Stafford –v- UK3* the Court stated that mandatory lifers are

entitled to a review of the legality of their continued imprisonment under article 5(4).

*Schedule 21 of Criminal Justice Act 2003*

In response to this latter decision in the European Court, the then Home Secretary sought

to reassert political influence in these matters. This resulted in section 269 of the Criminal

Justice Act 2003 being passed which requires the sentencing court in murder cases to

have regard to the principles contained in Schedule 21 to the Act when determining the

minimum term. This provision of the Act identifies three starting points: - a whole life

(i.e. the murderer must spend the rest of his/her natural life in prison) in exceptionally

serious cases, as in the murder of two or more people where each murder involves

premeditation, torture of the victim, or sexual or sadistic conduct; the sexual or sadistic

murder of children; murder to advance a political, religious, racial or ideological cause; or

murder by a previously convicted murderer.

For particularly serious cases the starting point is 30 years – the murder of a police or

prison officer in the course of their duty; murder involving a firearm or explosive; murder

for gain; murder that is intended to obstruct or interfere with the course of justice; a

sexual or sadistic murder; the murder of two or more people; murder aggravated by

racial, religious or sexual orientation; or any of the murders which would point to a whole

life tariff if committed by a person under 21 years at the time of the offence. Finally, the

starting point is 15 years for murders not falling within the other two categories. These

provisions are not meant to be definitive or absolutely mandatory – the factors identified

should “normally” indicate such a starting point: the judge should have regard to them

but need not follow them, but if the court departs from them it must explain the reasons

2 [2002] UKHL 4.

3 (2002) 35 EHRR 121.

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for so doing.4 The sentencing judge is then entitled to take into account other aggravating

and mitigating factors5 in determining the minimum term, which is announced in court.

*Role of the Parole Board of England and Wales*

Just before the minimum term expires, prisoners can formally apply to the Parole Board

for release on licence. The test for release is whether the Board is “satisfied that it is no

longer necessary for the protection of the public that the prisoner should be confined”.6

The Board may direct the Secretary of State for Justice to release the prisoner on licence,

or it may reject the prisoner’s application. The Secretary of State cannot order release if

the Parole Board has not directed him or her to do so. The majority of convicted

murderers serve a lengthy period in prison and are then released into the community “on

licence”, i.e. under supervision and subject to various constraints. The life licence is

indefinite; it remains in force until the licensee dies.7 It stipulates that the licensee must

comply with certain conditions such as reporting to a supervising probation officer, and

having approved accommodation. The licence is revocable in the event that the licensee

breaches its terms, and licensees are liable to be recalled to prison. A small minority of

offenders convicted of murder remain in prison for the remainder of their natural lives.

*Law Commission Proposals*

Like most, if not all, jurisdictions, the criminal law of England and Wales recognises a

distinction between what are regarded as the more serious homicides – namely murder

(which attracts a mandatory life sentence) - and those which are less serious – namely

manslaughter (which carries a discretionary life sentence). Murder requires an intent

either to kill or to cause serious injury to someone, together with an absence of any

recognized mitigating factor (i.e., that the killing was provoked, that the killer’s

responsibility for his actions was substantially impaired, or that the killing was in

pursuance of a suicide pact). If one of these mitigating factors is present, or if the

offender lacked an intent to kill or cause serious injury (but fulfilled certain other criteria

which rendered the homicide sufficiently culpable, such as killing through gross

negligence or recklessness, or in the course of some other crime), then the appropriate

offence of conviction should be manslaughter.

In 2003, the Law Commission of England and Wales was asked by the government to

review areas of the homicide law which had attracted criticism and controversy, namely

the partial defences of provocation and diminished responsibility (which, if successful,

reduce the offence to manslaughter), and the use of excessive force when acting in selfdefence

(which is no defence at all). After a consultation process the Law Commission

concluded that “[t]he present law of murder in England and Wales is a mess. There is

both a great need to review the law of murder and every reason to believe that a

comprehensive consideration of the offence and the sentencing regime could yield

4 *Sullivan* (2005) 1 Cr App R 23.

5 For example, there should be a discount for pleading guilty.

6 Section 28(6)(b) of the Crime (Sentences) Act 1997.

7 Section 31(1) of the Crime (Sentences) Act 1997.

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rational and sensible conclusions about a number of issues. These could include the

elements which should comprise the substantive offence; what elements, if any, should

elevate or reduce the level of culpability; and what should be the appropriate sentencing

regime” (Law Commission, 2004, para 2.74). In 2005 the government responded to the

Law Commission’s proposals by asking the Law Commission to carry out a wider review

of the homicide law, but unfortunately the terms of reference expressly excluded

consideration of the mandatory life sentence (Law Commission*,* 2006, para 1.1).

Over the years, commentators have argued that the current definition of murder is both

over-inclusive (for example, by allowing an intent to cause serious harm to suffice and

thereby treating lesser cases as murder), and over-exclusive (for example, by insisting

that the killer intended death or serious harm, when the label “murder” should apply to

some killers who are merely reckless as such injury or homicides which are committed in

certain circumstances, such as in the course of other serious offences).8 In its review the

Law Commission (2006, para 9.5) concluded that an intent to cause serious harm per se is

insufficient, and recommended that for the worst types of criminal homicide (which it

described as “murder in the first degree”) the killer should either intend to kill or cause

serious harm whilst also being aware of a serious risk of causing death.

Following publication of the Law Commission’s report the Ministry of Justice assumed

responsibility for the review of the homicide law, and published proposals to amend the

partial defences of provocation and diminished responsibility, the crime of infanticide,

and the law regarding complicity, many of which were set out in the Coroners and Justice

Bill. The Coroners and Justice Act 2009 received royal assent in December 2009 and

changes to the substantive homicide law – more particularly, to the partial defences of

provocation and diminished responsibility - are due to come into force on 4th October

2010. Again, however, the sentencing arrangements for murder have been excluded from

discussion because the assumption continues to be made that there is overwhelming

public support for the existing penal law, and that any weakening of the mandatory

sentence might be changed would cause a loss of public confidence in the criminal justice

system.

*Joint enterprise liability in homicide*

A further controversial element of the law relates to the liability of people who do not

themselves directly commit the offence but give assistance or encouragement to others to

do so. This is sometimes generally referred to as “accessorial liability”, and there are

specific concerns in relation to homicide when two individuals act in what is often called

a “joint criminal enterprise” – i.e. they have a common intent to commit a criminal

offence.9 In particular, there is uncertainty in the law where D assists or encourages P and

P subsequently kills V. Depending on issues such as (1) whether the jury think that P’s

act is fundamentally different from that which D envisaged; (2) whether they think D

foresaw that P would or might kill whilst intending to kill or cause serious injury; and (3)

8 Such arguments are neatly summarized in Ashworth (2009).

9 These issues were addressed and proposals for reform were made by the Law Commission in 2007; see

*Participating in Crime,* Law Com No 305 (2007) Cm 7084, London; TSO.

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the line of legal authority which the court chooses to follow, D may be convicted of murder or manslaughter, or neither.

**Self-Defence**

[**http://www.guardian.co.uk/commentisfree/libertycentral/2010/jun/14/reasonable-law-on-self-defence**](http://www.guardian.co.uk/commentisfree/libertycentral/2010/jun/14/reasonable-law-on-self-defence)

The self-defence law does not need unreasonable changes | Issy McCann

The debate about the law on self-defence is populated with larger-than-life figures. Most notoriously, there's [Tony Martin](http://www.guardian.co.uk/commentisfree/libertycentral/2010/jun/14/%20http:/www.guardian.co.uk/uk/2000/apr/20/tonymartin.ukcrime3), the Norfolk farmer with the shotgun and the booby-trapped stairs, and there's [Munir Hussain](http://www.guardian.co.uk/commentisfree/libertycentral/2010/jun/14/%20http:/www.guardian.co.uk/commentisfree/2009/dec/15/self-defence), the Asian businessman with the cricket bat, whose family was tied-up and threatened. It may be that the source of the widespread interest in the issue is not a well-grounded fear of what would happen if we confronted an intruder, but the old Tory romance of the Englishman, whose home is his castle. After all, if the expenses scandal taught us anything, it's that at least one Tory MP did have a moat.

Outside the realms of fiction, and in the corridors of power, the coalition partners are hesitating over the promise, made by the Tories in opposition, to amend the law on self-defence. Detailed plans have been sidelined and the talk now is of altering the law "if necessary" and after ["consulting with officials"](http://news.bbc.co.uk/1/hi/politics/10249894.stm).

The truth is that the Conservative proposal was always a tawdry one: practically useless and theoretically dangerous. You can only be prosecuted for using force in self-defence if your act is not "reasonable". The Tory idea, first put forward by Patrick Mercer in a private member's bill, is to change the standard to ["grossly disproportionate".](http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf)

The amendment would not have affected the outcome of either the Tony Martin or the Munir Hussain case. Neither man was prosecuted because their actions were not reasonable. They were prosecuted because their actions were not in self-defence. They wielded their cricket bats and shotguns against criminals who were already fleeing empty handed.

Only the outcomes of cases where an act of self-defence was considered not reasonable, but also not grossly disproportionate, could be affected by this bill. It's a subtle distinction. The Ministry of Defence document, ["Are juries fair?"](http://www.justice.gov.uk/about/docs/are-juries-fair-research.pdf), recently found that 69% percent of jurors in the study were unable to identify the key questions they were being asked to decide in cases involving force used in self-defence. It's hard to believe that slightly altering one of those questions would change the verdicts they came to in most cases.

So the importance of the amendment is largely theoretical. Mercer thinks it would resolve an inconsistency in the law. At the moment, all acts of self-defence that are not reasonable are criminal, but those who suffer them cannot claim civil damages unless the act was "grossly disproportionate". This situation arose ad hoc, after provision was made in the [Criminal Justice Act 2003](http://www.opsi.gov.uk/acts/acts2003/en/03en44-b.htm) to avoid the public outcry that would have resulted if burglar Brendon Fearon had claimed damages against [Tony Martin](http://www.guardian.co.uk/uk/tonymartin).

Nonetheless, and funnily enough, the current state of the law actually makes quite a lot of sense. Civil and criminal law have different purposes. Criminal law is designed to maintain law and order in society, while civil law aims to uphold the rights of individuals and provide redress for those who are wronged. When force of any kind is used against, say, a burglar, many people do not see him (it nearly always is a him) as personally wronged, because he provoked the attack. For example, few people would see someone as wronged when, having punched someone in aggression, he or she gets punched back, even if it is with disproportionate (but not grossly disproportionate) force. If they are correct, then it is right that there is no civil redress unless the force used is actually grossly disproportionate.

But the punch might still properly be seen as a criminal offence, because it constitutes a threat to law and order. The problem with the Tory plan is that it would shift the focus of the law away from whether or not it does. As [Carl Gardner points out](http://www.guardian.co.uk/commentisfree/libertycentral/2009/dec/21/self-defence-chris-grayling) reasonable means "reasonable in the circumstances as they were understood at the time", so what matters at the moment is not really what the citizen did, but what they thought they were doing. To be reasonable is to do what you feel is necessary.

But the ["grossly disproportionate"](http://www.cps.gov.uk/Publications/docs/intruder_leaflet2005.pdf) test focuses on the act itself, permitting disproportionate force that was not proportionate because it was motivated by spite or revenge, as well as the need for self-defence. This would allow citizens to pursue punishment and revenge on the streets, instead of in the court rooms. The amended law would thus send out the message that the law has no monopoly on punishment, and that our legal system may be bypassed at will. That is why it is so strange that it is a cause célèbre for people like Colonel Patrick Mercer, who profess to hold these ancient institutions dear. We should all be glad that his plan appears to be on the back burner.

Right to self-defence in homes to be 'much clearer'

<http://www.bbc.co.uk/news/uk-politics-13957587>

Justice Secretary Ken Clarke has said a householder who knifes a burglar will not have committed a criminal offence under plans to clarify the law on self-defence in England.

He told the BBC people were entitled to use "whatever force necessary" to protect themselves and their homes.

David Cameron recently said the issue should be put "beyond doubt".

Labour said the law was "already clear" and the remarks were a "smokescreen" to hide confusion over sentencing changes.

Mr Clarke has come under attack over proposed changes to sentencing policy, but has denied making a series of U-turns on key elements amid pressure from Tory MPs and sections of the media.

He has said he is committed to axing indeterminate prison sentences, despite opposition from many Tory MPs.

He said indeterminate sentences - where prisoners can be held beyond their original release date if they still pose a danger to society - had been an "unmitigated disaster" since they had been introduced by Tony Blair and suggested an alternative to them would be in place within two years.

On people's rights to self-defence in their homes, Mr Clarke said there was "constant doubt" about the issue and the proposed legislation would make this "much clearer".

Under the terms of the 2008 Criminal Justice and Immigration Act, homeowners who use "reasonable force" to protect themselves against intruders should not be prosecuted, providing they use no more force than is absolutely necessary.

**'Absolute right'**

But the government is set to place people's right to defend their property, long present in common law, in statute law.

"It's quite obvious that people are entitled to use whatever force is necessary to protect themselves and their homes," Mr Clarke said.

Asked about what this would mean in practice, he said: "If an old lady finds she's got an 18 year old burgling her house and she picks up a kitchen knife and sticks it in him she has not committed a criminal offence and we will make that clear."

He added: "We will make it quite clear you can hit the burglar with the poker if he's in the house and you have a perfect defence when you do so."

Mr Clarke said legal protection would not extend to anyone shooting a burglar in the back when they were fleeing or "getting their friends together to beat them up".

"We all know what we mean when we say a person has an absolute right to defend themselves and their home and reasonable force.

"Nobody should prosecute and nobody should ever convict anybody who takes those steps."

But Labour said ministers had created confusion by first suggesting they were going to change existing laws before deciding merely to clarify them.

"The law is already clear - under the existing law people can rightly defend themselves and their property with reasonable force," said shadow justice secretary Sadiq Khan.

He added: "This government has used spin and smokescreens of new laws in an attempt to distract from what is a justice bill in total shambles."

**Indeterminate terms**

Mr Clarke has been defending proposed sentencing and legal aid changes in Parliament.

Although no plans to change indeterminate public protection sentences are currently included in proposed legislation debated on Thursday, Mr Clarke earlier made clear his determination to repeal them.

While some people had to stay in prison for an unspecified amount of time, he said the six-year old policy was "filling up" prisons and it was "indefensible" some prisoners did not know how long they would have to serve.

Ministers dropped plans to offer suspects pleading guilty at the earliest opportunity a 50% reduction in their jail sentences following a public consultation, but Mr Clarke suggested there would be no backtracking on this matter.

Although he would consider carefully any changes, he said more prisoners should get "fixed-length" sentences.

Tory MP Philip Davies said indeterminate sentences - 6,000 of which have been handed down - have reduced crime and Mr Clarke's stance on the issue "shows beyond all doubt that re-offending is not his priority".

"This bill is not the rehabilitation revolution or the reduced reoffending revolution we were promised," Mr Davies told the Commons.

"This is a release revolution which will simply catapult more criminals out on to the streets to commit more crimes."

A No 10 spokesman said the government was looking at the system of indeterminate sentencing "with a view to replacing it".

**Legal advice centres**

MPs also discussed the government's plans to cut legal aid in England and Wales at the second reading of Legal Aid, Sentencing and Punishment of Offenders Bill.

Under the plans, aimed at saving £300m from the £2.1bn legal aid bill, people will not be eligible for legal aid in a far broader range of civil cases than at present.

But the proposals have come under fire from lawyers and campaign groups, who claim they will lead to more crime and penalise victims.

In an effort to reassure some critics, Mr Clarke announced an additional £20m for this financial year to help fund not-for-profit legal advice centres.

"I agree that they do very important work in providing quality, worthwhile advice of the kind required by very many people who should not need adversarial lawyers," he said.

But he added that legal aid was only one of several income streams for many such organisations, with 85% of Citizens Advice Bureaux funding coming from other sources.

At the end of the debate, 295 MPs voted in favour of the bill and 212 voted against. Five Conservatives were among those who voted no.

Cameron faces questions over home defence pledge

<http://www.bbc.co.uk/news/uk-politics-13865987>

Wednesday's newspaper headlines will be dominated by David Cameron's decision to scrap controversial plans to give criminals who plead guilty at the earliest stage 50% off their jail terms.

The prime minister acknowledged, at a Downing Street news conference, that idea would have led to sentences that were "too lenient".

But he also returned to a theme he touched on in opposition - one that has occupied headline writers for more than a decade.

Remember Tony Martin?

In 1999, the Norfolk farmer shot and killed Fred Barras, 16, who, along with 29-year-old Brendan Fearon had broken in to his home, Bleak House, in Emneth Hungate, near Wisbech.

Martin was jailed for murder, and the case provoked a debate that has never really gone away: In the eyes of the law, how much force can people use when confronted by burglars in their own home?

The 2008 Criminal Justice and Immigration Act says that homeowners who use "reasonable force" to protect themselves against intruders should not be prosecuted, providing they use no more force than is absolutely necessary.

But in January 2010, David Cameron, then the leader of the Opposition, suggested changing the law made sense - both on the grounds of fairness, and saving money.

**'Perfectly legitimate'**

He told BBC One's Politics Show: "The reason for changing the law is people find it rather unclear what the current framework of 'reasonable force' actually means.

"One of the reasons for raising the threshold is to make sure fewer cases are taken to court, that fewer people are arrested for doing what I think is perfectly legitimate, which is to defend yourself in your own home."

He added: "The moment a burglar steps over your threshold and invades your property, with all the threat that gives to you, your family and your livelihood, I think they leave their human rights outside."

The implication then appeared clear: Providing the response of a homeowner was not grossly disproportionate, they would not find themselves facing a court themselves.

Now, 18 months on and over a year into the coalition government, the prime minister is fleshing out his outlook on the issue.

"We will put beyond doubt that homeowners and small shopkeepers who use reasonable force to defend themselves or their properties will not be prosecuted," he told reporters.

**Emotive issue**

But what does he mean by that?

In reality, how different would this be from how things are now?

How do you put it into law?

And is this more about grabbing a tabloid headline, given how few cases like these there actually are?

There is no reference to the prime minister's idea in the Justice Bill, because of the need for consultation on the issue first.

A spokesman for the Ministry of Justice could not add much detail, but told the BBC: "The coalition agreement contained a commitment to ensure that people have the protection they need to defend themselves from intruders, prevent crime or apprehend offenders. We will announce details of our plans shortly."

The spokesman went on to say that the law "already allows a person to use reasonable force in self defence, but we are looking at ways of clarifying the law so people are clearer about what this means in practice".

On this highly contentious and emotive issue, there remain many unanswered questions.

But 12 years on, the legacy of the Tony Martin case lives on.

**The necessary intent for murder**

**Voluntary Manslaughter**

**Provocation**

Law on provocation in killings 'a mess'

<http://www.guardian.co.uk/politics/2003/oct/31/ukcrime.prisonsandprobation1>

The law on provocation, which allows a killer to be convicted of the lesser offence of manslaughter, is in such a mess that it should be abolished in its present form, the Law Commission concludes in a consultation paper today.

It is seeking views on whether the defence of provocation should be swept away, reformed, or combined with diminished responsibility to create a new defence to a murder charge. But it has "great doubt whether a satisfactory version of the defence can be devised".

The home secretary, David Blunkett, asked the commission to look at the law because of concern that it was allowing men who kill their wives in a burst of anger to receive lenient sentences but not battered women who kill violent husbands after years of abuse.

The commission stresses it has reached no firm views and wants feedback from the public. It says the problems with the law on provocation cannot be put right by judges and need tackling by legislation. Harriet Harman, the solicitor general, who wants the law reformed so that killers can no longer blame their victims, said: "The Law Commission signals that provocation has had its day."

She said the commission's eventual conclusions after the consultation would be incorporated in a proposed domestic violence and victims bill in the new year.

# Push To End 'Crimes Of Passion'

<http://news.sky.com/home/politics/article/15058684>

## Men who murder their wives will no longer be able to use the excuse they were provoked by nagging or infidelity, under Government plans.

At the moment, someone who kills their partner can escape a murder conviction by pleading the defence of provocation.

That sees them tried for manslaughter instead - sometimes allowing them to avoid jail altogether.

However, the new plans would see the defence scrapped.

It follows concerns that men were using it to escape the full force of the law while women who should legitimately have been allowed to plead it were being prevented from doing so.

A series of past cases saw men receive relatively light sentences for killing women after pleading that they were being nagged or in a jealous rage after finding out about an affair.

At the same time, women who killed men after suffering prolonged sexual or physical abuse have often received harsher sentences, prompting equal rights activists to campaign on the issue.

### Cases That Sparked Outrage

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| **::** In 1991, Joseph McGrail walked free from court after standing trial for kicking his common-law wife to death.  The judge said that his "nagging" wife "would have tried the patience of a saint" and gave him a two-year suspended sentence.  **::** The following year, Abnash Bisla was killed by her husband, Rajinder Singh Bisla, in front of her two children.  Bisla said he had been nagged and the judge agreed that he had "suffered" from her "sharp tongue" and handed down a suspended sentence.  **::** Sara Thornton stabbed her alcoholic husband Malcolm to death after he abused her and repeatedly beat her up.  In 1990, she was given a life sentence for murder by a judge who told her she could have walked out of the marriage at any time - only to be freed following a retrial six years later.  **::** Teenage prostitute Emma Humphreys was convicted of murder and jailed for life after stabbing the man who had imprisoned and repeatedly raped her in 1985.  She spent over ten years in prison repeatedly trying to commit suicide until a campaign led to her successful appeal and release. |

The [**Ministry of Justice**](http://indepth.news.sky.com/InDepth/topic/Ministry%20of%20Justice) admitted there were "long-standing concerns" that the law as it stands is "too generous to those who kill out of anger and too hard on those who kill out of fear of serious violence".

The new proposals would see the defence of provocation be replaced with two new ones - that of killing in response to a fear of serious violence, or following words or conduct that give the defendant a sense of being "seriously wronged".

Solicitor General Vera Baird QC said: "I did many Court cases defending battered women who killed their violent partners, when I was a practising barrister.

"Unlike the current defence of provocation, (the new defences) can't be used when ordinary domestic conflicts cause friction and emphatically will not be available as a reaction to sexual infidelity.

"The days of sexual jealousy as a defence are over."

Welcoming the proposed changes, Minister for Women [**Harriet Harman**](http://indepth.news.sky.com/InDepth/topic/Harriet%20Harman) said: "After a man has intentionally killed his wife, bereaved relatives have said to me why is he allowed to try and get away with murder?

"He planned to kill her, he intended to kill her, he did kill her. How is this not murder?

"At the moment, the law allows him to try to get off a murder charge by claiming she provoked him, for example by being unfaithful.

"It's unacceptable if you've lost a sister, or a mother, to then be told it's her fault because she provoked him."

Nicki Norman, deputy chief executive of Women's Aid, told Sky News the charity "wholeheartedly welcomes" any change that would leave men "unable to literally get away with murder where provocation defences are based on 'nagging', jealousy or breach of so-called honour within their intimate relationships".

"Furthermore, we want to see an end to women who have experienced serious and prolonged violence at the hands of their partner being inappropriately convicted of murder through lack of recognition of the long term fear and impact of abuse," she added.

"If the legislation is to be effective, it is imperative that any changes are supported by training for prosecutors and court personnel to ensure there is awareness of domestic violence in these cases."

**Diminished Responsibility**

**When jurors have to judge sanity**

[**http://news.bbc.co.uk/1/hi/uk/7143252.stm**](http://news.bbc.co.uk/1/hi/uk/7143252.stm)

**Anthony Joseph has been detained indefinitely for killing another man on a night bus in north London in 2005. It is the latest in a series of cases which have highlighted the difficulty of judging if someone has genuine mental health problems. Is there not a better way?**

Stabbing a complete stranger to death for no apparent reason may appear - to the layman - to be the actions of a "madman".

But when it comes to the law there is a fine line between being "mad or bad".

Every year dozens of juries all over the country are asked to decide for themselves - based on often diametrically opposed views from psychiatric experts - if someone is guilty of murder or manslaughter, due to diminished responsibility.

In recent months there have been a number of high-profile trials in which there was little doubt the man in the dock was the killer but he and his legal team were seeking to persuade the jury that a mental disorder had removed his ability to form intent.

The case of Anthony Joseph was one of the hardest to judge.

Joseph's defence counsel, Philip Katz QC, claimed his client was suffering from the onset of schizophrenia when he killed Richard Whelan on a night bus in north London in July 2005.

The prosecution initially refused to accept the diminished responsibility defence. At the retrial Victor Temple, QC, said: "The defendant had been drinking and taking drugs and needed little or no excuse to turn his pent up anger against the innocent victim."

He pointed out Joseph had gone out and bought a knife only hours after being freed from prison.

Two psychiatrists gave differing views and two juries were unable to reach verdicts, with the prosecution eventually agreeing to accept the diminished responsibility plea.

Richard's family were angry and his sister, Teresa Ward, said outside court that diminished responsibility was a "defence for the indefensible".

Last week the government announced "the next step in the first comprehensive review of murder law for 50 years".

The Ministry of Justice said it was seeking the views of key "stakeholders" on a report by the Law Commission which suggested, among other things, a reform of the defence of diminished responsibility.

It promised that if changes were necessary draft legislation would be published for public consultation next summer.

A Ministry of Justice spokeswoman said: "Where mental disorder is cited as a diminished responsibility defence, a successful defence may lead to a hospital order which requires evidence from at least two psychiatrists, one of whom must be registered as having special experience in the diagnosis and treatment of mental disorder."

**Killer 'depressed'**

But in several recent cases psychiatrists have given very different views on the sanity of the defendant.

Kemal Dogan went on trial earlier this month accused of murdering his wife, Aygul, after he found her exposing herself on a webcam and flirting with another man in an internet cafe near their home in north London.

Dr Tony Nayani, giving evidence for the defence, said Dogan had been suffering from "medium to severe" depression at the time of the killing and had also reported hearing voices and seeing animals talking to him.

But two other psychiatrists disagreed with Dr Nayani's diagnosis.

One of them, Dr Thomas McLintock, told the court that Dogan was possibly "malingering" and may have been "coached by another patient".

He said there were serious inconsistencies in the symptoms Dogan was presenting and he pointed out that the defendant smiled and laughed when he was visited by his family at the John Howard Centre, a forensic mental health unit in east London.

The jury found Dogan guilty of murder and he was jailed for life.

The government has in the past suggested removing juries from complex fraud trials, although it has yet to introduce legislation.

**'Jury right forum'**

Barristers have opposed the idea of doing away with juries in fraud cases and Sally O'Neill QC, from the Criminal Bar Association, said she was similarly reluctant to remove them in homicide cases.

She said: "Expert evidence is always difficult for juries and when you have expert witnesses disagreeing then it can be very difficult.

"Sometimes the issues can be very complex but juries are usually able to form a view and I still feel the jury is the right forum. It is usually a question of presentation and that is up to the prosecution."

The Ministry of Justice insists it is right for a jury of laymen to be the final arbiters of guilt, rather than a panel of psychiatric experts.

A spokeswoman said: "In a criminal trial which relies on a jury to determine issues of guilt and criminal responsibility, the decision has to be informed but not determined by expert opinion.

"As the European Court has noted, psychiatry is not an exact science. Medical evidence on the single issue of a defendant's mental state is likely to vary widely between doctors, and much more so the issue of criminal responsibility, which turns as much on cultural as medical issues.

"The point that juries may find it hard to conclude the issue of responsibility simply reflects its complexity.

"It is not an argument for delegating the decision to expert opinion which will necessarily approach it from a narrower professional perspective, and with no greater prospect of agreement."

Justice Minister Maria Eagle said: "Murder is the most serious crime and it is essential that the law reflects this.

"The law needs to be clear and fair so that people have confidence in the criminal justice system. We want to have an open and inclusive debate on the issues before we bring forward firm proposals on how the law should be reformed."

**'Not for jurors'**

Michael Howlett, director of the Zito Trust, said he would prefer a system whereby the jury simply decided whether a defendant had committed "homicide".

"It would then be left up to the judge to decide based on the evidence - including the psychiatric evidence - what was the most appropriate way of dealing with the person who was convicted. This distinction between murder and manslaughter is way out of date," he said.

Consultant clinical psychologist, Elie Godsi, agrees and believes the current system is "flawed".

Mr Godsi, the author of Violence and Society: Making Sense of Madness and Badness, said: "Psychiatrists' opinions are not objective. It is not like diagnosing cholera or some other illness. The notion that it is clear cut is a myth."

He said it would be better to have a system whereby homicides could be graded to take into account a number of factors, including premeditation, provocation and mental illness.

Mr Godsi also pointed out that those killers who fake mental illness because they see "mad as the soft option" may be mistaken.

"They usually get banged up indefinitely and their time in hospital is proportionate to the crime they committed rather than how ill they are," he said.

Marjorie Wallace, chief executive of the mental health charity Sane, said: "The diminished responsibility plea can be abused in some rare cases, but it usually reflects that a person is not capable of rational action.

"While we recognise the concerns of victim's families and loved ones, Sane believes that the law should be able to demonstrate compassion towards those who commit crimes - however terrible - when the balance of their mind was disturbed."

http://newsimg.bbc.co.uk/nol/shared/img/v3/start_quote_rb.gif**The defence of diminished responsibility in this case has been used as a defence for the indefensible, with so much evidence showing that Anthony Joseph was an angry and vindictive man** http://newsimg.bbc.co.uk/nol/shared/img/v3/end_quote_rb.gif

Whelan family

http://newsimg.bbc.co.uk/nol/shared/img/v3/start_quote_rb.gif**The law needs to be clear and fair so that people have confidence in the criminal justice system** http://newsimg.bbc.co.uk/nol/shared/img/v3/end_quote_rb.gif

Maria Eagle  
Justice Minister

http://newsimg.bbc.co.uk/nol/shared/img/v3/start_quote_rb.gif**The diminished responsibility plea can be abused in some rare cases, but it usually reflects that a person is not capable of rational action.** http://newsimg.bbc.co.uk/nol/shared/img/v3/end_quote_rb.gif

Marjorie Wallace  
Chief executive, Sane

Wayne Royston killed a man in Bargoed, south Wales. Prosecution refused to accept diminished responsibility plea. Jailed for life for murder in Nov 2006

Stuart Harling jailed for life in Jun 2007 for murder of nurse Cheryl Moss. Harling's lawyers claimed he suffered from Asperger's syndrome and a personality disorder

Kemal Dogan given life on 12 Dec 2007. Claimed he was suffering from severe depression when he killed wife Aygul

Anthony Joseph claimed to be schizophrenic. Two trials ended in hung juries. Prosecution finally accepted plea of guilty to manslaughter on grounds of diminished responsibility. Sent to Broadmoor on 20 Dec 2007

Garath Davies convicted of murdering jogger Egeli Rasta despite diminished responsibility defence. Sentenced next month

|  |  |
| --- | --- |
| **Defence only available on charges of murder** *not* **attempted murder** | |
| **The law on diminished responsibility is contained in** [section 2 of the Homicide Act 1957.](http://sixthformlaw.info/06_misc/statutes/08_homicide_act_1957.htm#2_Persons_suffering_from_diminished_resp) | ***"Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such***   * [*abnormality of mind*](http://sixthformlaw.info/01_modules/mod3a/3_31_voluntary/01_vol_mans_dim_res.htm#Abnormality of mind) * *(whether arising from* [*a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury*](http://sixthformlaw.info/01_modules/mod3a/3_31_voluntary/01_vol_mans_dim_res.htm#a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury)*) as* * [*substantially impaired*](http://sixthformlaw.info/01_modules/mod3a/3_31_voluntary/01_vol_mans_dim_res.htm#Substantially impaired) *his* * [*mental responsibility*](http://sixthformlaw.info/01_modules/mod3a/3_31_voluntary/01_vol_mans_dim_res.htm#Impaired mental responsibility) *for his* * *acts and omissions in doing or being a party to the killing. "* |
| **Introduced because** | Problems with the very narrow definition of insanity under the M'Naghten rules.    Before the 1957 Act, over 40% of murder trials involved a plea of insanity. Now most defendants will opt of the defence of diminished responsibility.    DR is easier to prove, than insanity sometimes relying on little evidence, for example in [Price (1971)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Price (1971) The Times, 22 December 1971 (news item)) D killed his severely handicapped son.    The following examples would not equate with insanity and before 1957 so a defendant would be found guilty of murder, which was thought to be harsh.    Diminished Responsibility had long been known to the Scottish Courts.    It is not available for attempted murder. |
| **Examples of conditions held to amount to diminished responsibility** | * Perverted sexual desires that created irresistible impulses [*R v Byrne* (1960)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Byrne, R v (1960) CA) * Depression [*R v Gittens* (1984)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Gittens, R v (1984) CA) and [*R v Seers* (1985)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Seers, R v (1985) CA) * Battered Woman Syndrome [*R v Hobson* (1997)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Hobson, R v (1997) CA) and [*R v Ahluwalia* [1992]](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Ahluwalia, R v [1993] CA) * Paranoid psychosis, arising from his upbringing. [*R v Sanderson* (1994)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Sanderson, R v (1994) CA) * Alcoholism or drug addiction [*R v Tandy* (1989)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Tandy, R v (1989) CA) * Post-natal depression and premenstrual tension can constitute a disease [*R v Reynolds* (1988)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Reynolds, R v (1988) CA) * Extreme jealousy (so called "Othello syndrome" - a state of morbid jealousy for which there is no cause)[*R v Vinagre* (1979)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Vinagre, R v (1979) CA) * 'Mercy killing' where the dilemma which has caused the accused to kill can be said to have given rise to depression or some other medically recognised disorder which can be said to be the cause of an abnormality of mind [*R v Price* (1971)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Price (1971) The Times, 22 December 1971 (news item)) * Paranoid Personality disorder, thinking he was in greater danger than he was [*R v Martin* [2003]](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Martin (Anthony), R v [2002] CA) |
| **Reduces the offence to that of manslaughter** | Allowing the judge to exercise discretion in sentencing.    About 30% receive prison sentences.  An alternative sentence is a hospital order under s.37 Mental Health Act 1983. |
| **Jury to decide in new or borderline cases.** | Since 1962 pleas of diminished responsibility are decided by the prosecution and judge, if they don‘t agree it goes to the jury. New or borderline case are left to the jury.    [Peter Sutcliffe (The Yorkshire Ripper)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Sutcliffe, R v (1981) Boreham J) pleaded diminished responsibility.  He murdered 13 women. Medical reports were unanimous in suggesting that he was a paranoid schizophrenic and the prosecution were prepared to accept diminished responsibility.  The judge decided that it was in the public interest for the jury to decide on the matter. The jury returned 13 verdicts of murder.  The jury's response reflects public reaction rather than any clear cut rule of law and it illustrates rather well that in practice medical evidence alone may not be sufficient for the defence to succeed. It appears they did not accept there was “substantially impaired responsibility‘ which is a moral as well as a medical decision.    Today only about 1 in 5 cases of diminished responsibility go to a jury. |
| **Balance of probabilities** | DR is raised by the defence, who have to prove it on the preponderance of probabilities, [Dunbar [1958]](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Dunbar, R v [1958] CA). It is only argued in court when the prosecution rejects the plea or has counter evidence, for example that D is in fact insane.  The burden being on the defence does not breach the ECHR, Article 6 [*R v Lambert* [2001] HL](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Lambert, R v [2001] HL) (a drug and murder cases conjoined). |
| **The separate requirements** | |
| **Abnormality of mind** | |
| **In Byrne [1960] Lord Parker defined 'abnormality of mind' as:** | *"a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise willpower to control physical acts in accordance with that rational judgment."*  Byrne was a sexual psychopath who found it difficult, if not impossible, to control his perverted sexual desires he strangled a young woman and horrifyingly mutilated the body.    So, irresistible impulses are capable of amounting to diminished responsibility. |
| **"Abnormality of mind", which has to be contrasted with the expression "defect of reason"** | It appears to cover the mind’s activities in all its aspects. It is not limited to the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong.  It includes the ability to exercise will-power to control physical acts in accordance with rational judgment [*R v Byrne* [1960] CA](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Byrne, R v (1960) CA).    It is not necessary to show that the accused’s abnormality existed from birth **R v Gomez [1964] CA**. |
| Abnormality of mind induced by alcohol or drugs is not due to inherent causes | [*R v Gittens* [1984] CA](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Gittens, R v (1984) CA)& [*R v Fenton* (1975) CA](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Fenton, R v (1975) CA)**.**  If drinking alcohol has reached the stage that the accused’s brain has been damaged so that there is gross impairment of judgment, or the accused drinks alcohol because he can no longer resist the impulse to drink, the defence of diminished responsibility is available [*R v Tandy* [1989] CA](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Tandy, R v (1989) CA).    If D was intoxicated during a killing and also has an abnormality of the mind, the intoxication can contribute to his diminished responsibility; [*R v Dietschmann* [2003]](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Dietschmann (Anthony), R v (2001) CA). He does not have to show he would still have killed if sober. |
| **A condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury** | |
| **This includes absence not only of the ability to tell right from wrong but also of the willpower to control physical acts.** | Sec 2 restricts the defence so it is not available to people who kill because of emotions such as hate or jealousy (but note that so called "Othello Syndrome" is a more serious form of jealousy and was allowed, but this is doubted; [*R v Vinagre* 1979 CA](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Vinagre, R v (1979) CA)).    Depression or a medical disorder can be linked to either an “inherent cause‘ or “disease‘  Diminished responsibility must occur because of one of the reasons in the list any other cause will not suffice. The Act does not provide that a defence of diminished responsibility must be based on medical evidence, such a defence is not likely to succeed without such evidence **R v Dix (1981) CA.**  Lord Parker in [*R v Byrne* [1960]](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Byrne, R v (1960) CA)  *"medical evidence is no doubt of importance, but the jury are entitled to take into consideration all the evidence, including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence if there is other material before them which, in their good judgment, conflicts with it and outweighs it" .*  **‘arrested or retarded development’** Is assumed to mean what was formerly referred to as ‘mentally subnormal’ individuals [*R v Egan* [1992]](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Egan, R v [1992] CA).  ‘Inherent cause’ is widely assumed to allude to functional mental illness as opposed to organic disease or injury [*R v Sanderson* (1993)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Sanderson, R v (1994) CA),    The issue which has arisen in connection with the defence is what is meant by disease in this context. Is battered woman’s syndrome a disease or injury?    There is a medical list – the British Classification of Mental Diseases – of recognised mental diseases and currently it does include battered women’s syndrome [*R v Hobson* [1998]](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Hobson, R v (1997) CA).    Alcoholism at the level of an irresistible impulse to take drink can give rise to a defence of diminished responsibility [*R v Tandy* (1987)](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Tandy, R v (1989) CA). However, mere intoxication on a particular occasion or desire for alcohol or drugs that falls short of ‘irresistible’ cannot be regarded as a disease or an injury for these purposes [*R v O’Connell* [1997]](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#O’Connell, R v [1997] CA).    If someone is intoxicated and also suffering from arrested or retarded development (for example) the jury does not have to consider what the effect would have been if the defendant were not intoxicated [*R v Dietschmann* [2003]](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Dietschmann (Anthony), R v (2001) CA).    Injury is usually taken to apply to organic or physical condition of the brain or parts of the body which can affect behaviour. |
| **Substantially impaired** | |
| **The abnormality of the mind had to be such as to substantially impair the defendant's responsibility for his actions.** | But this does not require that the defendant is not at all responsible for his actions.    ‘Substantially’ allows the jury to consider the issue of degree.    The word means more than some trivial degree of impairment but less than total impairment [*R v Lloyd* [1967]](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Lloyd, R v [1966] CA).    ‘Substantially’ suggests some quantitative assessment, which suggests a moral judgment.  Medical witnesses feel uneasy about testifying about responsibility which is a  legal or moral concept but do so in order that the defence can work. |
| **Impaired mental responsibility** | |
| **‘Mental responsibility for his acts’** | Means the extent to which the accused’s mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will-power to control his physical acts [*R v Byrne* [1960] CA.](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Byrne, R v (1960) CA) |
| **Diminished responsibility is not a medical diagnosis, it is a legal concept which ultimately only a jury can decide** | The state of mind must by a condition of arrested development of the mind or any inherent causes along with disease or injury.    Medical evidence from at least two psychologists is also required.  Medical evidence is important but the jury is not bound to accept it.  Whether the abnormality of mind was sufficiently substantial to impair his mental responsibility is a question of degree.    Abnormalities from taking drugs or alcohol alone cannot form the basis for a defence of diminished responsibility.    An abnormality which ‘substantially impairs his mental responsibility’ involves a mental state which in popular language a jury would regard as amounting to partial insanity or being on the borderline of insanity [R v Byrne.](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Byrne, R v (1960) CA)  In [*R v Rose* [1961] PC](http://sixthformlaw.info/02_cases/mod3a/cases_33_vol_dim_res.htm#Rose, R v (1961) PC), a warning was given about directing a jury that ‘borderline of insanity’ could be equated with ‘abnormality of mind’ (case of chronic reactive depression)).    The abnormality of mind has to substantially impair the defendant’s mental responsibility for his acts or omissions.  By contrast, insanity is concerned with the ability to appreciate the nature and quality of the act.    Diminished Responsibility includes:   * the perception of physical acts and matters * the ability to form a rational judgment whether an act is right or wrong, * the ability to exercise will-power to control physical acts in accordance with that rational judgment.   The jury can take into account the medical evidence, the conduct of the accused at the time of the killing, and his statements, acts and demeanour. They are not bound to accept the medical evidence. |

**Reclassification of Homicide**

Murder sentence changes supported by top prosecutor

[**http://www.bbc.co.uk/news/uk-11224583**](http://www.bbc.co.uk/news/uk-11224583)

Calls for different degrees of murder charges have received the backing of the director of public prosecutions.

Keir Starmer told the BBC he supports calls for the introduction of first-degree and second-degree murder charges in England and Wales, along similar lines to the US system.

Critics of the current mandatory life sentence say it can be hard for juries to ascribe degrees of culpability.

The government says it is considering recommendations.

A change, which would be similar to the approach in the US, could mean that England and Wales would have a system in which first-degree murder with intent to kill carried a life sentence.

Second-degree murder, with intent to cause grievous bodily harm, would carry a discretionary life sentence, as would manslaughter.

Mr Starmer, who expressed his views to BBC Radio 4's Today programme, is the second successive holder of the post to support calls for such changes.

His predecessor, Sir Ken MacDonald, says it would be particularly helpful in cases involving what is known as joint enterprise, often used to deal with gang-related murder.

**'Firm and fair'**

Next year sees what could be the largest joint enterprise case yet, involving 20 defendants charged with murder.

Sir Ken said: "It is not just a question of people who are not guilty being convicted, there is a risk that people who are guilty will be acquitted of murder.

"My sense is that a lot of juries who instinctively kick against the idea that someone should be convicted of murder with a mandatory life sentence, if they intend less than killing.

"It should be fair, it should be firm and it should be explicable. I don't think that we are presently achieving those qualities in our homicide law."

He continued: "Many of us think that that's an aspect of the law which needs reforming, that we should have degrees of murder, rather in the way they do in the US.

"First degree would be killing with the intention to kill, second degree would be killing with intention to do grievous bodily harm.

"I think if you had those sorts of categories, it would be much easier to look at a joint enterprise case and describe particular roles and particular degrees of culpability to individual defendants, rather than sweeping up perhaps large numbers of people who in some cases might have been fairly peripheral to the enterprise," he said.

Former commissioner of the Metropolitan Police, Lord Blair, said a change in the law was "extremely sensible".

He said: "While murder must remain a very specific crime, with a very serious penalty attached to it, there are, and I think everybody can see it, different kinds of murder and different levels of culpability in those murders and I think the Americans have a very sensible idea that there are degrees of murder."

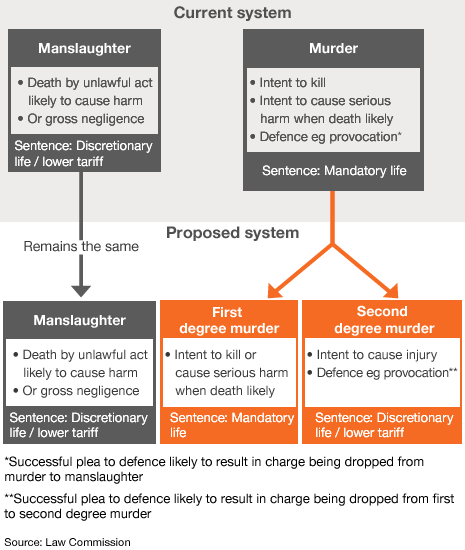
But the former Lord Chancellor, Lord Falconer, said he was not convinced of the need for a change.

"The message that the law is sending out is that we are very willing to see people convicted if they are a part of gang violence - and that violence ends in somebody's death.

"Is it unfair? Well, what you've got to decide is not 'does the system lead to people being wrongly convicted?' I think the real question is "do you want a law is as draconian as our law is, which says juries can convict even if you are quite a peripheral member of the gang which killed?"

"And I think broadly the view of reasonable people is that you probably do need a quite draconian law in that respect."

In 2004, the Law Commission, which advises the government on legal reforms, made wide-ranging recommendations for changes to legislation.



A year later, it said the homicide law was a "rickety structure set upon shaky foundations", with some of the rules being in place since the 17th century.

In a further review, published in 2006, the commission suggested a three-tier system for homicide cases, depending on their seriousness.

These were first-degree murder, carrying a mandatory life sentence; second-degree murder, with a life term at the discretion of the judge plus sentence guidelines; and manslaughter, also with a maximum penalty of life.

However, the Labour government decided not pursue a complete overhaul of the system.

Instead, it introduced new rules on provocation and some technical adjustments to the law on diminished responsibility, complicity and infanticide.

Meanwhile, the Metropolitan Police has launched its first Facebook campaign, warning young people that they can be charged with joint enterprise if they get caught up in knife crime.

The video of a staged stabbing, entitled Who Killed Deon, aims to deliver the message that "you do not have to wield the weapon to be convicted of the murder".

A Ministry of Justice spokeswoman said: "The government is aware of the recommendations put forward in the Law Commission's report on murder, which we will consider."

## Homicide law in the US

* First degree murder: Homicide with a clear premeditation to kill.
* Second degree murder: Homicide with mitigating factors such as the criminal's mental state and the manner in which the crime occurred.
* Manslaughter: Where an individual caused a death - but did not consciously set out to harm or kill.

**Non-fatal offences**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | | Actus | Mens | Mens to what | | D does not have to have the mens to cause specific injury, namely the….. |
| Sec 39 Assault | | By words/actions;  Direct or indirect [Wilson](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Wilson, R v [1955] CCA) | Intention/  Recklessness  [*Fagan v MPC*](http://sixthformlaw.info/02_cases/mod3a/cases_03_actus_contemporaneity.htm#Fagan v Metropolitan Police Commissioner [1968] QBD) | Fear of immediate violence | |
| Sec 39 Battery | | By application of force;  Direct or indirect | Intention/  Recklessness  [*Brown*](http://sixthformlaw.info/02_cases/mod3a/cases_52_assaults_consent.htm#Brown, R v (1993) HL) | (Application of force [*Venna*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Venna, R v (1975) CA)) | |
| Sec 47  ABH | | Assault Occasion (causing [objective view [*Roberts*](http://sixthformlaw.info/02_cases/mod3a/cases_53_assaults_non_contact.htm#Roberts, R v (1971) CA)] injury by assault includes battery [*Little*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Little, DPP v (1992) QBD) & [*Lyndsey*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Lynsey, R v [1995] CA))  (no battery necessary [*Constanza*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Constanza, R v [1997] CA) and [*Ireland*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Ireland, Burstow, R v (1997) HL))  (... any hurt or injury calculated to interfere with the health or comfort ... [*Miller*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Miller, R v (1954) Winchester Assizes)) | Intention/  Recklessness | (No more needed than the assault or battery [*Savage*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Savage (1), Parmenter(2), R v (1992) HL)) | | Specific ABH Injury |
| Sec 20  Wounding | | Wound  By battery | (Maliciously means "intention or recklessness"  [*Cunningham*](http://sixthformlaw.info/02_cases/mod3a/cases_11_mens_intention.htm#Cunningham, R v (1981) HL)) (and subjective foresight of consequences [*Mowatt*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Mowatt, R v (1967) CA) and [*Savage*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Savage (1), Parmenter(2), R v (1992) HL)) | Inflict some physical harm [*Mowatt*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Mowatt, R v (1967) CA) | | Specific Wounding |
| Sec 20  GBH | | Inflict (cause) GBH;    (Inflict and cause have same meaning Lord Hope in [*Burstow*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Burstow, R v [1997] HL))    (Assault not necessary [*Wilson*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Wilson. R v (1984) HL))    (Application of force not now required e.g. [escape cases](http://sixthformlaw.info/02_cases/mod3a/cases_53_assaults_non_contact.htm), stalking cases) | Maliciously (intention or recklessness)  [*Cunningham*](http://sixthformlaw.info/02_cases/mod3a/cases_11_mens_intention.htm#Cunningham, R v (1981) HL) | Inflict some harm | | Serious harm |
| Sec 18  GBH  with intent | | Cause  (inflict) GBH Assault not necessary.  Application of force not now required e.g. escape cases, stalking cases  (Inflict and cause have same meaning;Lord Hope in [*Burstow*](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Burstow, R v [1997] HL)) | Wounding with intent to do grievous bodily harm;  causing grievous bodily harm with intent to do so  maliciously cause grievous bodily harm with intent to resist arrest etc. or  maliciously causing grievous bodily harm with intent to resist arrest etc. | Cause GBH            Cause some harm. | | D does require specific mens rea for the 4 offences in Sect 18 each requires a specific intent. |
| **Definitions of the offences.** | | 1. There is still no clear statutory definition of assault and battery. 2. Much of the vocabulary antiquated and even misleading, for example ‘assault’ in section 47 and ‘maliciously’, section 20. 3. The requirement that the threat must be of immediate force to be an assault means that there is a gap in the law. Currently, it may be an assault if a person shouts that he is going to hit you, but if the threat is to hit you tomorrow, is not. | | | |
| **Lynsey, R v [1995] CA** | | **[Assault includes battery]** D detained for shoplifting struggled in the manager's office, and spat in a police officer's eye. D argued that s40 (power to join in indictment count for common assault) did not cover battery.    **Held**: Henry LJ:  *"drafting of the 1988 Act is a mess, and they must have meant to include battery in s40 as well as in s39. Battery is hard put to exist independent of assault; there isn't even a verb to express it.  So assault in normal usage includes battery."*  Henry LJ the present state of the law concerning non-fatal offences against the person *‘is yet another example of how bad laws cost money and clog up the courts with better things to do’*    **Guilty** | | | |
| **Seriousness of the offences.** | | The hierarchy of the offences in terms of seriousness can also be criticised.   * Assault and battery only carry a maximum of six months' imprisonment, and * section 47 five years, the only real difference between them is that injury is ‘occasioned’ and that injury can amount to as little as discomfort to the victim. * Section 20 offences are defined as much more serious offence than section 47, and yet they share the same maximum sentence of five years. | | | |
| **Sec 20 carries 5 years, Sec 18 leaps to life.** | | * The only significant difference between Section 20 and section 18 is more serious mens rea, and yet the maximum sentence leaps from five years to life. * Is this justified by the fact that a defendant who intends to cause GBH has the mens rea of murder (the mens rea of murder is intention to kill or cause GBH), and it is merely chance which that the victim survives, therefore chance that he is convicted of GBH or murder, therefore chance that he receives and mandatory or maximum life sentence? | | | |
| **Reform of the Offences Against the Person Act 1861** | | | | | |
| **Reform.** | | In the 1960’s the Criminal Law Revision Committee recommended that this area of the law should be reformed. | | | |
| **The Law Commission again considered the matter producing a report and draft criminal Law Bill** | | **Report = "Legislating the Criminal Code: Offences against the Person and General Principles" (1993)**  **Draft Criminal Law Bill in 1993**. No action until:  February 1998, the Home Office produced a Consultation Document in furtherance of its commitment to modernise and improve the law. This resulted in a draft Offences Against the Person Bill modelled largely, but not entirely, on the Law Commission's 1993 Draft Criminal Law Bill. | | | |
| **Law Commission Proposals** | | | | | |
| **Antiquated language** | | Bill removes the difficulty of trying to distinguish between "causing" and "inflicting" GBH  Avoids the artificial distinction between "wounding" and other bodily harm, | | | |
| **Injury; clause 15** | | "Injury" is defined as physical or mental injury.  "Physical injury does not include anything caused by disease, but.... includes pain, unconsciousness and any other impairment of a person's physical condition".  "Mental injury does not include anything caused by disease....”  'Anything caused by disease' is not an injury of either kind, except for the purpose of clause 1. | | | |
| **Criminal Law not appropriate for Transmission of disease.** | | Law Commission thought the OAP Act could be used in cases of the transmission of disease, but the government has not accepted this entirely.  It was felt that it would be inappropriate to use the criminal law where disease was transmitted through normal everyday activities.  Especially where there was a reckless transmission of relatively minor diseases such as mumps or measles even though there might be serious consequences for more vulnerable citizens. | | | |
| **AIDs?** | | As to potentially more serious diseases the government felt it is appropriate to criminalize the **deliberate** transmission of a disease causing serious illness. However, the government maintains that the existing law requires no significant change.    The case of [*R v Dica [*2003]](http://sixthformlaw.info/02_cases/mod3a/cases_51_assaults_actus.htm#Dica, R v (2003) Crown Court) the first case of biological GBH may have 'plugged' this loophole, Dica received 8 years for infecting 2 women. In 1993 the Law Commission recommended the creation of a specific offence of transmitting HIV recklessly, following the case of [Roy Cornes](http://webjcli.ncl.ac.uk/1996/issue1/ormerod1.html#introduction), an HIV-positive haemophiliac who was accused of recklessly infecting four women. He died before his case could reach court. | | | |
| **Assault and Battery Sec 39 (Clause 4)** | | The draft Bill still proceeds to use the term 'assault' for conduct that some would argue is better described as two separate offences of assault and battery. | | | |
| **Section 47 (Clause 3)** | | Intentionally or recklessly causing injury = triable either way = 5 years imprisonment.   Removes the requirement of an 'assault', which would be tidier and avoid the problem of finding an assault where there is a course of conduct (**R v Cox (Paul 1998**). | | | |
| **Section 20 (Clause 2)** | | Recklessly causing serious injury = triable either way = 7 years imprisonment | | | |
| **Section 18 (Clause 1)** | | Intentionally causing serious injury = indictable = life imprisonment. | | | |
| **Omissions?** | | could be committed by an omission but not the lesser offences | | | |
| **These three offences have now been incorporated in a Bill.** | | The Bill is based very much on the Law Commission's proposals which were widely critically reviewed. | | | |
| **Criticisms of the proposed reforms** | | | | | |
| **Why not intentional and reckless non-serious harm?** | | If there is a justifiable need to have separate offences dealing with intentional and reckless serious harm why should this not also be necessary for cases of non-serious harm? | | | |
| **Mens Rea** | | Recklessness to remain subjective. Difficulties could arise as the statutory definitions differ from the common law definitions and if, for example, a jury was also faced with an accusation of murder, they would have to understand and apply two different tests for intention. | | | |
| **What makes harm more serious? (William Wilson, Criminal Law (1998)** | | Its nature?  Its consequence?  Its effect on the victim's lifestyle?  The way it is administered?  The context in which it is administered?   No definitional distinction between serious and non-serious injury is made. | | | |
| **Horder has argued that the desire for certainty and the fair labelling principle point to the need for greater distinctions between offences.** | | He advocates the need for "moral nominalism" so that the law should reflect ordinary moral distinctions by more descriptive definitions.  Thus, there should be separate crimes dealing with mental cruelty and separate offences representing different methods of commission (disablement, disfigurement, castration etc.).    J.Horder, **"Rethinking Non-fatal Offences against the Person" (1994)** | | | |
| **Body piecing and tattooing** | | Since 1st April 2004 regulation of piercing the body and skin colouring has been a matter for local authorities.    There have been cases of septicaemia and even death as a result of this activity.  Even Henna tattoos that do not pierce the skin can cause serious problems to persons who are allergic.    Whilst not an unlawful activity it used to to be thought that there was an injury to the customer which is in excess of that allowed by common law.    This appears now to be purely academic as Parliament has regulated this activity, see the [Local Government Act 2003: Regulation of cosmetic piercing and skin colouring businesses](http://www.dh.gov.uk/assetRoot/04/07/43/12/04074312.pdf) | | | |

<http://www.lawteacher.net/PDF/Reform%20of%20OAPA.pdf>

**Violence: Reforming the Offences Against the Person Act 1861**

<http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/cpd/sou/vroapa.htm>

**CHAPTER ONE**

**INTRODUCTION**

**1.1** This paper sets out proposals for the reform of the criminal offences used to prosecute violence against individual people. The vocabulary of offences of violence against the person is part of the common currency of everyday life. Court reports and drama have made the very words grievous bodily harm and actual bodily harm deeply familiar. However familiarity does not mean that such time-hallowed offences are readily understood or that they provide an effective means for the courts to deal with violent behaviour. Criminal law that applies to violence against the person derives from both common and statute law, but the unrepealed parts of the Offences Against the Person Act 1861 provide the bulk of the statutory offences. That Act was itself not a coherent restatement of the law, but a consolidation of much older law. It is therefore not surprising that the law has been widely criticised as archaic and unclear and that it is now in urgent need of reform.

**1.2** Reforming the law on violence against the person is not just an academic exercise - criminal cases involving non-fatal offences against the person make up a large part of the work of the courts and cost a great deal of taxpayers money. In 1996 83,000 cases came before the courts. It is therefore particularly important that the law governing such behaviour should be robust, clear and well understood. Unclear or uncertain criminal law risks creating injustice and unfairness to individuals as well as making the work of the police and courts far more difficult and time-consuming. The Government’s aim is that the proposed new offences should enable violence to be dealt with effectively by the courts and that the law should be set out in clear terms and in plain, modern language. That is what the draft Bill contained in this consultation paper does. It is intended to help not only practitioners of the law but anyone who find themselves involved in court cases, whether as a defendant, victim or witness.

**1.3** The proposals in this paper are based on the work of the Law Commission as set out in its report No 218: Offences Against the Person and General Principles. That report examined the current state of the law in great detail and proposed a new set of offences ranging from intentional serious injury to assault, as well as rationalising and codifying other offences. The Government is deeply grateful to the Law Commission for the careful and painstaking work that they have done on this subject, and for the principled way they have approached it.

**1.4** The purpose of this consultation paper is to set out both the rationale and the detail of the Government’s proposals, how they relate to those of the Law Commission, and to invite comments on them. The Government recognises that reforming the law in this area can raise important questions of policy, principle and practice and wishes to ensure that the implications of its proposals are fully appreciated and that all those affected have an opportunity to contribute their views.

**1.5 The Government would welcome views on any aspects of the proposals, whether on matters of general principle and policy or on the details of the proposals. Specific questions are asked at certain points in the text: these are not exclusive but indicate that views are sought on these particular issues. The Government would particularly welcome views on the likely practical consequences of the proposed changes.**

**1.6** Responses should be sent to:

**Mrs Betty Moxon**   
*Sentencing and Offences Unit*   
*Home Office*   
*Room 323*   
*50 Queen Anne’s Gate*   
*London SW1H 9AT*

to reach her by **Friday 15 May 1998**.

*Unless confidentiality is requested, it will be assumed that responses can be made available to others.*

**Any telephone enquiries or requests for further copies of this document should be directed in the first instance to Miss Samantha Holman on 0171 273 3594.**

**This document is also available on the Internet @:http://www.homeoffice.gov.uk/index.htm**

**CHAPTER TWO**

**THE DEVELOPMENT OF THE PROPOSALS**

**2.1** This paper sets out the Government’s proposals for the reform of the law for dealing with non-fatal violence against the person. It does not deal with the law on murder or manslaughter. It does not attempt to be a full codification of the law in this area, or to replace all the common law offences that relate to violence. Its primary purpose is to replace the outdated offences contained in the Offences Against the Person Act 1861 with a rational and coherent set of new offences. In doing so it is not the Government’s intention to alter fundamentally the scope or operation of the law. It does not intend to make the law either tougher or more lenient, but to make it clearer and easier to use. In one or two minor respects the proposals will extend the scope of the present law to fill gaps that have been identified, and a few apparently archaic offences are being retained because they are still useful to the prosecuting authorities. The Government recognises that the proposed new offences will bring changes, some of them quite fundamental, to this much used part of the law. This is an important reason why the Government wishes to seek views more widely before finalising its proposals.

**Background**

**2.2** The law on Offences Against the Person has long been criticised by judges and lawyers as archaic, confusing, and unhelpful to all those involved in the criminal justice system. Some have also argued that the state of the law in this areas creates unnecessary and expensive appeals arising from wrong decisions on questions of law. It was against this background of general criticism that in November 1993, as a step towards codification of the criminal law, the Law Commission published its report No 218 "Offences against the Person and General Principles", from which the current proposals are derived.

**2.3** As the Law Commission acknowledged, their work relied on the earlier Report on Offences Against the Person by the Criminal Law Revision Committee (CLRC) which first suggested a new set of offences to replace the current offences. In particular, they suggested that the distinctions in the 1861 Act between wounding and various types of "bodily harm" should be swept away, in favour of the simpler concept of "causing injury". They also suggested that there should be a distinction between serious injury and other injury, and that in respect of serious injury there should be a distinction between intentionally causing such injury and recklessly causing such injury.

**2.4** In preparing law reform proposals the Law Commission adopt a careful and consultative approach. Their report No 218 was preceded by their 1992 Consultation Paper number 122, Legislating the Criminal Code: Offences Against the Person and General Principles. In this the Law Commission accepted these basic conclusions of the CLRC and incorporated them into their proposals. The responses to the Law Commission’s Consultation exercise revealed strong support for legislation.

**Law Commission report number 218: Offences Against the Person and General Principles (LC218)**

**2.5** The Law Commission presented their considered conclusions on reforming offences against the person and general defences in this report, published in 1993. In addition to a careful analysis of the issues, it included a draft Criminal Law Bill of 39 clauses and 4 schedules. The report had two distinct objectives:

* to reformulate those non-fatal offences against the person found largely, but not exclusively, in the Offences Against the Person Act 1861 in a more comprehensible and legally certain manner
* to place in statute for the first time certain defences such as duress and self-defence which apply not only to the newly formulated offences but also across the criminal law as a whole.

**2.6** The Law Commission’s report was warmly welcomed by many in the criminal justice system as a clear and coherent statement of the law of violence against the person. The Law Commission themselves consider it to be one of their most important law reform projects. Since its publication, successive Lord Chief Justices have called for the proposals to be implemented.

**The Government response**

**2.7** The Government has considered the Law Commission’s proposals with great care. Following careful analysis and consultation with the police and prosecuting authorities, an interdepartmental working group, in close association with the Law Commission, considered the issues in great detail. It was particularly concerned to test the proposals for their practical effect and their robustness in the light of developments in case and statute law since the Law Commission had reported. The outcome of this process was the Draft Bill. This is structured rather differently from the Law Commission’s draft Bill, but largely reflects the policies and principles adopted by the Commission.

**2.8** In a written Parliamentary answer on 31 July 1997, the Home Secretary gave the formal Government response to the report:

*" The Law Commission’s report no 218, published in November 1993 is a major contribution to the development of the criminal law. It was warmly welcomed by many involved with the criminal justice system as creating a clearer and more coherent statement of the law of violence against the person. The Government have considered the Law Commission’s recommendations with great care, and accept the principle of their proposals for reform of those offences contained mainly in the Offences Against the Person Act 1861.*

*This is a complex and difficult area of the law, and case law has evolved since the Law Commission’s report was first published. It is important that any proposals to reform offences that come before the courts so frequently, and have been in existence for 136 years, are robust, well thought through and well supported. Following a detailed consideration of their report, done in close collaboration with the Law Commission, we have decided to publish a draft Bill in a consultation paper later this year. This will set out our initial proposals for reforming the law in this area, based on the Law Commission’s report, and seek views on some of the difficult issues around the technical legal changes proposed by the Law Commission such as definitions of intent, recklessness and intoxication or whether the intentional transmission of disease should be included in the Bill. The proposals will apply to England and Wales.*

*In accepting the principle of reforming the Offences Against the Person Act 186, the Government does not intend to take forward all the Law Commission’s proposals at this juncture. In particular, the Law Commission made recommendations for setting out the general defences of duress and the justifiable use of force in statute. We recognise the importance of these proposals, which are not directly related to the reform of the 1861 Act, but they raise some very difficult questions which should be considered in a longer timescale.****"***

**CHAPTER 3**

**THE SCOPE OF THE PROPOSALS**

**3.1** TheLaw Commission's Report 218 addressed a myriad of issues and their draft Bill was a weighty measure of 39 clauses. As the first stage in their proposals to codify the criminal law, in addition to reforming the Offences Against the Person Act 1861, it included some other offences of violence from common and statute law and also set out some general principles of law in the general defences. This chapter summarises the Government’s proposals and, where they diverge from the Commission’s proposals, gives an explanation.

**3.2** Our proposals do not extend to all the issues covered in LC218. The Government has taken the view that the outdated offences in the 1861 Act are in the most urgent need of reform. These are the offences which cause the greatest difficulties for the courts, and are most obviously in need of modernisation. The priority in this law reform is therefore to place the main offences against the person on a good foundation. In doing so, we have examined all the relevant provisions in the 1861 Act, and have also taken those other parts of the Law Commission’s recommendations that are particularly relevant to offences of violence and included them in the draft Bill. Hence we have taken the Law Commission’s recommendations on omissions and supervening fault, and included them in our draft Bill. The Law Commission also included offences relating to detention and abduction. These offences are set out in recent statute law or are common law offences. The Government has no reason to think that they are defective, or in need of reform. Therefore we have taken the decision to set them on one side.

**3.3** The Law Commission also recommended that two major general defences, at present set out either wholly in common law or partly in statute law and partly in common law, should be put into statutory form. The defences of duress and the justifiable use of force are important and substantial topics in their own right. They apply across the criminal law to many offences not contained within the overall category of non-fatal offences against the person. Their scope is therefore much wider than the offences under consideration in the rest of the Law Commission’s report, and in the Government’s draft Bill. They raise sensitive and complex questions. The consideration of these issues is a major project in itself, and including them as well as the other provisions referred to above in a single Bill would, we believe, be an unmanageable and impractical task. The Government has not yet reached any conclusion on the merit of these proposals and will consider them separately at a later date.

**The Government’s Proposals**

***Summary of the contents of the Offences Against the Person Bill***

**3.4** The proposals apply to England and Wales, and are set out in a draft Bill of 28 clauses. Clauses 1 to 4 contain the set of simple and straightforward new offences to replace the various existing offences of grievous and actual bodily harm and assault. These are

* intentional serious injury
* reckless serious injury
* intentional or reckless injury
* assault

The Government accepts the Law Commission’s recommendations, and those of the earlier Criminal Law Revision Committee, that the offences should be clear and easily understood, and should be based on a combination of *motivation* and *outcome.* Hence the most serious offence is intentionally causing serious injury; the same injury caused recklessly, without the same intent, will be a less serious offence carrying a lower sentence. These offences do not exactly replicate those they replace, nor is it right that they should. There are some differences in relative seriousness between these proposals and the 1861 "equivalents" which are set out in the detailed analysis in Chapter 4. However the new offences provide a comprehensive and rigorous means of dealing with the vast generality of offences against the person.

***Assault***

**3.5** The Government’s proposals on the offence of assault go rather further than those of the Law Commission. The Commission proposed to replace common assault and battery with a new offence of assault that would combine the two existing offences. In doing this the Commission were concerned to clarify the meaning of assault and to remove the need for separate offences of assault. However, although the Commission considered the effect of their proposals on a number of different assault offences, they did not undertake a comprehensive survey of all other statutory offences of assault. The Government is concerned to ensure that the courts are able to apply a single definition of assault in all those many offences which use the concept of assault, wherever they occur. In considering this issue, we identified over 70 different uses of assault in law. It is vital that in considering cases involving any of these offences, judges, lawyers and juries know exactly what is meant by the term assault.

**3.6** The Government is therefore proposing to apply the definition of assault in this Bill to all assault offences, whether they be indecent assault (which is an assault committed in circumstances of indecency) or assault on a particular class of persons. This proposal builds on the initial premise of the Law Commission but goes much further than their recommendation. Schedule 1 to the draft Bill sets out the precise impact of these changes on each piece of legislation. The list is long and detailed; at this stage the Government is only proposing to align meanings. This paper does not address the separate question of whether all these offences of assault are now necessary.

***Will applying the definition of assault in this Bill to other statutory assaults improve the clarity and accessibility of the law?***

***Specific assault offences in the Bill***

**3.7** The Government shares the Law Commission’s view that in general, the proposed new general offences offer protection for everyone, and that in principle special protection in law for particular classes or individuals should not normally be necessary. There are however some exceptions to this general principle. Some sections of society may require or deserve the additional protection of a specific provision in law. The Government has included in the Crime and Disorder Bill, now before Parliament, new aggravated offences for racially motivated violence which are based on existing offences of violence against the person in the Offences Against the Person Act 1861. Using these well-established and familiar offences will allow the courts to build on the existing law in dealing with those who commit these offences. The Government recognises that any subsequent implementation of its proposals to reform the Offences Against the Person Act 1861 will also have to amend the way in which these aggravated offences are formulated. The intention would be to re-state these offences following the model of the new offences against the person in the draft Bill. The Government recognises that it is unusual for Parliament to be asked to consider the same offences in quick succession in this way; however any such re-enactment would be a consolidation exercise to ensure that the law remained consistent.

**3.8** The Law Commission recognised that the police and those carrying out a lawful arrest, had a legitimate and well-justified case for special recognition in the law, as they do at present. The Government agrees with this view. The Government is proposing to retain a number of particular offences relating to the police. The Law Commission had proposed to retain the offence of assaulting a police officer; the Government proposes to retain this offence and the offences of assault in resisting arrest. Clauses 5 to 7 therefore set out specific offences against the police. We recognise that Clause 6 does not fully mirror exactly the same approach of motivation and intent adopted by the Law Commission to the substantive offences in clauses 1 to 4 of this Bill, in that it does not require intent or recklessness to be proved. These offences are intended to replicate the present provisions relating to assaults on the police or in resisting arrest, so preserving the current legal position. The Government does not wish to reduce the protection given to the police in this law reform. The offences in Clauses 5 to 7 are derived partly from the 1861 Act, but also reflect recent statutory changes.

***Is the retention of these special offences for the police generally supported?***

***Other Offences***

**3.9** A number of updated offences, mainly replacing offences currently contained in the 1861 Offences Against the Person Act, appear in clauses 8 to 13. Those relating to dangerous substances (clauses 8 and 9) are a reworking of the 1861 provisions to reflect the new substantive offences against the person, and to provide comprehensive protection against particular kinds of dangerous activity. The Law Commission had recommended that these provisions should be reviewed, and we have taken this opportunity to do so. Clause 8 is little changed in essence from the earlier provision; clause 9 has been amended to mirror the provisions of clause 8 where injury, rather than serious injury is caused,  reflecting the structure of the first three clauses of the draft Bill. These changes are fully in accord with the principles of the Law Commission’s report.

**3.10** The Government accepts the Law Commission’s reasoning that the existing offence of making threats to kill should be extended to threats to cause serious injury and also to threats made to a second person to harm a third person. This extended offence fills a gap in the equivalent 1861 Act offence, by creating a specific offence of threatening a third party. It is set out in clause 10. The new offence of administering a substance capable of causing injury (clause 11) was proposed by the Law Commission to replace the old poisoning offences. It has been revised slightly to remove any possibility that it could apply to bona fide medical treatment. Clause 12 restates the law on torture (presently set out in section 134 of the Criminal Justice Act 1988). Clause 13 sets out an updated version of the 1861 Act offences of causing danger on railways. These reflect and build on the Law Commission’s work but are set out in the body of the Bill rather than in a Schedule as the Commission had proposed.

***Definitions of Intent, Recklessness and Injury***

**3.11** The Law Commission set out statutory definitions of intent and recklessness for the first time in their draft Bill. The Government welcomes this as giving a greater clarity and certainty to the criminal law, and accepts the Law Commission’s conclusion that it is appropriate to have a subjective rather than objective definition of recklessness for offences against the person. The Government recognises that a different definition will apply to other criminal behaviour, such as criminal damage, but is satisfied that this reflects the present state of the law. Clause 14 defines intent and recklessness for the purpose of the Bill. These definitions have been reformulated in close collaboration with the Law Commission.

**3.12** Clause 15 defines the meaning of injury in the Bill. This clarifies the meaning of the new offences in clauses 1 to 4. There is however no definition of what is a serious injury. The Government, like the Law Commission, is content for the courts to decide what is appropriate in individual cases. The definition of injury does however raise a number of important questions. It is sufficiently wide to encompass psychological and psychiatric harm as well as physical harm. The definition will also allow the transmission of disease to be included in the clause 1 offence of *intentionally causing serious injury.*

***Are these definitions appropriate*?**

***Transmission of illness and disease***

**3.13** In seeking to reform an archaic and outdated law, the Government has to consider what the present law includes, how the courts have interpreted it, and how any replacement law should replicate or alter the present law. That is the context in which the question of whether the intentional transmission of disease ought to fall within the criminal law is being considered. In LC218 the Law Commission were unequivocal that the Offences Against the Person Act 1861 could be used to prosecute the transmission of disease, and recommended that the proposed new offences should enable the intentional or reckless transmission of disease to be prosecuted in appropriate cases. The Government has not accepted this recommendation in full.

**3.14** There are few decided cases on this point, so the position in the criminal law is not entirely clear. The most commonly cited case, that of *Clarence* (1888*),* seems to indicate that the 1861 Act could not be successfully used to prosecute the reckless transmission of disease. However it is now accepted that the judgement related to one specific offence and to the issue of consent, and that in principle it may well be possible to prosecute individuals for transmitting illness and disease at least when they do so intentionally. Although this has not been tested in the courts in recent years, in *Ireland and Burstow* the House of Lords held thatthe 1861 Act could be used to prosecute the infliction of psychiatric injury. In reforming the law, the issue of whether and if so how the transmission of disease should fall within the criminal law needs the most careful consideration.

**3.15** The Government recognises that this is a very sensitive issue. The criminal law deals with behaviour that is wrong in intent and in deed. The Law Commission’s original proposal, which included illness and disease in the definition of injury, would have resulted in the intentional or reckless transmission of disease being open to prosecution. They argued that the width of their proposal would be balanced by the fact that prosecution would only be appropriate in the most serious cases. The Government has considered their views very carefully, but is not persuaded that it would be right or appropriate to make the range of normal everyday activities during which illness could be transmitted, potentially criminal. We think it would be wrong to criminalise the reckless transmission of normally minor illnesses such as measles or mumps, even though they could have potentially serious consequences for those vulnerable to infection.

**3.16** An issue of this importance has ramifications beyond the criminal law, into the wider considerations of social and public health policy. The Government is particularly concerned that the law should not seem to discriminate against those who are HIV positive, have AIDS or viral hepatitis or who carry any kind of disease. Nor do we want to discourage people from coming forward for diagnostic tests and treatment, in the interests of their own health and that of others, because of an unfounded fear of criminal prosecution.

**3.17** The Government therefore considered whether it should exclude all transmission of disease from the criminal law, and concluded that that too would not be appropriate. The existing law extends into this area, even though it has not been used. There is a strong case for arguing that society should have criminal sanctions available for use to deal with evil acts. It is hard to argue that the law should not be able to deal with the person who gives a disease causing serious illness to others with intent to do them such harm. That is clearly a form of violence against the person. Such a gap in the law would be difficult to justify.

**3.18** The Government therefore proposes that the criminal law should apply only to those whom it can be proved beyond reasonable doubt had deliberately transmitted a disease intending to cause a serious illness. This aims to strike a sensible balance between allowing very serious intentional acts to be punished whilst not rendering individuals liable for prosecution for unintentional or reckless acts, or for the transmission of minor disease. The Government believes that this is close to the effect of the present law, and that it is right in principle to continue to allow the law to be used in those rare grave cases where prosecution would be justified. This proposal will clarify the present law which, because it is largely untested is unclear; by doing so the effect of the law will be confined to the most serious and culpable behaviour.

**3.19** It is important to emphasise that *this proposal does not reflect a significant change in the law.* Prosecutions for the transmission of disease are very rare for very good reasons. Any criminal charge has to be supported by evidence and proved to a court beyond reasonable doubt. It is very difficult to prove both the causal linkage of the transmission and also to prove that it was done intentionally. To do so beyond reasonable doubt is even more difficult. The Government does not expect that the proposed offence will be used very often, but considers that it is important that it should exist to provide a safeguard against the worst behaviour**.**

**3.20** Clause 15 provides for the intentional transmission of serious injury or disease to be included for the purposes of clause 1 (intentional serious injury), but not for any other purpose. This means that only those who transmit diseases with intent to cause serious injury, will be criminally liable.

***The Government invites views on this proposal.***

**Defences**

**3.21** As explained in paragraph 3.3 above, the Government’s Bill does not include all the Law Commission’s recommendations relating to general defences. However the Government considered that it was important to include a number of issues relating to the liability of defendants in the Bill. The Law Commission proposed to include clauses relating to supervening and transferred fault, and the Government agrees that it would be useful to have these technical issues set out in statute law. They are contained in clauses 16 and 17.

**3.22** The Bill also provides that the general defences already set out in the common or statute law will continue to apply to the offences in the bill. This will ensure that the present law will continue to apply even though there is no specific mention of provisions relating to such important issues as consent, as the Law Commission had proposed. The Law Commission itself has issued separate consultation papers on the specific question of consent in the criminal law, and is still considering the issues involved.

**3.23** The Bill also applies only a limited provision on intoxication, similar to that in the Law Commission’s report no 218. Since then the Law Commission has made separate recommendations about replacing the *Majewski* rules in statute law in their report "Intoxication in the Criminal Law" (LC 122). The Government considered these proposals, but thought that they were unnecessarily complex for the purposes of this Bill. Clause 19 sets out criteria for the courts to apply when considering whether a defendant had chosen to be drunk. There should be no loophole in the law which excuses violent behaviour simply because an attacker chose to become intoxicated and run the risks that entails.

**Alternative Verdicts**

**3.24** The Law Commission also recommended a new provision for alternative verdicts for use by the courts in dealing with cases of offences against the person, which the Government has accepted, and are set out in clause 22. These largely replicate the existing arrangements for alternative verdicts (set out in the Criminal Law Act 1967), which are often used for offences of violence where a more serious offence may not be proved beyond reasonable doubt, but a lesser offence is so proved.

**3.25** The new element of the proposal is a system of alternative verdicts in the magistrates’ courts where they do not exist at present. There is no real difference in principle in enabling the magistrates’ courts to have the same powers to use alternative verdicts as the Crown Court now does. This would enable for example, the magistrates’ courts to find a defendant guilty of assault (clause 4) even though they had not found the defendant guilty of intentionally or recklessly causing injury (clause 3) or assault to resist arrest (clause 7). By extension these provisions have also been extended to the Crown Court in hearing appeals against the decision of the magistrates’ court. The Crime and Disorder Bill that is now before Parliament contains new racially aggravated assaults based on the offences in the 1861 Act. The Government would also wish to give the courts the power to provide alternative verdicts between the substantive offence (clause 4 assault) and the aggravated racially motivated offence.

***The Government invites views on extending the system of alternative verdicts to the magistrates’ courts.***

**Other issues**

**3.26** The Law Commission also suggested that a number of other offences in the 1861 Act be repealed, and those that are retained should be modernised to reflect the changed formulation of the new substantive offences in clauses 1 to 4. The Government has largely accepted these recommendations, but has decided that where apparently archaic offences are still used by the courts they should be retained. Hence the Government does not propose to repeal section 35 of the 1861 Act on wanton and furious driving which applies to a wide variety of vehicles both on and off the public highway.

**3.27** A number of other issues do not feature in the Bill. It deals only in non-fatal offences and does not extend to the Commission’s proposals relating to involuntary manslaughter and corporate killing, as set out in Law Commission's report number 237. These are the subject of separate consideration by an inter-departmental working party. Furthermore, pending the outcome of the Law Commission’s ongoing study of Consent in the Criminal Law, issues of consent have been largely removed from the Bill. The common law defence of consent will continue to apply to all the offences in the Bill by virtue of clause 18 of the draft Bill.

**The impact of the Bill**

**3.28** The main purpose of the Bill is to modernise the existing law and incorporate it in a single statute. Although there will be some adjustments to the present law, no major substantive changes are anticipated. For example, most current offences will simply be replaced by revised and modernised offences, which cover the same kinds of behaviour and carry similar maximum penalties. It is intended that the effect will be to make the law easier to understand and to apply, which should result in more streamlined cases, and in the longer term fewer appeals.

**3.29** The Government does not expect that the Bill will lead to substantial changes in prosecution policy, mode of trial, or sentencing outcomes, although we recognise that there will be some shifts in boundaries between the new offences. On this basis the Government does not think that the Bill will add extra long term costs to the criminal justice system, although it recognises that reforming offences that come before the courts so frequently will require a significant training effort for the police, judges, prosecutors and other criminal justice practitioners.

***The Government would welcome views on the likely practical impact of the changes in the Bill .***

**CHAPTER 4**

**ANALYSIS OF THE DRAFT BILL**

**New offences against the person**

Clause 1 - **offence of intentional serious injury (clause 2 of LC218)**

This offence, as recommended by the Law Commission, replaces the first limb of section 18 of the 1861 Offences Against the Person Act: causing grievous bodily harm with intent and wounding with intent to inflict grievous bodily harm. The maximum penalty remains life imprisonment. The new offence also extends to omissions where a person omits to do an act which he has a duty to do at common law eg a vehicle maintenance engineer who deliberately omits to mend faulty brakes on a vehicle, intending serious injury to result.

Clause 2 - **offence of reckless serious injury (clause 3 of LC218)**

Clause 2 replaces section 20 of the 1861 Act (wounding or inflicting grievous bodily harm) with a slightly more serious offence. At present, one need only prove that the defendant foresaw that harm, albeit of a minor character, would result from his actions, whereas the new offence requires foresight of a risk that **serious** injury would result. Also, under the new offence serious injury must result, whereas under section 20 mere wounding is necessary. The offence carries a maximum penalty of seven years’ imprisonment, compared with 5 years at present, to reflect the seriousness of the new offence. Other than the increase in the maximum penalty, the offence is as recommended by the Law Commission.

Clause 3 - **offence of intentional or reckless injury (clause 4 of LC218)**

This clause replaces section 47 of the 1861 Act (assault occasioning actual bodily harm). Like the offence at clause 2, the new offence is more serious in that it requires intent to commit injury or foresight of a risk that injury would result. Two changes have been made to the Law Commission’s original provision: clause 3(2) has been added to enable prosecutions in cases where injury occurs outside England and Wales but the act took place in this country; and the maximum penalty has been raised from the Law Commission’s proposed three years to five years imprisonment.

Clause 4 - **offence of assault (clause 6 of LC218)**

This replaces the existing common law offences of common assault and battery, and carries a maximum penalty of 6 months imprisonment as at present. The formulation is based on the present state of the law. The offence may be used as an alternative for those charged with other offences. One change which has been made to the Law Commission’s original provision is that pending the outcome of their study of Consent in the Criminal Law, the offence does not refer to consent.

**Offences Against the Police and others who carry out lawful arrests**

Clause 5 - offence of **assault on a constable (clause 7 of LC218)**

This provision, which replicates section 89(1) of the Police Act 1996 and carries the same maximum penalty of 6 months imprisonment, is included for purposes of completeness. The Law Commission’s original provision has been revised to reflect the 1996 Act.

Clause 6 - offence of **causing serious injury to resist arrest (new clause)**

No specific offence of serious injury to resist arrest, to replace the second limb of section 18 of the 1861 Act, was included in LC218, and cases would have simply have been prosecuted under clause 1 or 2. This clause has been inserted in recognition that by the nature of their task, special provision for the police and others who carry out lawful arrests is justified and should be retained. As at present, the offence carries a maximum penalty of life imprisonment.

Clause 7 - offence of **assault to resist arrest (clause 8 of LC218)**

This clause, which reflects the Law Commission’s original proposal, replaces section 38 of the 1861 Act (assault with intent to resist arrest) and carries the same maximum penalty of 2 years imprisonment. Clause 7(2), which reflects the current state of the law, sets out a subjective test (circumstances as the defendant believed them to be) in establishing mens rea.

**Other offences**

Clause 8 - **dangerous substances: intending or risking serious injury (new clause)**

This provision replaces and broadens section 29 of the 1861 Act (causing explosion, or sending explosive substance, or throwing corrosive fluid) to cover those who use dangerous substances with intent (or recklessly) to cause serious injury, whether or not such injury is caused. The Law Commission recommended that this section be retained within the 1861 Act and modernised, but did not make detailed proposals. Having reviewed its purpose and utility we take the view that such a reformulated offence should be set out on the face of the Bill. The maximum penalty remains life imprisonment

Clause 9 - **dangerous substances: intending or risking injury ( new clause)**

This provision replaces and broadens section 30 of the 1861 Act (placing gunpowder near a building with intent to do bodily injury) in much the same way as clause 8 replaces section 29. This clause is however broader than its 1861 Act equivalent because it has been constructed to mirror clause 8 so that it can be used when the outcome of the criminal behaviour is to cause injury rather than serious injury, on the same model as the Law Commission adopted in the substantive offences set out in clauses 1, 2 and 3 of the Bill. As at present, the maximum penalty remains 14 years imprisonment.

Clause 10 - **threats to kill or cause serious injury (clause 9 of LC218)**

As recommended in LC218, this provision replaces section 16 of the 1861 Act (threats to kill) and also extends the law to cover threats to cause serious injury and threats against third parties. Like the present offence, the maximum penalty is 10 years imprisonment.

Clause 11 - **administering a substance capable of causing injury (clause 5 of LC218)**

Clause 11 replaces the offences of administering poison under sections 23 and 24 of the 1861 Act. The proposed maximum penalty of 5 years imprisonment is less than the existing section 23 offence but in line with the penalty for intentional or reckless injury under clause 3. Acts causing serious injury might be prosecuted under clauses 2 or 3. The Law Commission’s original provision has been amended to remove the element of consent, pending the outcome of the Law Commission’s separate study of Consent in the Criminal Law. It has also been reformulated to meet concerns that the offence should not be so widely defined as to risk catching bona fide medical treatment.

Clause 12 - **torture (clause 10 of LC218)**

This provision, which is a revised restatement of section 134 of the Criminal Justice Act 1988 has been aligned more closely with section 134 of the 1988 Act than the original LC218 provision, and is included in the Bill for purposes of completeness.

Clause 13 - **causing danger on railways (new clause)**

Clause 13 updates section 34 of the 1861 Act (endangering safety of persons on a railway), and carries the same maximum penalty of 2 years imprisonment. Like the section 34 offence, the offence also applies to omissions. In LC218, this offence was simply updated in the 1861 Act. The Government considers that it should be included on the face of the Bill.

**Remaining Clauses**

Clause 14 - **definition of fault terms: intent and recklessness (clause 1 of LC218)**

This clause defines intentional and reckless acts and omissions for the purposes of the Bill. The definition of recklessness requires a subjective test (circumstances as the defendant believed them to be) to be applied in establishing mens rea, and reflects the conclusion of the House of Lords in *Savage and Parmenter [1992] AC699.* As discussed in relation to clauses 2 and 3, in so far as it requires foresight of a risk of injury, it represents a raising of the threshold for the current equivalent grievous and actual bodily harm offences. The definition has been re-formulated in consultation with the Law Commission. In particular, it now makes clear that it is reckless for a defendant to take an unreasonable risk having regard to the circumstances **as he knows or believes them to be.**

Clause 15 - **meaning of injury (clause 18 of LC218)**

Clause 15 defines "injury" as physical or mental injury (for example the impairment of mental health inflicted by a "stalker"). The Bill does not define serious injury which will be left to the courts to interpret. Apart from in Clause 1, it does not include the effects of disease.

Clause 16 - **supervening fault (clause 31 of LC218)**

As recommended by the Law Commission, supervening fault provides for the prosecution of those who later become aware that they have done something which might lead to a particular result, but fail to take measures to prevent it.

Clause 17 - **transferred fault (clause 32 of LC218)**

This clause facilitates the prosecution of those who may have intended to affect one person but actually affect another, and reflects the Law Commission’s original formulation. It applies in the same way where there is awareness of a risk that a person will be affected.

Clause 18 - **general defences (clause 20 of LC218)**

This Clause provides for all existing defences (including those of duress and self defence) to continue to apply. The wording is unchanged from LC218 other than the addition of sub clauses 2 and 3 relating to torture (clause 12).

Clause 19 - **effect of voluntary intoxication (clauses 21 and 35 of LC 218)**

This Clause provides a limited exception to the definition of recklessness contained in clause 14, to the effect that a person who became voluntarily intoxicated cannot say that they thereby became unaware of the risk they were taking in doing an act and therefore should not be held criminally responsible for its consequences. Law Commission Report 229 (Voluntary Intoxication) contained detailed proposals for the replacement of the *Majewski* rules governing intoxication which have not been included in the Bill.

Clause 20 - **Attempts (new clause)**

This provision is designed to avoid any confusion over the definition of intent, by making clear that in cases involving attempts, the definition of intent is as contained in clause 14 (1) and not the definition generally used for the purposes of the Criminal Attempts Act 1981.

Clause 21 - **Charging more than one offence (clause 22 of LC218)**

This clause provides for clauses 1 to 13 each to count as one offence for charging purposes.

Clause 22 - **Alternative verdicts (clause 23 of LC218)**

Where a defendant is found not guilty of a more serious offence, this provision enables the court to find him guilty of a lesser offence. The Law Commission’s original provision has been extended to cover Crown Court appeal cases where the defendant was originally convicted in a magistrates’ court.

Clause 23 - **Abolition of certain common law offences (clause 36 of LC218)**

This Clause abolishes common assault, battery and mayhem which are replaced by new offences.

Clause 24 and Schedules 1 and 2 - **Amendments and repeals (clause 37 of LC218)**

These provide for a series of consequential amendments and repeals, including the amendment or abolition of various offences contained within the 1861 Act. In particular, the offence of furious driving, which the Law Commission recommended for repeal, has been retained and updated in modern language. This is because the offence fills a gap in the law and is still used, principally because it applies to unmechanised as well as mechanised vehicles, and to private land as well as public roads.

Clause 25 - **Extent (clause 38 of LC218)**

Subject to a number of specified of exceptions, the Bill extends to England and Wales.

Clause 26 - **Commencement (clause 39 of LC218)**

Clause 26 provides for the Act to be brought into force by way of a Statutory Instrument sometime after Royal Assent.

Clause 27 - **Citation (clause 39 of LC218)**

This Clause names the Bill.

**Schedules**

These contain various consequential changes resulting from the substantive proposals in the Bill. In some cases, those offences still retained from the 1861 Act have been modified to reflect the new definitions in the Bill.

**CHAPTER 5**

**CONCLUSION**

**5.1** The law on offences against the person is outmoded and unclear, and creates unnecessary confusion in the courts. The Bill contained in this Consultation Paper sets out the way in which the Government believes that the law in this area can be modernised, simplified and brought within a single statute. In particular, it sets out a new hierarchy of offences against the person, ranging from intentional serious injury to assault, based on motivation and outcome, to replace the existing range of statutory and common law offences. Making the law more accessible in this way will help to smooth the passage of thousands of cases each year, enabling the citizen to understand the criminal offences more easily, and enabling the police to explain and charge offences that are more readily understood. It should also make the task of judges, magistrates and juries more straightforward in the day to day administration of justice. All in all these proposals are intended to improve the quality of justice in England and Wales.

**5.2** The Government welcomes your views on any aspect of these proposals.