

These notes refer to the Criminal Cases Review (Insanity) Act 1999 (c.25) which received Royal Assent on 27th July 1999

CRIMINAL CASES REVIEW (INSANITY) ACT 1999

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Criminal Cases Review (Insanity) Act 1999 which received Royal Assent on 27th July 1999. They have been prepared by the Home Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

SUMMARY

3. The Act enables the Criminal Cases Review Commission to refer to the Court of Appeal a verdict of “guilty but insane” under the Trial of Lunatics Act 1883 and gives the Court of Appeal powers to hear and dispose of an appeal on such a reference. Although the verdict of guilty but insane was abolished in the 1960s there may still be a small number of people who were the subject of such a verdict and would like to have it reconsidered by the Court of Appeal.

BACKGROUND

The special verdict

4. Section 2(1) of the Trial of Lunatics Act 1883 provided as follows:

“Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such a person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or the omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.”

This verdict is commonly referred to as “guilty but insane”. Section 3 of the 1883 Act extended to Ireland but not to Scotland.
5. Soon after the passing of the Criminal Appeal Act 1907, which established the Court of Criminal Appeal, the question arose whether there was an appeal to that Court against a verdict of “guilty but insane”. In *Felstead* [1914] AC 534, the House of Lords held that a person found guilty but insane was acquitted of the offence because he lacks the guilty mind required for him to be convicted so that no appeal was possible against the finding that the accused did the act or that he was insane at the time.

6. Although recommendations for a change in the law, to remove the reference in the verdict to the guilt of the accused, were made in 1923 and in 1953, no change was made until the 1960s. The Mental Health Act (Northern Ireland) 1961 repealed the 1883 Act in its application to Northern Ireland and introduced the *finding* of not guilty on the ground of insanity: see now article 50 of the Mental Health (Northern Ireland) Order 1986 (S.I. 1986/595 (N.I.4)). In England and Wales, the Criminal Procedure (Insanity) Act 1964 amended section 2(1) of the 1883 Act so that the *verdict* became one of not guilty by reason of insanity.
7. Section 2 of the 1964 Act provided for a right of appeal against the new verdict and, under subsection (4), the power of the Secretary of State to refer a conviction to the Court of Criminal Appeal (under section 19 of the 1907 Act) was to include cases involving the new verdict. Equivalent provision for Northern Ireland was made by section 15 of the Criminal Justice Act (Northern Ireland) 1966. The provisions for appeal against the new verdict and finding are now to be found in sections 12, 13 and 17 of the Criminal Appeal Act 1968 for England and Wales and sections 12 and 14 of the Criminal Appeal (Northern Ireland) Act 1980. But it remained the case that there was no appeal against a verdict of “guilty but insane”.

The Criminal Cases Review Commission

8. The Commission was established by Part II of the Criminal Appeal Act 1995. It is empowered to review and investigate possible miscarriages of justice in England, Wales and Northern Ireland. On 31 March 1997, the Commission took over the powers formerly exercised by the Home Secretary and the Secretary of State for Northern Ireland to refer a conviction or sentence on indictment to the Court of Appeal. Sections 9(5) and 10(6) of the 1995 Act transferred to the Commission the power to refer the new verdict and finding of not guilty by reason of insanity in England and Wales and in Northern Ireland respectively. In all cases, the Commission can only make a reference if certain criteria are met (see further paragraph 12 below) and the Court of Appeal has to treat the reference as an appeal against the verdict or finding. No provision was made for the Commission to refer a verdict of “guilty but insane” to the Court of Appeal.

Recent developments

9. In 1998, Mr Iain Hay Gordon, against whom a jury had returned a verdict of guilty but insane when he was tried in Northern Ireland in 1953 for murder, made an application to the Commission to have his case referred to the Court of Appeal. Section 14(3) of the 1995 Act provides for the Commission to refer to the Court of Appeal any point on which they desire its opinion in considering whether to make a reference. Under this provision, the Commission referred to the Court of Appeal in Northern Ireland the issue of whether they had the power to make the reference sought by Mr Gordon. On 30 June 1998, the Court held that section 10(6) of the 1995 Act did not allow the Commission to refer the verdict of guilty but insane. Their reasoning would also have led the Court to reach that conclusion in respect of section 9(5), which applies to England and Wales.

THE ACT

10. The Act firstly gives the Commission the power to refer the verdict of guilty but insane, following as closely as possible its existing powers to make a reference. The Act also gives the Court of Appeal the power to hear and dispose of such a reference as if it were an appeal. These powers follow as closely as possible those that the Court of Appeal already has in respect of the verdict and finding of not guilty by reason of insanity.

COMMENTARY ON SECTIONS

Section 1: Reference of former verdict of guilty but insane

12. *Subsection (2)*: the conditions which have to be satisfied if the Commission is to refer a verdict of guilty but insane to the Court of Appeal, as provided for by *subsection (1)*, mirror those in section 13 of the 1995 Act for the Commission to refer a verdict or finding of not guilty by reason of insanity. However, one of those conditions - that an appeal against the conviction or finding has to have been determined or leave to appeal against it been refused (section 13 (1)(c)) - is not applied by the Act, because, as explained in paragraphs 5 and 7 above, there is no right of appeal against the verdict of guilty but insane.
13. The further provisions in section 14 of the 1995 Act about the making of references by the Commission, applied by *subsection (3)* to any reference of a verdict of guilty but insane, include, for instance, what the Commission shall have regard to in considering whether to make a reference, and the requirement for it to give a statement of the reasons for its decision. The supplementary powers given to the Commission in sections 17 to 22 of the 1995 Act, and the provisions on the disclosure of information by the Commission in sections 23 to 25, will apply automatically to the Commission's consideration of whether to refer a verdict of guilty but insane.

Section 2: reference treated as an appeal: England and Wales

14. *Subsection (1)*: section 12 of the Criminal Appeal Act 1968 makes provision for an appeal against the verdict of not guilty by reason of insanity. Sections 13 and 14 of the 1968 Act (reproduced on pages 5 and 6 of these notes) set out the powers of the Court of Appeal on an appeal under section 12. *Subsection (2)* applies those provisions to the reference of a verdict of guilty but insane with minor modifications.
15. In brief, section 13 deals with the disposal of an appeal under section 12, requiring the Court of Appeal to allow the appeal if they think that the verdict is unsafe, and to dismiss it in any other case. Where the Court finds that the accused was not insane but *was* guilty of an offence, they can substitute a verdict of guilty of that offence, and shall have like powers of dealing with the appellant as the court at trial would have had, except that the death penalty cannot be imposed.
16. Section 14 of the 1968 Act provides that, if the Court of Appeal concludes that the proper findings in a case in which there has been an appeal under section 12 would have been that the accused "was under a disability and that he did the act or made the omission charged against him", the Court of Appeal shall either make an order that the appellant shall be admitted to hospital, or, where they have the power to do so, a guardianship order, supervision and treatment order, or an order for the appellant's absolute discharge. Because there could not have been such findings in cases before the Criminal Procedure (Insanity and Unfitness to Plead Act) 1991, subsection 2(2)(b) has the effect of requiring the Court in these cases to consider not what findings there should have been, but simply what the facts of the case are.

Section 3: reference treated as appeal: Northern Ireland

17. This section makes provision parallel to that made by section 2 for Northern Ireland. It operates on sections 12 and 13 of the Criminal Appeal (Northern Ireland) Act 1980 which are reproduced on pages 7 and 8 of these notes.

COMMENCEMENT

18. This Act will come into force on Royal Assent.

HANSARD REFERENCES

The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

<i>Stage</i>	<i>Date</i>	<i>Hansard reference</i>
House of Lords		
Introduction	11 March 1999	Vol 598 Col 354
Second Reading	23 March 1999	Vol 598 Cols 1253-1258
Committee	13 April 1999	Vol 599 Col 628
Third Reading	22 April 1999	Vol 599 Col 1242
House of Commons		
Introduction	30 April 1999	Vol 329 Col 672
Second Reading and Committee	14 May 1999	Vol 331 Cols 610-611
Report and Third Reading	23 July 1999	Vols 335 Cols 1469-1505

Royal Assent – 27 July 1999	House of Lords Hansard Vol 604 Col 1422
	House of Commons Hansard Vol 336 Col 152

Extract from the Criminal Appeal Act 1968

S 13 Disposal of appeal under s12

- (1) Subject to the provisions of this section, the Court of Appeal –
 - (a) shall allow an appeal under section 12 of this Act if they think that the verdict is unsafe; and
 - (b) shall dismiss such an appeal in any other case.

- (3) Where apart from this subsection –
 - (a) an appeal under section 12 of this Act would fall to be allowed; and
 - (b) none of the grounds for allowing it relates to the question of the insanity of the accused,

the Court of Appeal may dismiss the appeal if they are of opinion that, but for the insanity of the accused, the proper verdict would have been that he was guilty of an offence other than the offence charged.

- (4) Where an appeal under section 12 of this Act is allowed, the following provisions apply:-
 - (a) if the ground, or one of the grounds, for allowing the appeal is that the finding of the jury as to the insanity of the accused ought not to stand and the Court of Appeal are of opinion that the proper verdict would have been that he was guilty of an offence (whether the offence charged or any other offence of which the jury could have found him guilty), the Court –
 - (i) shall substitute for the verdict of not guilty by reason of insanity a verdict of guilty of that offence; and
 - (ii) shall, subject to subsection (5) below, have the like powers of punishing or otherwise dealing with the appellant, and other powers, as the court of trial would have had if the jury had come to the substituted verdict; and

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- (b) in any other case, the Court of Appeal shall substitute for the verdict of the jury a verdict of acquittal.
- (5) The Court of Appeal shall not by virtue of subsection (4)(a) above sentence any person to death; but where under that paragraph they substitute a verdict of guilty of an offence for which apart from this subsection they would be required to sentence the appellant to death, their sentence shall (whatever the circumstances) be one of imprisonment for life.
- (6) An order of the Court of Appeal allowing an appeal in accordance with this section shall operate as a direction to the court of trial to amend the record to conform with the order.

S 14 Substitution of findings of unfitness to plead etc

- (1) This section applies where, on an appeal under section 12 of this Act, the Court of Appeal, on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved, are of opinion that –
 - (a) the case is not one where there should have been a verdict of acquittal; but
 - (b) there should have been findings that the accused was under a disability and that he did the act or made the omission charged against him.
- (2) Subject to subsection (3) below, the Court of Appeal shall either –
 - (a) make an order that the appellant be admitted, in accordance with the provisions of Schedule 1 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, to such hospital as may be specified by the Secretary of State; or
 - (b) where they have the power to do so by virtue of section 5 of that Act, make in respect of the appellant such one of the following orders as they think most suitable in all the circumstances of the case, namely-
 - (i) a guardianship order within the meaning of the Mental Health Act 1983;
 - (ii) a supervision and treatment order within the meaning of Schedule 2 to the said Act of 1991; and
 - (iii) an order for his absolute discharge.
- (3) Paragraph (b) of subsection (2) above shall not apply where the offence to which the appeal relates is an offence the sentence for which is fixed by law.

Extract from the Criminal Appeal (Northern Ireland) Act 1980

S 12 Appeal against finding of not guilty on ground of insanity

- (1) A person in whose case a finding is recorded under Article 50(1) of the Mental Health Order that he was not guilty of the offence charged on the ground of insanity may appeal to the Court of Appeal against that finding –
 - (a) with the leave of the Court; or
 - (b) if the judge of the court of trial grants a certificate that the case is fit for appeal.
- (2) Subject to subsection (4) below, the Court –
 - (a) shall allow an appeal under this section if it thinks that the finding is unsafe; and
 - (b) shall dismiss such an appeal in any other case.
- (4) Where but for this subsection –
 - (a) an appeal under this section would fall to be allowed; and
 - (b) none of the grounds for allowing it relates to the question of the insanity of the appellant,

the Court may dismiss the appeal if of opinion that but for the insanity of the accused the proper verdict would have been that he was guilty of an offence other than the offence charged.

S 13 Disposal of appeal allowed under s12

- (1) The following provisions apply where an appeal under section 12 of this Act is allowed in accordance with that section.
- (2) If the ground, or one of the grounds, for allowing the appeal is that the finding of the jury as to the insanity of the accused ought not to stand, but the Court of Appeal is of opinion that the proper verdict would have been that he was guilty of an offence (whether the offence charged or any other offence of which the jury could have found him guilty), the Court –
 - (a) shall substitute for the finding of not guilty on the ground of insanity a verdict of guilty of that offence; and
 - (b) subject to subsection (3) below, shall have the like powers of punishing or otherwise dealing with the appellant and all other powers as the court of trial would have had if the jury had returned that verdict.
- (3) Where the offence mentioned in subsection (2) above is one for which the sentence fixed by law is one of death or of imprisonment for life, the sentence shall (whatever the circumstances) be one of imprisonment for life.
- (4) In a case where the Court allows an appeal under section 12 above but subsection (2) of this section does not apply, the Court shall substitute for the finding of the jury a verdict of acquittal.
- (5) An order of the Court allowing an appeal under section 12 of this Act shall operate as a direction to the chief clerk acting for the court of trial to amend the record to conform with the order.
- (5A) Where, on an appeal under section 12, the Court is of opinion that the case is not one where there should have been a verdict of acquittal but that there should have been findings that the accused was unfit to be tried and that he did the act or made the omission charged against him, the court may make any such order as may be made under Article 50A(2) of the Mental Health Order (powers to deal with persons found not guilty on the ground of insanity).
- (6) Where in accordance with subsection (4) of this section the Court substitutes a verdict of acquittal for a finding of not guilty on the ground of insanity, any order previously made in consequence of that finding under Article 50A(2) of the Mental Health Order shall cease to have effect, so however that if the Court is of opinion -
 - (a) that the appellant is suffering from mental disorder of a nature or degree which warrants his detention in a hospital for assessment (or for assessment followed by medical treatment); and
 - (b) that failure to so detain him would create a substantial likelihood of serious physical harm to himself or to other persons,the Court shall make an order that the appellant be admitted for assessment to such hospital as may be required by the Department of Health and Social Services; and Schedule 2 to this Act shall apply as to the consequences and effect of an order made by the Court under this subsection.