



Circular No. 2012/03

TITLE	DOMESTIC VIOLENCE, CRIME AND VICTIMS (AMENDMENT) ACT 2012
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This circular is addressed to	Lord Chief Justice, Justices of the Supreme Court, President of the Queen's Bench Division, Senior Presiding Judge for England and Wales, Lords Justices of Appeal, High Court Judges, Crown Court Judges, District Judges (Magistrates' Courts), Chairmen of the Justices, Clerks to the Justices, Chief Officers of Police in England and Wales, Director of Public Prosecutions, Chief Crown Prosecutors
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THE DOMESTIC VIOLENCE, CRIME AND VICTIMS (AMENDMENT) ACT 2012

Introduction

This circular is about the commencement of the Domestic Violence, Crime and Victims (Amendment) Act 2012 (“the 2012 Act”). It provides a brief explanation of the key provisions and the circumstances in which they may apply. It should not be regarded as providing legal advice. Legal advice should be sought if there is any doubt as to the application or interpretation of the legislation.

2. Further explanation of all the provisions of the 2012 Act can be found in the Explanatory Notes which accompany the Act (see “Useful Links” section at the end of this circular).

3. The 2012 Act extends to England and Wales and will come into force on 2 July 2012.¹

4. The provisions of the Act apply only to offences committed on or after the date of commencement.

5. This circular should be read in conjunction with Home Office Circular 9/2005 (“the 2005 circular”)² which provides guidance on sections 5 and 6 of the Domestic Violence, Crime and Victims Act 2004 (“the 2004 Act”). A link to the 2005 circular is included in the “Useful Links” section at the end of this circular. For ease of reference, the text of the 2005 circular is also reproduced at Annex A. Sections 5 and 6 of the 2004 Act as amended by the 2012 Act are set out in Annex B.

6. As with the 2005 circular, this circular should, in particular, be drawn to the attention of officers working in Child Abuse Investigation Units and Major Crime Teams which deal with homicide or serious injury cases involving children and vulnerable adults, and to those staff in Social Services departments who deal with children, carers, vulnerable adults and wider domestic violence issues.

Summary

7. The 2012 Act extends the offence of causing or allowing the *death* of a child or vulnerable adult in section 5 of the 2004 Act (“the causing or allowing death offence”) to cover causing or allowing *serious physical harm* (equivalent to grievous bodily harm) to a child or vulnerable adult (“the causing or allowing serious physical harm offence”). It also inserts a new section 6A into the 2004 Act. Section 6A contains procedural and evidential provisions, similar to those at section 6 of the 2004 Act, which apply where a defendant is charged with the causing or allowing serious physical harm offence and with an offence against the person or an offence of attempted murder arising from the same serious physical harm.

8. Sections 5 and 6 of the 2004 Act were enacted to deal with the situation where it was clear that one of a number of adults in a household was responsible for the death of a child or vulnerable adult in that household but it could not be proved which one. The section 5 offence has been used successfully in a number of cases.

¹ The Domestic Violence, Crime and Victims (Amendment) Act 2012 (Commencement) Order 2012, S.I. 2012/1432 (C. 54).

² The Home Office was responsible for this area of law when the 2005 circular was issued. Following machinery of Government changes in 2007 it now falls within the remit of the Ministry of Justice.

9. The 2012 Act is intended to fill a recognised gap in the law in cases where, although it is clear that serious injuries short of death suffered by a child or vulnerable adult must have been sustained at the hands of one of a limited number of members of the household, there is insufficient evidence to point to the particular person responsible. Like the causing or allowing death offence and section 6 of the 2004 Act, the causing or allowing serious physical harm offence and new section 6A of the 2004 Act together form a package of measures intended to prevent those accused of causing serious physical harm to a child or vulnerable adult from escaping justice by remaining silent or blaming someone else.

The extended section 5 offence

10. For the most part section 1 of the 2012 Act extends section 5 of the 2004 Act by inserting references to “serious physical harm” at appropriate places (see Annex B). This means that the same conditions which apply to the causing or allowing death offence apply equally to the causing or allowing serious physical harm offence. The extended section 5 offence therefore:

- is limited to cases where the victim has died or has suffered serious physical harm as a result of an unlawful act (section 5(1)(a) of the 2004 Act). **It will not apply to a death or serious physical harm which results from an accident, or from a natural cause.**
- applies only to members of a victim’s household (section 5(1)(a)(i) of the 2004 Act) who had frequent contact with the victim (section 5(1)(a)(ii) of the 2004 Act), and could therefore reasonably be expected to have been aware of a risk of serious physical harm to the victim, and to have protected the victim from such harm. The household member must have either caused the victim’s death or the serious physical harm or failed to take reasonable steps to protect the victim (section 5(1)(d) of the 2004 Act).
- does not require the prosecution to prove whether a defendant was responsible for causing the death or serious physical harm or for allowing the death or serious physical harm (section 5(2) of the 2004 Act).
- applies only where the victim was at significant risk of serious physical harm (section 5(1)(c) of the 2004 Act). The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household. **The extended offence will not apply if there was no previous history of abuse, nor any reason to suspect a risk.** Where there is no reason to suspect the victim is at risk, other members of the household cannot reasonably be expected to have taken steps to prevent the abuse.
- applies only to those who are 16 or over unless they are the mother or father of the victim (section 5(4) of the 2004 Act). Members of the household aged under 16 will not have a duty of care or be expected to take steps to prevent a victim coming to harm. In particular, a child under 16 will have no duty to prevent his parents from harming a sibling. The parents of a child will be expected to take reasonable steps to protect their child even if they themselves are under 16.

11. Similarly, the guidance given in the 2005 circular in relation to the causing or allowing death offence on the following:

- frequent contact (paragraph 14);
- household (paragraphs 15 to 18);
- victims of domestic violence (paragraphs 22 to 24);
- reasonable steps (paragraphs 25 to 27); and
- vulnerable adult (paragraph 29)

applies equally to the causing or allowing serious physical harm offence. Briefly, this means that:

- the extended section 5 offence is not limited to family members or carers;
- the term 'household' is *not* intended to include care homes or, for example, nurseries where a child is looked after with a number of others;
- if one of the defendants has been the victim of, or a witness to, domestic violence, the steps that defendant could reasonably have been expected to take may be more limited than the steps that someone not suffering or witnessing that violence could reasonably have been expected to take;
- what constitutes "reasonable steps" will depend on the circumstances of the person and their relationship to the victim, and will vary from case to case. The court will take all of the circumstances into account;
- a 'vulnerable adult' is defined (section 5(6) of the 2004 Act) as "a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise".

12. The maximum penalty for the offence of causing or allowing serious physical harm is 10 years' imprisonment.

Vulnerable adults

13. The definition of 'vulnerable adult' in section 5(6) of the 2004 Act applies to the *victim* of an offence but it is possible that *defendants* may be vulnerable for similar reasons. The 2005 circular specifically addresses the situation where defendants charged with the causing or allowing death offence are themselves victims of domestic violence and the issues relevant to the investigation of offences in such cases and these still apply. The same principles apply equally to the causing or allowing serious physical harm offence and to defendants who are vulnerable for other reasons. So, for example, the steps that someone with a learning disability could reasonably have been expected to take to protect a child or vulnerable adult from a foreseeable risk of serious physical harm may be more limited than the steps that someone without a learning disability could reasonably have been expected to take.

14. For the avoidance of doubt, there is no question of defendants being deemed to have 'allowed' a child or vulnerable adult to die or suffer serious physical harm simply by living in the same household. As indicated in paragraph 10, the 'allowing' part of the offence has a high threshold.

Evidence and procedure in cases of serious physical harm

15. Section 2 of the 2012 Act inserts a new section 6A in the 2004 Act covering evidence and procedure in cases involving serious physical harm. The evidential and procedural provisions in section 6A are similar to those in section 6 of the 2004 Act and apply to the causing or allowing serious physical harm offence in the same way that section 6 applies to the causing or allowing death offence.

Section 6 of the 2004 Act

16. Section 6 of the 2004 Act modified certain evidential and procedural provisions in relation to alternative charges in trials involving the causing or allowing death offence. The modified procedures in section 6 apply where a defendant is charged with causing or allowing the death of a child or vulnerable adult and with murder or manslaughter **in the same proceedings** and in relation to **the same death**.

17. Briefly, there are two main changes to normal trial procedure. The first change concerns the drawing of adverse inferences from silence in court. Where a defendant refuses to give evidence in court, any adverse inference that may be drawn in relation to the causing or allowing death charge may also be drawn in relation to the murder or manslaughter charge, even if there would otherwise be no case to answer on that count (see paragraphs 33 to 36 of the 2005 Circular).

18. The second change means that, during the trial, a submission of no case to answer on the murder or manslaughter charge is delayed until all the evidence is heard, both from the prosecution and the defence, rather than taking place at the close of the prosecution case (see paragraphs 37 and 38 of the 2005 Circular).

19. These changes to normal trial procedure are intended to encourage defendants to give evidence; and to ensure that the more serious charge of murder or manslaughter remains available if evidence emerges as to who was responsible for the victim's death during the trial. In other words, the aim is to identify the person who *caused* the victim's death so that the defendants can be convicted and sentenced according to their culpability.

Section 6A of the 2004 Act

20. Similarly, section 6A modifies evidential and procedural provisions in relation to alternative charges in trials involving the causing or allowing serious physical harm offence. However, in keeping with the extraordinary nature of these provisions, they apply only to the more serious offences that are likely to be tried with the offence of causing or allowing serious physical harm.

21. So, the procedural provisions in section 6A are limited to cases where the defendant is charged with causing or allowing serious physical harm to a child or vulnerable adult and either:

- with a serious assault offence under section 18 or section 20 of the Offences Against the Person Act 1861; or
- with attempted murder under section 1 of the Criminal Attempts Act 1981.

22. As with the causing or allowing death offence, the modified procedures apply where a defendant is charged with the causing or allowing serious physical harm offence and one of the other offences **in the same proceedings** and where the two offences arise from **the same serious physical harm** caused to the victim.

Death or serious physical harm resulting from neglect

23. As indicated above, the extended section 5 offence will be committed in circumstances where a child or vulnerable adult dies or suffers serious physical harm as a result of “an unlawful act” (i.e. an offence) and either the defendant was himself responsible for that act, or, knowing that a risk of serious physical harm to the victim existed, failed to take reasonable steps to protect the victim. The unlawful act which triggers the offence will in the vast majority of cases be an offence against the person (such as grievous bodily harm).

24. However, where there are already criminal offences of wilful ill-treatment or neglect then wilful neglect is also an “unlawful act” which conceivably could trigger a prosecution for the section 5 offence. Such offences exist under:

- section 1 of the Children and Young Person's Act 1933 (cruelty or neglect of a child under 16);
- section 127 of the Mental Health Act 1983 (ill-treatment or neglect of a patient receiving treatment for a mental disorder); and
- section 44 of the Mental Capacity Act 2005 (ill-treatment or neglect of a person who lacks capacity).

25. So, if **a child dies or suffers serious physical** harm as a result of neglect which would constitute an offence under section 1 of the Children and Young Person's Act 1933 and the other elements of the section 5 offence are present, the defendants could be guilty of causing or allowing the child to die or suffer serious physical harm.

26. Similarly, if **a vulnerable adult dies or suffers serious physical harm** as a result of neglect which would constitute an offence under section 127 of the Mental Health Act 1983 or section 44 of the Mental Capacity Act 2005 and the other elements of the section 5 offence are present, the defendants could be guilty of causing or allowing the vulnerable adult to die or suffer serious physical harm.

Cases where the cause of death cannot be established

27. The causing or allowing death offence applies in circumstances where a child or vulnerable adult has died as a result of an unlawful act but it is not known **which** one of a number of adults in the household caused the death. It was not intended to, nor does it, apply to the situation where a child or vulnerable adult has died but it is not known **how** they died.

28. In cases where there is insufficient evidence to show that any unlawful act was the cause of death, in principle there appears to be no reason why, if there is sufficient evidence of an unlawful act resulting in grievous bodily harm, the causing or allowing serious physical harm offence should not be charged. In such circumstances, however, the offence could only be prosecuted on the basis that the victim had suffered *serious physical harm* as a result of the unlawful act. And if convicted the defendant would be sentenced on that basis and *not for causing or allowing the death*.

Useful links

Domestic Violence, Crime and Victims (Amendment) Act 2012

www.legislation.gov.uk/ukpga/2012/4/enacted

Explanatory notes on the Domestic Violence, Crime and Victims (Amendment) Act 2012

www.legislation.gov.uk/ukpga/2012/4/notes/contents

Home Office Circular 9/2005

www.homeoffice.gov.uk/about-us/home-office-circulars/circulars-2005/009-2005/

Domestic Violence, Crime and Victims Act 2004

www.legislation.gov.uk/ukpga/2004/28/contents

Explanatory notes on the Domestic Violence, Crime and Victims Act 2004

www.legislation.gov.uk/ukpga/2004/28/notes/contents

National Policing Improvement Agency (NPIA) guidance

(Relevant publications include: *Investigating Domestic Abuse* 2008; *Guidance on Investigating Child Abuse and Safeguarding Children, Second Edition* 2009; and *Guidance on Responding to People with Mental Ill Health or Learning Disabilities* 2010

www.npia.police.uk/en/6533.htm

TEXT OF HOME OFFICE CIRCULAR 9/2005

“1. The Domestic Violence, Crime and Victims (DVCV) Act 2004 is the biggest overhaul of the law on domestic violence in the last 30 years. It contains a wide range of reforms in the three distinct areas; domestic violence, crime and victims. Its provisions will be commenced in stages.

2. The purpose of this circular is to provide guidance to those working in the criminal justice system on the provisions of sections 5 and 6, which introduce a new offence of causing or allowing the death of a child or vulnerable adult and new procedural measures linked to the offence. The offence will come into force in England and Wales on 21st March 2005. This Circular is for guidance only and should not be regarded as providing legal advice. Legal advice should be sought if there is any doubt as to the application or interpretation of the legislation.

3. The new offence and procedural changes form a package of measures which are intended to solve the problem that arises when a child or vulnerable adult suffers an unlawful death and it can be proved that one or more of a small group of people living in the same household as the victim caused the death, but not which of them. In such circumstances there may be no case to answer against any member of the household for murder/manslaughter. Until now this loophole in the law has enabled those co-accused of the death of a child or vulnerable adult to escape justice by remaining silent or by blaming each other. However it is also a serious stand-alone offence which puts a new legal responsibility on adult household members who could be charged with the offence even for example where there is no charge of murder/manslaughter or where evidence suggests that the defendant could not themselves have committed the criminal act which killed the victim.

4. The offence provides that members of a household who have frequent contact with a child or vulnerable adult will be guilty if they caused the death of that child or vulnerable adult or three conditions are met:

- they were aware or ought to have been aware that the victim was at significant risk of serious physical harm from a member of the household
- they failed to take reasonable steps to prevent that person coming to harm
- the person subsequently died from the unlawful act of a member of the household in circumstances that the defendant foresaw or ought to have foreseen

The offence may therefore be applicable in two different circumstances – the defendant may have caused or allowed the death of a child or vulnerable adult. The prosecution do not have to prove which of the two circumstances apply to the defendant. The maximum penalty is 14 years.

5. The text of the Act including the new offence and procedural measures can be found on <http://www.hmso.gov.uk/acts/acts2004.htm>.

6. The offence applies in England, Wales and Northern Ireland. The procedural measures are different for Northern Ireland in order to take account of the different

court system and legal process there. It will apply to acts committed on or after the date of commencement. The 'allowing' element of the offence will generally be continuous rather than a single event, but for the offence to apply some failure to take reasonable steps to protect the victim, or continuation of a failure to take steps, must have taken place after the commencement of the provisions in the Act.

7. This Circular should in particular be brought to the attention of officers working in Child Abuse Investigation Units and Major Crime Teams which deal with homicide cases involving children and vulnerable adults, and to those staff in Social Services departments who deal with children, carers, vulnerable adults and wider domestic violence issues.

8. This circular is in four parts:

- A Background to the offence**
- B Formulation and purpose of the offence**
- C Issues relevant to the investigation of offences**
- D The procedural measures**

Its terms have been agreed with ACPO.

A Background to and context for the legislation

9. The loophole in the law, which can enable those co-accused of the death of a child or vulnerable adult to escape justice, has been recognised for some time. The potential problems of investigation and prosecution of these offences has been addressed by a number of organisations, prompted by a number of high-profile cases. This has included the NSPCC who organised a seminar called 'which of you did it' in November 2002. Subsequent work resulted in a detailed report issued the following year, and drawing on contributions from the police, academics, health and social services, the Criminal Bar Association and the Crown Prosecution Service. The Law Commission were also working on the problem from the point of view of criminal law reform, and they issued a consultation document in April 2003, followed by a report in September of that year (report no 282 Children: Their non-accidental death or serious injury.) The full report is available on the internet at www.lawcom.gov.uk.

10. Although the loophole can result in no charges of murder/manslaughter being brought, it is sometimes possible to bring instead charges of child cruelty. In cases where the child has suffered injury, rather than death, child cruelty offences under the Children and Young Persons Act 1933 may be an appropriate charge and provide appropriate penalties. But the child cruelty offence does not reflect the seriousness of the criminal behaviour if it has resulted in the death of a child. Nor can child cruelty be used where the victim is a vulnerable adult. The new offence will help deal with the 'which of you did it' cases, so that offenders can be brought to justice, and charges and sentences are available which properly reflect the seriousness of the criminal behaviour involved.

11. We would not necessarily expect a high volume of cases where charges under the new offence would be appropriate. It is difficult to be precise. Most recent Home Office statistics show that in the year 2003/4 there were a total of 70 victims of homicide under 16. In 30 of these the suspected perpetrator was a parent. But it is likely that only a small proportion of these would fall within the category where there was insufficient evidence to justify a charge of murder or manslaughter, and the new offence would result in additional people being charged. Moreover the offence is not

limited to 'which of you did it' cases, but can be used where, even if there is strong evidence that one individual caused the death, there is evidence that other adult members failed to act to protect the victim in the circumstances set out in the legislation. So there may be additional cases resulting from this. We also need to add to this figure the cases where the member of the household who is suspect is not the parent, and the cases involving vulnerable adults rather than children. Based on current statistics, we would expect the number of cases to be small. Nevertheless, these may be important and difficult cases.

B Formulation and purpose of the offence

12. The offence is contained in section 5 of the DVCV Act. A summary of the offence is given above. The offence will only apply to a person who, because they were members of the household who had frequent contact with the victim, had a duty to protect the victim from harm. It is reasonable that a person in those circumstances should be expected to take some action if this is possible, not simply stand by and do nothing. It is also reasonable that such a person should be expected to account to the court for the circumstances of the victim's death. It is expressly mentioned within the offence that it is not necessary for the prosecution to prove whether the defendant caused the death or allowed the death to occur. This is to enable a prosecution to be brought against both defendants even where they remain silent about what happened or blame each other. Charges can be brought under the offence when evidence suggests that the defendant could not have directly caused the death, but there is sufficient evidence that he or she allowed the death to occur.

13. The offence will not apply for example where the death was an accident, or was the result of a cot death (sudden infant death syndrome). Nor will it apply where there was one specific known risk within a household, such as a violent or abusive person, but the child or vulnerable person died or may have died from a different cause. The offence therefore does not criminalise members of the household for allowing the death if the death was the result of an event which they could not have anticipated or avoided.

Frequent contact

14. The offence applies to members of the household who have frequent contact with the victim. This may include family members or carers, but is not confined to that group. This is different from other offences such as those in the Children and Young Person's Act 1933, which are based on cruelty or negligence by a carer. This is for a number of reasons. One is that the offence encompasses vulnerable adults, who often do not have an identifiable 'carer'. The other is that it is a frequent scenario that a child is placed at risk when a new member of the household arrives, such as when a parent strikes up a relationship with a new partner after splitting up with a previous one. The new partner might legitimately claim that he or she has no caring role for the child. But the new offence makes clear that if he or she is in the position of a household member who has frequent contact with a child or vulnerable person, he does have a responsibility to protect that child or vulnerable person from harm.

Household

15. The term 'household' will be given its ordinary English meaning by the courts. This means it is *not* likely to include care homes or, for example, nurseries where a child is looked after with a number of others. A child or vulnerable person who is being cared for in this situation will be covered by professional safeguards and

standards and professional duties of care. A paid or voluntary domiciliary carer or housekeeper or an au-pair or similar may come under the definition of 'household' if it would be reasonable in the circumstances to regard them as such (see paragraph 16 below). They may therefore come within the offence. But the offence will mainly cover domestic situations where the 'which of you did it' scenario is most likely to occur, and where members of the household may feel under pressure to remain silent in order to protect themselves and protect other members of the household.

16. The offence also allows for the fact that, with modern lifestyles and increasingly flexible family arrangements, a person may be a member of more than one household at any one time. But if this is so, the offence will only apply to members of the household where the victim was living at the time of the act which caused their death. Increasingly children may live in one household, for example with their parents, but spend most of their time in another, for example grandparents or aunts and uncles. In the example above, the grandparents would not have responsibility for what happened in the parents' household and vice versa.

17. The DVCV Act stipulates that a person may be regarded as a member of the household for the purpose of this offence if they visit so often and for such periods of time that it is reasonable to regard that person as a member of the household. Whilst the mere fact of frequent and long visits can in itself be sufficient to show that a person can be regarded as a member of the household, other relevant factors may include taking meals in the household or routinely being included in outings and other household social activities and routines. Membership of the household will be for the courts to determine on a case-by-case basis, taking all the circumstances into account.

18. In order to prove the offence, it will be necessary to show that the defendant either caused the death of the victim or failed to take reasonable steps to protect the victim from a foreseeable risk of serious physical harm. What will constitute those "reasonable steps" will depend on the circumstances of the person and their relationship to the victim, and will vary from case to case. The court will need to take all the circumstances into account. For example, if the defendant is a foster-child of 16, the steps which he or she could be expected to take to protect a younger member of the household might be limited. If one of the defendants has themselves been the victim of domestic violence, the steps that defendant could have reasonably taken may be more limited than someone not suffering that violence. Depending on the facts of the particular case the court may find that the defendant may have been too frightened to take some of the steps which in other circumstances might have been available to them.

19. Subsection (3) establishes that only those who are 16 or over may be guilty of the offence, unless they are the mother or father of the victim. This is intended to reflect the special responsibility which parents have towards their children. It is also intended to reflect that the parent under 16 will normally have support and advice available to them from social services, health visitors and their GP amongst others. Other members of the household who are under 16 may not have this sort of support available, and are not under the same duty of care as the parents of the child.

20. In cases where it is not clear which of the co-accused caused the death, the offence, together with the procedures which support it, should provide a mechanism to help ensure that the person who caused the death is identified and appropriately charged and sentenced. It will therefore often be appropriate for the defendants in the case to be charged with the new offence and with murder/manslaughter. But the offence is self-standing and household members could be charged with the new

offence for example, where there is no charge of murder/manslaughter or where evidence suggests that the defendant could not themselves have committed the criminal act which killed the victim. The CPS will issue legal guidance to assist prosecutors in making charging decisions.

21. The offence only applies where the victim died of an unlawful act. Subsection (5) defines an unlawful act, as one that constitutes an offence, or would be were it not for the fact that the person lacks criminal responsibility. This means that if the person who caused the death lacks criminal responsibility or may lack criminal responsibility, the other household members can still be charged with the 'allowing' part of the new offence in respect of their failure to protect the victim. In this circumstance, it is possible that no charge of murder or manslaughter would be brought, but it would still be possible to pursue charges for the offence of causing or allowing the death.

C Issues relevant to the investigation of offences

Victims of domestic violence

22. Investigating officers will need particularly to be aware that in some of the households where this offence has occurred, more widespread violence and abuse may be present. Witnesses and co-defendants may therefore also be victims of domestic violence in these cases. It should be borne in mind that the defendant may be in fear of further violence. Domestic violence may seriously undermine the confidence of the victim and create an atmosphere of intimidation, shame and low self-esteem. It may not be easy for people to come forward if they are the victims of or witnesses to domestic violence or abuse. They may be very reluctant to admit that they are victims of domestic violence and therefore may not make clear their true circumstances, including any extenuating circumstances such as fear of the perpetrator. They may be afraid that they will be blamed for what has happened and that the family will be broken up and children will be taken into care. This is important since in cases where the defendant has also been the victim of violence, there may be limited steps which they could reasonably have taken in order to protect themselves, and even more limited steps which it would be reasonable for them to take to protect the child or vulnerable person who was at risk from violence. And the victim of domestic violence may not be ready to volunteer such information at the outset.

23. The offence should therefore be investigated and dealt with sensitively. The ACPO/Centrex guidance on child abuse and safeguarding children, published on 3rd March 2005 and the ACPO/NCPE Guidance on Investigating Domestic Violence (launched in November 2004)³ will provide further direction to the Police Service of England and Wales. Where there is a need to carry out a joint enquiry under section S47 of the Children Act 1989 involving social services and the police this should be undertaken in accordance with the guidance set out in working together to safeguard children.

24. But it should also be remembered that this offence is premised on a duty to protect the vulnerable person from harm. All members of the household who had frequent contact with the victim would have that duty. The fact that the defendant may be young and uncertain, feel intimidated or have suffered violence, will not in itself be conclusive evidence that it was reasonable for the defendant *not* to take any

³ The guidance referred to above has been superseded by NPIA *Guidance on Investigating Child Abuse and Safeguarding Children, Second Edition 2009* and *Investigating Domestic Abuse 2008* (see 'Useful links' on page 7).

steps to protect the victim. In most cases (although not necessarily all) there will be steps, however limited, which the defendant could have taken. Investigating officers will need to identify those steps. They will then need to make a judgement about what steps a court is likely to conclude that the defendant in all the circumstances could have reasonably been expected to take.

Reasonable steps

25. What steps a person might reasonably have taken will depend on their situation. It is an objective test and it will be for the courts to decide what was reasonable for a person in that situation. A judgement will need to be taken on a case-by-case basis as to whether a court would be likely to hold particular steps to have been reasonable in the circumstances of each particular case. As cases come before the courts, a body of caselaw will develop which will help in that judgement. Reasonable steps might include, for example:

- reporting suspicions of abuse to the police
- contacting social services. Most local authorities have websites and helplines for those seeking further advice
- making sure that the child or vulnerable person is treated promptly and appropriately for any injuries or illnesses which they may suffer
- explaining concerns to their family GP or health visitor
- contacting their teacher, head teacher or school nurse
- contacting organisations such as the NSPCC or Childline
- ringing one of the other voluntary agencies that support families, such as Home-Start
- contacting grandparents, an aunt or uncle, or another responsible adult member of the family
- exploring concerns with neighbours or others who may have contact with the person who is at risk
- making sure that alcoholism or drug dependence in other members of the household are acknowledged and appropriately treated
- attending anger management or parenting classes if appropriate, or ensuring other members of the household attend such classes

26. This list is not exhaustive, but gives examples of the steps which might be considered reasonable. Some of these steps could be taken anonymously, if the defendant were afraid of being identified. This may particularly be the case if the defendant has been a victim of domestic violence. If the defendant has chosen to do any of these things anonymously, it may be more difficult to prove conclusively at a later stage that they did take the appropriate steps. If there are no records, for example, of an anonymous report having been received by social services, then the court will have to make a judgement on the evidence available about whether they believe reasonable steps were taken.

27. The victim must have been at significant risk of serious physical harm from a member of the household. The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household. For example, a person cannot be guilty of allowing the death of a child or vulnerable person if the victim died from a blow when there was no previous history of abuse, nor any reason to suspect a risk. Where there is no reason to suspect the victim is at risk, other members of the household cannot reasonably be expected to have taken steps to prevent the abuse and eventual death. They would therefore not be guilty of allowing the death if the death could not have been foreseen, even where it is clear

that one of the household is guilty of a homicide offence. In that case every effort should be made by the investigating officer to obtain as much evidence as possible so that other appropriate charges can be considered. Appropriate charges might include murder/ manslaughter, or child cruelty or neglect under the Children and Young Person's Act 1933.

28. Investigating officers should remember that a victim can be put at risk by neglect. If a child dies of neglect and other household members knew of the significant risk of serious injury from neglect, they could be guilty of the new offence. Where a vulnerable adult dies of neglect, this may not necessarily mean that the death was caused by a criminal act which would be caught by the offence. It would only be caught if the neglect was so serious that it would constitute gross negligence manslaughter (a criminal act). In that event it may be possible to charge all or some of the parties with gross negligence manslaughter rather than the new offence. The CPS guidance referred to previously should help to establish what charges may be most appropriate.

Vulnerable adult

29. The offence defines the term 'vulnerable adult' as any person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise. The age of 16 rather than 18 is used in this context because the term 'child' is defined as under 16, and the term 'vulnerable adult' needs to include anyone who is vulnerable but is no longer defined as a child. Legal convention means that the term 'or otherwise' will be read with the words which have gone before, so that it will cover those who are unable to protect themselves for reasons similar to those listed. Although there are a range of definitions of the term 'vulnerable' in other legislation and in guidance, it was necessary to define the term for the purposes of this offence so that it would be as inclusive as possible. It covers those who are vulnerable temporarily as well as permanently, and those who are vulnerable due to mental as well as physical incapacity. Although the term 'vulnerable' is clearly defined in the legislation, the extent of the term in this context will emerge as offences under this part of the Act come to court.

D Evidential and procedural changes

30. Although the new offence will enable charges to be brought against all those in the household who had a responsibility for the death of a child or vulnerable adult, even where no charges were previously possible, the policy goal remains that the person who has caused the child's or vulnerable adult's death should be identified and convicted of murder or manslaughter if appropriate.

31. The new offence may assist in achieving this goal. But by itself the new offence might not always open the way to such a conviction. The less culpable party could still not be willing to explain what happened. Or he or she might only give their version of what happened after the close of the prosecution case, by which time the judge would already have withdrawn the murder/manslaughter charge on the basis of there being no case to answer.

32. The DVCV Act has therefore provided for two procedural changes to be made to usual court procedures in trials involving the section 5 offence. Their aim is to enable more charges of murder/manslaughter in "which of you did it?" cases to get past a "case to answer" submission made at half-time and be safely left to the jury. The changes relate to:

- a) the drawing of adverse inferences from silence in court, and
- b) the postponement, until the end of the defence case, of the decision on the question of whether there is a case to answer

Both have effect in relation only to the charge of murder or manslaughter, when those charges are accompanied by charges under the new offence. These procedural changes were proposed by the Law Commission in their report, *Children: Their Non-accidental Death or Serious Injury*, although the Act adopts a tighter mechanism for triggering them to keep them closely targeted at the “which of you did it?” cases.

Inferences from silence

33. Where a person is charged with an offence (including the new one) and that person fails to give evidence in court, section 35 of the Criminal Justice and Public Order Act 1994 (the 1994 Act) allows the jury a discretion to draw an adverse inference from the failure (or refusal) in relation to that offence, subject to certain safeguards. But in the “which of you did it?” cases where a case to answer cannot be established, section 35 of the 1994 Act does not help in respect of the murder/manslaughter charge, since the Court of Appeal has ruled (*Cowan* [1996] 1 Cr.App.R.1) that it only applies where there is already a case to answer.

34. Now, however, where a person is charged with the new offence and fails to give evidence, and if the jury would be able to draw adverse inferences in respect of the new offence under section 34 of the 1994 Act, section 6(2) of the DVCV Act provides that the jury may also draw an adverse inference from the silence in respect of the murder/manslaughter charge. Similar safeguards will apply to the drawing of an adverse inference under this new provision as apply to those drawn under section 35 of the 1994 Act. If the defendant stays silent and the requirements of the safeguards are met, then the inference that the jury may draw is that he or she has no reasonable explanation for his or her silence.

35. The safeguards which apply are similar to those that apply to adverse inferences drawn from silence under section 35 of the 1994 Act and aim to prevent a jury from drawing an adverse inference in inappropriate circumstances and from giving improper weight to any inference they did draw. Firstly, the jury would only be able to draw an inference if it was “proper” to do so. The judge would have to direct the jury only to draw an inference if it was satisfied that the defendant’s silence could only be attributed to the defendant having no answer to the charges against him or none that would stand up to cross-examination. This safeguard means that the jury would not be able to draw an inference against the defendant if it thought that the defendant’s silence could be attributable to other reasons, such as his desire to protect another person/defendant.

36. Secondly, there is a prohibition (section 38(3) of the 1994 Act, read with ECHR caselaw) on a conviction being based wholly or mainly on the inference from silence. But this does not mean that a conviction which would not have been obtained but for the inference is prohibited. The inference can be important and decisive in obtaining the conviction without being the whole or main basis for the conviction. If this were not so, the inference would clearly be worthless. The Law Commission, in its Report, said: “...where the evidence was such that the defendant was so close to the events that he or she must either have been the perpetrator, or been complicit in it, or be able, even if only by exculpatory evidence, to cast light on which other person was responsible for the child’s death or injury, then the court may

well conclude that the circumstances so called for an explanation from him or her, as a person with the statutory responsibility, that it would be proper to permit the jury to draw an adverse inference from the defendant's silence. In such a case the "eloquent silence" of the defendant might be said to be the "decisive" element in a decision to convict but it would not mean that the defendant was convicted "solely or mainly" on an inference from silence any more than the "decisive" straw is the "sole or main" cause of the camel's broken back" (paragraphs 6.86 and 6.87 of the Law Commission Report).

Postponement of the decision whether there is a case to answer

37. Where a person is charged both with the new offence and with murder/manslaughter, section 6(4) of the DVCV Act provides that the decision on a defence submission of "no case to answer" made at the end of the prosecution case shall be postponed until the close of all the evidence, providing that the prosecution has successfully established a case to answer on the charge of the new offence. If the decision on whether there was a case to answer were not postponed, and new evidence emerged about who caused the death, the murder/manslaughter charges would already have been dropped and, despite new evidence, it would not be possible to achieve a conviction for murder/manslaughter.

38. The purpose of section 6(3) is to prevent the normal procedures by which the defence can apply for charges to be dismissed at the pre-trial stage from undermining the impact of the other procedural changes.

Anticipated impact

39. The ability to draw an adverse inference from silence in respect of the murder/manslaughter charge, coupled with the postponement of the case to answer decision, should have a real impact in certain cases. We expect these measures to lead to convictions for murder/manslaughter that would not otherwise have been obtained. The impact should be felt in several ways:

- firstly, when the judge makes his or her decision as to whether there is a case to answer at the end of the defence case - if the judge considers that the jury could properly draw an adverse inference, he or she will be able to take the inference into account in making his or her decision on case to answer. It is anticipated that this will lead to more cases being put to the jury than is currently the case
- secondly, when the jury make their decision - if they consider that the safeguards in relation to drawing an adverse inference are met, they will be able to take the inference into account when making their decision
- thirdly, and more generally, the prospect of the adverse inference being drawn - in relation to murder/manslaughter as well as the new offence - may encourage one or more parties to give evidence explaining what happened

ECHR issues

40. The Parliamentary Joint Committee on Human Rights looked carefully at whether the procedural measures would be compatible with the ECHR requirements to provide a fair trial (ECHR Article 6). They concluded that the measures would be compatible with a fair trial, because they are confined to the very particular circumstances in which the new offence would apply. The Law Commission have also pointed out that there is an obligation under the ECHR for signatory states to ensure that deaths are properly investigated as part of the obligation to ensure that everybody's right to life is protected by law. Ministers have certified that in their view the DVCV Act is compatible with the ECHR rights."

SECTIONS 5 AND 6 OF THE DOMESTIC VIOLENCE, CRIME AND VICTIMS ACT 2004 AS AMENDED BY THE DOMESTIC VIOLENCE, CRIME AND VICTIMS (AMENDMENT) ACT 2012 (amendments in bold italics)

*Causing or allowing **child or vulnerable adult to die or suffer serious physical harm***

5 The offence

- (1) A person (“D”) is guilty of an offence if—
- (a) a child or vulnerable adult (“V”) dies ***or suffers serious physical harm*** as a result of the unlawful act of a person who—
 - (i) was a member of the same household as V, and
 - (ii) had frequent contact with him,
 - (b) D was such a person at the time of that act,
 - (c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and
 - (d) either D was the person whose act caused ***the death or serious physical harm*** or—
 - (i) D was, or ought to have been, aware of the risk in paragraph (c),
 - (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
 - (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.
- (2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.
- (3) If D was not the mother or father of V—
- (a) D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused ***the death or serious physical harm***;
 - (b) for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.
- (4) For the purposes of this section—
- (a) a person is to be regarded as a “member” of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it;
 - (b) where V lived in different households at different times, “the same household as V” refers to the household in which V was living at the time of the act that caused ***the death or serious physical harm***.
- (5) For the purposes of this section an “unlawful” act is one that—
- (a) constitutes an offence, or
 - (b) would constitute an offence but for being the act of—
 - (i) a person under the age of ten, or
 - (ii) a person entitled to rely on a defence of insanity.

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

- (6) In this section—
“act” includes a course of conduct and also includes omission;
“child” means a person under the age of 16;
“serious” harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the [Person Act 1861 \(c. 100\)](#);
“vulnerable adult” means a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.
- (7) A person guilty of an offence under this section **of causing or allowing a person’s death** is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.
- (8) **A person guilty of an offence under this section of causing or allowing a person to suffer serious physical harm is liable on conviction on indictment to imprisonment for a term not exceeding 10 years or to a fine, or to both.**

6 Evidence and procedure *in cases of death*: England and Wales

- (1) Subsections (2) to (4) apply where a person (“the defendant”) is charged in the same proceedings with an offence of murder or manslaughter and with an offence under section 5 in respect of the same death (“the section 5 offence”).
- (2) Where by virtue of section 35(3) of the Criminal Justice and Public Order Act 1994 (c. 33) a court or jury is permitted, in relation to the section 5 offence, to draw such inferences as appear proper from the defendant’s failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether he is guilty—
(a) of murder or manslaughter, or
(b) of any other offence of which he could lawfully be convicted on the charge of murder or manslaughter,
even if there would otherwise be no case for him to answer in relation to that offence.
- (3) The charge of murder or manslaughter is not to be dismissed under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (c. 37) (unless the section 5 offence is dismissed).
- (4) At the defendant’s trial the question whether there is a case for the defendant to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the section 5 offence, before that earlier time).
- (5) An offence under section 5 **of causing or allowing a person’s death** is an offence of homicide for the purposes of the following enactments—

sections 24 and 25 of the Magistrates’ Courts Act 1980 (c. 43) (mode of trial of child or young person for indictable offence);
section 51A of the Crime and Disorder Act 1998 (sending cases to the Crown Court: children and young persons);

section 8 of the Powers of Criminal Courts (Sentencing) Act 2000 (c. 6)
(power and duty to remit young offenders to youth courts for sentence).

6A Evidence and procedure in cases of serious physical harm: England and Wales

- (1) Subsections (3) to (5) apply where a person (“the defendant”) is charged in the same proceedings with a relevant offence and with an offence under section 5 in respect of the same harm (“the section 5 offence”).**
- (2) In this section “relevant offence” means -**
 - (a) an offence under section 18 or 20 of the Offences against the Person Act 1861 (grievous bodily harm etc);**
 - (b) an offence under section 1 of the Criminal Attempts Act 1981 of attempting to commit murder.**
- (3) Where by virtue of section 35(3) of the Criminal Justice and Public Order Act 1994 a court or jury is permitted, in relation to the section 5 offence, to draw such inferences as appear proper from the defendant’s failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether the defendant is guilty of a relevant offence, even if there would otherwise be no case for the defendant to answer in relation to that offence.**
- (4) The charge of the relevant offence is not to be dismissed under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (unless the section 5 offence is dismissed).**
- (5) At the defendant’s trial the question whether there is a case for the defendant to answer on the charge of the relevant offence is not to be considered before the close of all the evidence (or, if at some earlier time the defendant ceases to be charged with the section 5 offence, before that earlier time).**