

DOMESTIC VIOLENCE, CRIME AND VICTIMS ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Domestic Violence Etc

Section 1: Breach of non-molestation order to be a criminal offence

12. Part 4 of the Family Law Act 1996 empowers a court to make an order giving personal protection to the applicant or relevant child from molestation by an associated person (a non-molestation order). The court can also make a non-molestation order if in any family proceedings to which the respondent is a party it considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though no application for an order has been made.
13. Parties to the proceeding may be “associated” by virtue of:
 - marriage or former marriage;
 - cohabitation or former cohabitation;
 - living together or having lived together in the same household other than as employees, tenants, lodgers or boarders;
 - being related;
 - an agreement to marry;
 - being parents or having parental responsibility for a child;
 - being connected by adoption; or
 - being parties to the same family proceedings.
14. Until now, a breach of such an order has been punishable only as a civil contempt of court. Speedy enforcement depended on whether the court attached a power of arrest to the order. If no power of arrest was attached, the victim had to go to the civil court to get an arrest warrant.
15. *Section 1* inserts a new section 42A into the Family Law Act 1996 which makes breach of a non-molestation order a criminal offence. As the maximum penalty for the offence is 5 years’ imprisonment, the offence will be arrestable under section 24(1) of the Police and Criminal Evidence Act 1984. This enables the police always to arrest for breach of a non-molestation order, without the need for the courts to attach a power of arrest, or for the victim to apply to the civil court for an arrest warrant. Under section 42A(2), an individual would only be guilty of a criminal offence if he is aware of the existence of the order. If the victim does not want to pursue criminal proceedings, the option still remains for them to apply for an arrest warrant for breach of a non-molestation order in the civil court.

16. Subsections (3) and (4) of the new section 42A provide that where an individual has been convicted of a breach of a non-molestation order, he cannot be punished subsequently for contempt, and vice versa.
17. A new sub-section (4A) is inserted into section 42 by paragraph 36 of Schedule 10 which places a duty on the court to consider making a non-molestation order when it considers whether to make an occupation order under Part 4. Occupation orders are orders regulating the occupation of a dwelling-house and may provide for the exclusion of the respondent from the house and the vicinity of the house or prohibit, terminate or restrict the exercise of the respondent's occupation rights. Breach of an occupation order is not to be made a criminal offence as history of violence or molestation is not a prerequisite for the grant of an order. However the new section 42(4A) is designed to ensure that adequate protection is always in place for those persons who need it.

Section 2: Additional considerations if parties are cohabitants or former cohabitants

18. This section repeals section 41 of the Family Law Act 1996, which currently applies where the parties are cohabitants or former cohabitants, and which provides that where the court is required to consider the nature of the parties' relationships it must have regard to the fact that they have not given each other the commitment involved in marriage. This flows from the amendment of the definition of "cohabitants" so as to include same-sex couples (see paragraph 21 below).
19. However, the section also amends section 36 of the Act, which is the only section where the court is specifically required to have regard to the nature of the parties' relationship (although it is also required to have regard to this when considering whether to transfer a tenancy under Schedule 7 to the 1996 Act: see paragraph 5(b)). Section 36 permits the court to make an occupation order in favour of a cohabitant or former cohabitant with no existing right to occupy the property. The amendment provides that when considering the nature of the parties' relationship the court must take into account in particular the level of commitment involved in that relationship.

Section 3: "Cohabitants" in Part 4 of the Family Law Act 1996 to include same-sex couples

20. Same-sex couples may apply for non-molestation orders by virtue of living together in the same household, but not for occupation orders merely by virtue of being an associated person. They must also have been legally entitled to occupy the dwelling-house and the house must have been intended to be their home. "Legal entitlement" means to occupy the dwelling-house concerned by virtue of a beneficial estate or interest or contract or by virtue of any other enactment giving the right to remain.
21. This section amends the definition of cohabitants to include same-sex cohabitants. This will enable same-sex cohabitants to apply for occupation orders under section 36 and section 38 of the Family Law Act 1996, even where they may not be "legally entitled", to bring their rights into line with the rights of opposite-sex cohabitants. It will also enable them to apply for a non-molestation order by virtue of being a cohabitant, rather than by virtue of being part of the same household as the respondent.
22. *Schedule 10* contains amendments replacing references to "living together" as husband and wife in Part 4 and Schedule 7 to the Act with the term - "cohabit" - to ensure that any reference in Part 4 and Schedule 7 to the Act to living together as husband and wife will encompass both opposite and same-sex cohabitants. The term "former cohabitant" is also amended to include former same-sex cohabitants.

Section 4: Extension of Part 4 of 1996 Act to non-cohabiting couples

23. This section extends the availability of non-molestation orders to those in domestic relationships who have never cohabited or have never been married. This new category

of associated person will also be able to apply for an occupation order under section 33 of the Act as long as the requirements of section 33(1) are met. As section 33 only applies to homes in which the applicant and respondent have lived or intended to live, it is unlikely that this new category of associated person will be able to satisfy this requirement very often.

24. It extends the list of associated persons by incorporating a reference to those who have or have had an intimate personal relationship which is or was of significant duration. It will be for the court to decide on whether the relationship meets these criteria. This covers a long-standing relationship which may, or may not, be a sexual relationship, but which is an intimate and personal one. It does not include long-term platonic friends or “one-night stands”.

Section 5: Causing or allowing the death of a child or vulnerable adult: the offence

25. *Subsection (1)* sets out the circumstances under which a person is guilty of an offence of causing or allowing the death of a child or a vulnerable adult. It limits the offence to where the victim has died of an unlawful act, so it will not apply where the death was an accident, or where for example a child may have suffered a cot death. The offence only applies to members of the household who had frequent contact with the victim, and could therefore be reasonably expected both to be aware of any risk to the victim, and to have a duty to protect him from harm.
26. The household member must have failed to take reasonable steps to protect the victim. What will constitute “reasonable steps” will depend on the circumstances of the person and their relationship to the victim.
27. The victim must also have been at significant risk of serious physical harm. The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household. The offence will not apply if the victim died of a single blow when there was no previous history of abuse, nor any reason to suspect a risk. Where there is no reason to suspect the victim is at risk, other members of the household cannot reasonably be expected to have taken steps to prevent the abuse. They will therefore not be guilty of the new offence, even where it is clear that one of them is guilty of a homicide offence.
28. The effect of *subsection (2)* is that where, for example, there are two defendants and it is established that one must have caused the death and the other must have failed to take reasonable steps to prevent it, the prosecution does not have to prove which is which.
29. *Subsection (3)* provides that only those who are 16 or over may be guilty of the offence, unless they are the mother or father of the victim. Members of the household under 16 will not have a duty of care or be expected to take steps to prevent a victim coming to harm. In particular, a child under 16 will have no duty to prevent their parents from harming a sibling. The parents of a child will be expected to take reasonable steps to protect their child even if they themselves are under 16.
30. *Subsection (4)(a)* provides that a person who visits the household frequently and for long periods can be regarded as a member of the household for these purposes. This will apply whatever the formal relationship of the person to the victim. *Subsection (4)(b)* covers situations where the victim might have lived in different households at different times. Only the members of the household where the victim suffered fatal harm could be guilty of the offence.
31. *Subsection (5)* makes it clear that a defendant can be charged with failing to take reasonable steps to protect the victim, even where the victim died as a result of the act of person who lacks criminal responsibility. There is a safeguard to ensure that a person who lacks criminal responsibility cannot be charged with the criminal act of causing the death by virtue of the definition in this section if he could not otherwise be charged with an offence.

32. *Subsection (6)* provides further definitions for the purposes of the section.

Section 6: Evidence and procedure: England and Wales

33. *Section 6* applies to trials in England and Wales only. It provides special rules for cases where a defendant is charged within the same proceedings with the new offence under section 5 and also with murder or manslaughter in relation to the same death. The provisions in *subsections (2) to (4)* apply in circumstances where this is the case.
34. *Subsection (2)* makes provision for drawing such inferences as appear proper from a defendant's failure to give evidence in court (or refusal, without good cause, to answer any question). Where the court or jury is permitted under section 35(3) of the Criminal Justice and Public Order Act 1994 to draw an adverse inference in respect of the offence under section 5 from the defendant's failure to give evidence or to answer questions, the subsection provides that an adverse inference may also be drawn in relation to the charge of murder or manslaughter. The subsection makes clear that an adverse inference can be drawn in relation to the murder or manslaughter charge even where there would not otherwise be a case to answer on that charge. However, a court or jury may only draw an adverse inference if to do so would be proper given all the circumstances of the case.
35. The entitlement under this section to draw an adverse inference in respect of the charge of murder or manslaughter is subject to the safeguard in section 38(3) of the 1994 Act. This, read with the *Murray v UK* case in the European Court of Human Rights ([1996] 22 EHRR 29), has the effect that a defendant may not be convicted solely or mainly on the basis of an inference drawn from his or her silence or refusal to answer questions.
36. *Subsection (3)* sets out how charges should be dealt with where a person is sent by a magistrates' court to the Crown Court for trial (pursuant to section 51 of the Crime and Disorder Act 1998), and the defence makes an application for the charges to be dismissed (under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998). This subsection prevents the murder or manslaughter charge being dismissed if the judge does not dismiss the section 5 offence charge.
37. *Subsection (4)* defers the decision on a question of whether there is a "case to answer" on the charge of murder or manslaughter until the close of the defence case, unless the prosecution fails to establish a case to answer on the section 5 offence charge by the conclusion of its case. This means that, in these cases, the court will hear all the evidence that is to be presented in the case before deciding whether the charges can safely be left to the jury.
38. *Subsection (5)* makes clear that the new offence should be treated as an offence of homicide for the purposes of the following enactments:
- Sections 24 and 25 of the Magistrates' Courts Act 1980
 - Section 51 A of the Crime and Disorder Act 1998
 - Section 8 of the Powers of Criminal Courts (Sentencing) Act 2000
39. Treating the offence as a homicide for the purposes of sections 24 and 25 of the Magistrates' Courts Act 1980 and section 51 of the Crime and Disorder Act 1998 means that the offence will always be tried in the Crown Court, even where the defendant is a juvenile. Including the offence as a homicide for the purposes of section 8 of the Powers of Criminal Courts (Sentencing) Act 2000 means that the offender can be sentenced in the Crown Court even if he or she is under 18.

Section 7: Evidence and procedure: Northern Ireland

40. *Section 7* provides special rules for trials in Northern Ireland equivalent to those for England and Wales provided in section 6. The provisions in subsections (2) to (4) apply

in circumstances where a defendant is charged within the same proceedings with the new offence under section 5 and also with murder or manslaughter in relation to the same death.

41. The effect of *subsection (2)* is to provide for Northern Ireland what section 6(2) provides for England and Wales: where the court or jury is permitted under Article 4(4) of the Criminal Evidence (Northern Ireland) Order 1988 to draw an inference of guilt in respect of the offence under section 5 from the defendant's failure to give evidence, the subsection provides that an adverse inference may also be drawn in relation to the charge of murder or manslaughter. The effect of this provision is as set out for England and Wales above.
42. *Subsection (3)* sets out how magistrates' courts should deal with the charge of murder or manslaughter when they consider, under Article 37 of the Magistrates' Courts (Northern Ireland) Order 1981, whether to commit the defendant for trial for that offence. This subsection provides that there will automatically be deemed sufficient evidence to put the person on trial for murder or manslaughter if there is found to be sufficient evidence to put him or her on trial for the section 5 offence.
43. The effect of *subsection (4)* is to provide for Northern Ireland what *section 6(4)* provides for England and Wales (see paragraph 37).
44. *Subsection (5)* makes clear that the new offence should be treated as an offence of homicide for the purposes of Articles 17 and 32 of the Criminal Justice (Children) (Northern Ireland) Order 1998. Treating the offence as a homicide for the purposes of Article 17 means that the offence will always be tried in the Crown Court, even where the defendant is a juvenile. Including the offence as a homicide for the purposes of Article 32 means that the offender can be sentenced in the Crown Court even if he or she is under 18. These provisions are considered to be justified by the seriousness of the offence.

Section 8: Evidence and procedure: courts martial

45. This section enables the special rules provided in section 6 to apply to proceedings before courts-martial where the defendant is charged within the same proceedings with the military offences corresponding to those referred to in section 6 in relation to the same death.

Section 9: Establishment and conduct of reviews

46. This section provides for guidance on the establishment and conduct of domestic homicide reviews, so that statutory and other agencies can learn lessons from them. Under *subsection (3)*, the relevant authorities have a duty to have regard to guidance issued by the Secretary of State when establishing or conducting such a review. The relevant authorities are listed in *subsection (4)(a)* for England and Wales as chief officer of police, local authorities, local probation boards, Strategic Health Authorities, Primary Care Trusts, Local Health Boards and NHS trusts and in *subsection (4)(b)* for Northern Ireland, as the Chief Constable of the Police Service of Northern Ireland, the Probation Board for Northern Ireland, Health and Social Services Boards and Health and Social Services Trusts.
47. It is envisaged that the guidance will encourage multi-agency reviews in relevant cases and will provide details as to leadership, format, timing and participants depending on the individual circumstances of the case.
48. The reviews are limited to deaths of those aged 16 years and above. Child deaths are already considered under Part 8 of the Serious Case Reviews ("Working Together to Safeguard Children") guidance. The guidance will cover deaths which have or appear to have resulted from violence, abuse or neglect inflicted by someone to whom he was

*These notes refer to the Domestic Violence, Crime and Victims Act
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related or of the same household or with whom the victim had an intimate personal relationship.

49. In addition, *subsection (2)* gives the Secretary of State the reserve power to direct a review to be established in a particular case, specifying who must establish and/or participate in such a review. *Subsection (6)* enables the Secretary of State to amend the definition of relevant authorities in *subsection (4)* and “local authority” in *subsection (5)* by order subject to the negative resolution procedure (see section 61(3)).