



TITLE **Partial defences to murder: loss of control and diminished responsibility; and infanticide: Implementation of Sections 52, and 54 to 57 of the Coroners and Justice Act 2009**

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THE CORONERS AND JUSTICE ACT 2009 (COMMENCEMENT NO. 4, TRANSITIONAL AND SAVING PROVISIONS) ORDER 2010 (SI. 2010/816)

1. This circular provides details of the provisions of the Coroners and Justice Act 2009 (“the 2009 Act”) for England and Wales¹ which come into force on 4 October 2010.
2. Sections 52, and 54 to 57 of the 2009 Act make changes to the law of homicide. Section 52 changes the definition of the partial defence to murder of diminished responsibility. Sections 54 and 55 introduce a new partial defence to murder of loss of control, to replace the existing partial defence of provocation, which is repealed by section 56. Section 57 makes small changes to the law relating to the offence/defence of infanticide.
3. These changes will come into effect in England and Wales on 4 October 2010.
4. This guidance 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. This circular should be read in conjunction with the explanatory notes to the Coroners and Justice Act 2009.

Changes effected by the Coroners and Justice Act 2009

Sections 52: Partial defences to murder: Diminished responsibility

5. Section 52 of the 2009 Act deals with the partial defence to murder of diminished responsibility as it applies in England and Wales. It replaces the existing definition of the partial defence with a new, more modern one. It does so by replacing section 2(1) of the Homicide Act 1957 with new subsections (1) to (1B). There is no change to the effect of successfully pleading the partial defence; it will continue to result in a verdict of manslaughter rather than murder (section 2(3) of the 1957 Act). Similarly, there is no change to the requirement in section 2(2) of the Homicide Act 1957 for the defence to prove that the partial defence applies (on the balance of probabilities).
6. The amended subsection (1) provides that a person who kills or is a party to the killing of another is not to be convicted of murder if the defendant was suffering from “an abnormality of mental functioning”. This should arise from a “recognised medical condition”, which requires that the abnormality of mental functioning substantially impaired the defendant’s ability to do one or more of three things set out in subsection (1A). The first of these is the ability to understand the

¹ Commencement of equivalent provisions and circular for Northern Ireland are a matter for Northern Ireland Executive. See end of circular for contact details.

nature of his or her conduct. The second is the ability to form a rational judgement. The third is the ability to exercise self-control.

7. Subsection (1B) provides that an abnormality of mental functioning provides an explanation for the defendant's acts or omissions in doing or being a party to the killing if it was at least a significant contributory factor in causing the defendant to act as he did. During passage of the Bill through Commons Committee stage the then Minister explained:

The Government agree with the Law Commission that it is necessary for there to be some causal connection between the abnormality of mental functioning and the killing in order for the partial defence to succeed. It is right for there to be some connection between the condition and the killing, otherwise the partial defence could succeed in cases when the defendant's mental condition made no difference to their behaviour, and they would have killed regardless of the medical condition. For that reason, subsection (1B) provides that, for the partial defence to succeed, any such abnormality of mental functioning must have been at least a significant contributory factor in causing the defendant to do as he did. It need not have been the only cause, the main cause or the most important factor, but it must be more than merely trivial. The partial defence cannot succeed when the truth is that the recognised medical condition and the impairment were randomly present by coincidence and made absolutely no difference to the behaviour that ensued. [Hansard 03 March 2009: Column 414]

8. The aim is that the defence should not be able to succeed where the defendant's mental condition made no difference to their behaviour i.e. when they would have killed regardless of their medical condition. [Hansard 03 March 2009: Column 410]
9. This contrasts with the position under the current definition of diminished responsibility which requires that a person's mental responsibility must be substantially impaired but does not specify in what respects this must be so.
10. Subsection (2) updates the language of section 6 of the Criminal Procedure (Insanity) Act 1964 insofar as it relates to the partial defence of diminished responsibility, so that it refers to "abnormality of mental functioning" as opposed to the current "abnormality of mind".
11. In drafting the new partial defence, it was envisaged that when determining what constitutes a "recognised medical condition", practitioners would have recourse to existing accepted classificatory lists. During the passage of the Bill through Commons Committee stage, the then Minister explained:

There are a number of accepted systems that encompass recognised physical, psychiatric and psychological conditions. Foremost among those is the World Health Organisation's international classification of diseases, ICD10, as well as, as has been said, DSM4, which is the American Psychiatric Association's diagnostic and statistical manual of mental disorders...The Government envisage that such accepted classification systems will be used later. If a qualified medical expert gives evidence that, at the time of the killing, a defendant was suffering from a condition included in one of these lists, and the jury accepts that, that part of the test will be met. There is also scope for conditions that are not included in such a list to be deemed recognised medical conditions for the purposes of the test. [Hansard 03 March 2009: Column 414]

12. We envisage that in relation to emerging conditions which, while being recognised, might not have been included in the accepted classificatory lists yet, it would be open to the defence to seek to call a recognised specialist who has had their work peer reviewed or validated in some other way and for the jury to decide how to treat this evidence, after any directions from the judge. [Hansard 03 March 2009: Column 413]

Sections 54, 55 and 56: Partial defence to murder: Loss of control

Existing law of provocation: abolition

13. Under the existing common law partial defence of provocation, a defendant who would otherwise be guilty of murder will be guilty of manslaughter instead, if he or she was provoked by things said or done (or both) to lose his or her self-control. The defence will succeed if in the opinion of the jury the provocation was enough to make a reasonable person do as the defendant did. Section 56 of the 2009 Act abolishes this partial defence.

New partial defence to murder of loss of control

14. Sections 54 and 55 of the 2009 Act between them provide for a new partial defence to murder of "loss of control".
15. Section 54 sets out the circumstances in which the new partial defence to murder of loss of control applies (section 54(1)). These are that the defendant must at the time of the offence have lost self-control resulting in them killing a person (section 54(1)(a)) in one of three types of situations (described in the Act as 'qualifying triggers'). These qualifying triggers are: where the defendant fears serious violence; when certain things have been said or done which amount to circumstances of an extremely grave character and caused the defendant to have a justifiable sense of being seriously wronged; or,

when a combination of the first two situations applies. The qualifying triggers are defined fully in section 55.

Factors common to both limbs of the partial defence of loss of control

16. Whichever of these qualifying triggers applies, a number of factors must be present for the defence to succeed.
17. The first is that a person with certain characteristics might have acted in the same or similar way to the defendant. These characteristics are that: (i) they were of the same sex and age as the defendant; (ii) they had an ordinary level of tolerance and self-restraint; and (iii) they were in the same circumstances of the defendant (section 54(1)(c)). The circumstances of the defendant in this context include any circumstances, except those whose only relevance to the defendant's conduct is that they impact on the defendant's general capacity for tolerance and self-restraint (section 54(3)). This means that if the defendant is known to have a short temper, this may not be taken into account by the jury for these purposes. On the other hand, a person's history of abuse at the hands of the victim could be taken into account. So if, for example, the defendant is, say, a 23 year old woman whose partner whom she has killed has beaten her frequently, the jury must consider whether a woman of that age with that history and with an ordinary level of tolerance and self-restraint might have done the same or a similar thing to their partner.
18. The defendant's loss of control need not be sudden (section 54(2)) – in other words, there may be a delay between the incident which was relevant to the loss of control and the killing. However, the judge may – when deciding whether to leave the defence to the jury – and the jury may – when deciding whether the killing resulted from the loss of control – take into account any delay.
19. The defence is not available to those who act in a considered desire for revenge (section 54(4)). This is so even if the defendant loses self-control as a result of one of the 'qualifying triggers'.
20. Neither is the defence available where one of the 'qualifying triggers' is present but the cause of the fear of serious violence or of a sense of being seriously wronged by a thing done or said was something that the defendant incited for the purpose of providing an excuse to use violence (sections 55(6)(a) and (b)). This might arise where the defendant baited the victim by taunting him in order to provoke him to do something outrageous which might then justify a fatal attack on him.
21. The provisions also make clear where the burden of proof lies when the partial defence of loss of control is raised. If sufficient evidence is raised, the burden of disproving the defence beyond reasonable doubt lies with the prosecution (section 54(5)). The evidence is sufficient to raise an issue as to the defence where a jury, properly directed, could

reasonably conclude that the partial defence might apply (section 54(6)).

22. Finally, in relation to each of the three situations where the defence might apply, in a situation where more than one person is charged with murder, it does **not** follow that, if one defendant successfully pleads this defence and secures a conviction of manslaughter, all other defendants must be convicted of manslaughter (rather than murder) as well (section 54(8)).

Loss of control: fear of serious violence

23. Section 55 provides full details of when the three 'qualifying triggers' apply. The first of these is where the defendant's loss of self-control was attributable to his or her fear of serious violence from the victim (section 55(3)).
24. There are two additional factors to be noted when considering whether the loss of control partial defence applies in circumstances where there is a fear of serious violence.
25. First, and in common with the complete defence of self-defence, this is a subjective test. The defendant does not need to prove that his or her fear was reasonable; the jury need only be convinced that the fear was genuine.
26. Secondly, the fear of serious violence needs to be in respect of violence against the defendant or another identified person. So, for example, the defendant could be afraid that the victim would use serious violence against her child; a general fear that the victim might use serious violence against someone where the defendant does not know who that might be is not sufficient.

Loss of control: a thing or things done or said (or both)

27. The second qualifying trigger is where the defendant's loss of self-control was attributable to a thing or things done or said (or both). This can only found the defence where the thing or things done or said amounted to circumstances of an extremely grave character and caused the defendant to have a justifiable sense of being seriously wronged (section 55(4)).
28. Two factors must be considered when determining whether the loss of control partial defence applies where the defendant relies on a thing or things done or said as the qualifying trigger for his loss of self-control.
29. First, whether the defendant's sense of being seriously wronged is justifiable is an objective question for the jury to determine. There may well be many situations where a particular individual feels particularly aggrieved by the behaviour of another. However, this will not be

sufficient for the defence to succeed unless the jury concludes that the defendant was indeed seriously wronged.

30. Secondly, in determining whether a loss of self-control has a 'qualifying trigger', the fact that a thing done or said amounted to sexual infidelity is to be disregarded (section 55(6)(c)). So, if a person kills another because they have been unfaithful (or believes they have been unfaithful), he or she will not be able to claim this partial defence. A question raised during the course of parliamentary debate was whether the partial defence was ruled out in circumstances which amounted to sexual infidelity but which also amounted to a 'qualifying trigger'. However, it is only the fact of sexual infidelity that must be disregarded. The thing done or said can still potentially amount to a 'qualifying trigger' if (ignoring the sexual infidelity) it amounts to circumstances of an extremely grave character which caused the defendant to have a justifiable sense of being seriously wronged.
31. An example might be: a woman discovers her husband has raped her sister, loses her self control and goes on to kill her husband. The fact that this would amount to sexual infidelity must be disregarded. However, the defendant's actions may still meet the qualifying trigger under section 55(4). The defence could argue that discovering the rape of a family member is what amounted to circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged such that the partial defence could still be argued.

*Loss of control: fear of serious violence **and** thing or things said or done*

32. The third qualifying trigger is where the defendant seeks to rely on both a fear of serious violence and a thing done or said. This might be relevant, for example, in cases where a person with the defendant's characteristics, and in his circumstances (as required in section 54(1)(c)), would not have acted in the same or a similar way, as a result of the fear of serious violence alone or as a result of the thing(s) done or said alone. But they might have reacted in the same or a similar way as a result of both factors. [Hansard 03 March 2009: Column 436]

Sections 57: Infanticide

33. Infanticide can only be prosecuted where a female defendant kills her own child, who is less than a year old, and "the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child". Infanticide may be charged in its own right (Infanticide Act section 1(1)); it may also be used to reduce the culpability of an offence of homicide where murder has been charged (Infanticide Act 1938, section 1(2)).

34. It had generally been assumed in the past that infanticide could apply only in circumstances that would otherwise amount to the offence of murder. However, the Court of Appeal in the case of *R v Gore* ([2007] EWCA Crim 2789) held that section 1 may apply whenever the requirements of infanticide are made out regardless of what offence would otherwise have been committed.
35. Section 57 clarifies the law in relation to the offence and partial defence of infanticide by amending section 1 of the Infanticide Act 1938 (which applies only in England and Wales), to provide that infanticide is available only where the circumstances were such that, but for the Act, the offence would have amounted to murder or manslaughter. It does so by making two sets of two separate textual amendments: in both subsections (1) and (2) of the 1938 Act, replacing “notwithstanding that” with “if” and after “murder” adding “or manslaughter”.

Transitional arrangements:

36. The homicide provisions in the 2009 Act will apply to defendants charged with murder where the acts or omissions resulting in the death of the victim took place on or after 4 October 2010. These provisions are not retrospective. Transitional provisions are set out in paragraph 7 of Schedule 22.

Background:

37. The Law Commission published a report on “Partial Defences to Murder” in 2004, having been asked to review those defences following concerns in particular about how provocation works in domestic homicide cases. In October that year, the then Home Secretary announced that the Home Office, the then Department for Constitutional Affairs, and the Attorney General’s Office would jointly review the law of murder with the first stage of the review being undertaken by the Law Commission and the second stage by the Government. In December 2005, the Law Commission published a consultation paper: “A new Homicide Act for England and Wales?”
38. In November 2006 the Law Commission published their report, “Murder, Manslaughter and Infanticide” which recommended modernising the definition of diminished responsibility and abolishing provocation to replace it with a new partial defence to murder.
39. The Law Commission report can be accessed via the Law Commission website: http://www.lawcom.gov.uk/lc_reports.htm.

40. In December 2007 the Ministry of Justice announced the second stage of the review stating that, having considered the Law Commission's recommendations carefully, the Government had decided to proceed on a step-by-step basis, looking first at the recommendations relating to:

- reformed partial defences to murder of provocation and diminished responsibility;
- reformed law on complicity in relation to homicide;
- infanticide.

41. The consultation paper "*Murder, manslaughter and infanticide: proposals for reform of the law*" was published on 28 July 2008. It sought views on proposals to reform the law in relation to the partial defences to murder of provocation and diminished responsibility, the law on complicity to murder and to infanticide.

42. The Government responded to the consultation on 14 January 2009. Given the strength of concern about reforming complicity to murder separately from complicity for the whole criminal law, the Government decided not to proceed with the proposed changes at the present time. It did, however, take forward proposals for reform of the partial defences to murder and the law of infanticide in the Coroners and Justice Act 2009, which received Royal Assent in November 2009.

Useful links

[The Coroners and Justice Act 2009](#)

[Explanatory notes on the Coroners and Justice Act 2009](#)

'Murder, Manslaughter and Infanticide' (Law Commission report, LC304, 2006)

http://www.lawcom.gov.uk/lc_reports.htm

Contact details:

Provisions	Name	Contact details
Provisions for England and Wales	Chiara Mac Call Magali Provensal	Criminal Law Policy Unit Criminal Policy Directorate 102 Petty France London SW1H 9AJ <u>Chiara.MacCall@justice.gsi.gov.uk</u> 020 3334 5018 <u>Magali.Provensal@justice.gsi.gov.uk</u> 020 3334 6075
Provisions for Northern Ireland	Susan Nicholson	<u>Susan.Nicholson@dojni.x.gsi.gov.uk</u> 02890 527142

Annex

Provisions from Coroners and Justice Act 2009 available at:

<http://www.legislation.gov.uk/ukpga/2009/25/part/2/crossheading/partial-defence-to-murder-diminished-responsibility>

<http://www.legislation.gov.uk/ukpga/2009/25/part/2/crossheading/partial-defence-to-murder-loss-of-control>

<http://www.legislation.gov.uk/ukpga/2009/25/part/2/crossheading/infanticide>