

# **CORONERS AND JUSTICE ACT 2009**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary on Sections*

#### **Part 2 - Criminal offences**

#### *Chapter 1: Murder, infanticide and suicide*

#### **Section 52: Persons suffering from diminished responsibility (England and Wales)**

327. The effect of section 52 is to replace the current definition of the partial defence of diminished responsibility with a modernised definition based on the concept of “an abnormality of mental functioning” arising from a “recognised medical condition”. The new definition requires that the abnormality substantially impaired the defendant’s ability to do one (or more) of three things and also provides that the defendant’s abnormality of mental functioning should be at least a significant contributory factor in causing the defendant’s acts or omissions.
328. *Subsection (1)* replaces the current subsection (1) of section 2 of the Homicide Act 1957 (the 1957 Act) with new subsections (1) to (1B). The amended section provides that a person is not to be convicted of murder if he or she was suffering from an abnormality of mental functioning which meets the three conditions set out in new section 2(1)(a) to (c). As now, under section 2(2) of the 1957 Act, the person will be convicted of the offence of manslaughter instead of murder.
329. New section 2(1)(a) sets out that the abnormality of mental functioning has to arise from a recognised medical condition. New section 2(1)(b) provides that the abnormality of mental functioning must have impaired the defendant’s ability to do one or more of the things mentioned in new section 2(1A). These are the ability of that person to understand the nature of his or her conduct, to form a rational judgement or to exercise self-control. This contrasts with the existing definition of the partial defence which requires a person’s mental responsibility to be substantially impaired but does not specify in what respects this must be so.
330. New section 2(1)(c) sets out that, in order for the partial defence to apply, the abnormality of mental functioning must provide an explanation for the defendant’s involvement in the killing. New section 2(1B) clarifies that this will be the case where the abnormality was at least a significant contributory factor in causing the defendant to carry out the conduct.
331. *Subsection (2)* updates the language of section 6 of the Criminal Procedure (Insanity) Act 1964 insofar as it refers to the partial defence of diminished responsibility.

#### **Section 53: Persons suffering from diminished responsibility (Northern Ireland)**

332. This section makes provision for Northern Ireland equivalent to section 52.

**Section 54: Partial defence to murder: loss of control**

333. Provocation is a common law partial defence supplemented by section 3 of the 1957 Act. Under the partial defence, 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 self-control, and in the opinion of the jury the provocation was enough to make a reasonable person do as the defendant did.
334. [Section 56](#) abolishes the common law partial defence of provocation and replaces it with a new partial defence to murder of “loss of control” at sections 54 and 55.
335. [Section 54](#) sets out the criteria which need to be met in order for the new partial defence of loss of self-control to be successful.
336. *Subsection (1)* lists those as:
- a) the defendant’s conduct resulted from a loss of self-control,
  - b) the loss of self-control had a qualifying trigger (which is defined in section 55), and
  - c) a person of the defendant’s sex and age with an ordinary level of tolerance and self-restraint and in the circumstances of the defendant might have acted in the same or similar way to the defendant.
337. *Subsection (2)* clarifies that the loss of control described in subsection (1) need not be sudden. Under the existing common law partial defence of provocation, the courts have held that the loss of self-control must be sudden. Case law has developed over time to the effect that the partial defence might still apply though where there was a delay between the provocative incident and the killing. The length of time between the incident and the killing does however affect whether there is sufficient evidence of a loss of self-control for the judge to leave the issue to the jury, and how readily a jury accepts that the defendant had indeed lost his or her self-control at the time of the killing. Although subsection (2) in the new partial defence makes clear that it is not a requirement for the new partial defence that the loss of self control be sudden, it will remain open, as at present, for the judge (in deciding whether to leave the defence to the jury) and the jury (in determining whether the killing did in fact result from a loss of self-control and whether the other aspects of the partial defence are satisfied) to take into account any delay between a relevant incident and the killing.
338. *Subsection (3)* supplements subsection (1)(c) by clarifying that the reference to the defendant’s circumstances in that subsection means all of those circumstances except those whose only relevance to the defendant’s conduct is that they impact upon the defendant’s general level of tolerance and self-restraint. Thus, a defendant’s history of abuse at the hands of the victim could be taken into account in deciding whether an ordinary person might have acted as the defendant did, whereas the defendant’s generally short temper could not. Consequently, when applying the test in subsection (1)(c) the jury will consider whether a person of the defendant’s sex and age with an ordinary level of tolerance and self-restraint and in the defendant’s specific circumstances (in the sense described earlier in this paragraph) might have acted as the defendant did.
339. *Subsection (4)* ensures that those acting in a considered desire for revenge cannot rely on the partial defence, even if they lose self-control as a result of a qualifying trigger.
340. *Subsection (5)* clarifies where the burden of proof lies in murder cases where the partial defence is raised. If sufficient evidence of the partial defence is raised, the burden of disproving the defence beyond reasonable doubt rests with the prosecution. It is supplemented by *subsection (6)* which confirms that for the purposes of subsection (5) the evidence will be sufficient to raise an issue as to the defence where a jury, properly directed, could reasonably conclude that the partial defence might apply. It will be

a matter of law, and therefore for a judge to decide, whether sufficient evidence has been raised to leave the partial defence to the jury. This differs from the position with the existing partial defence of provocation where, if there is evidence that a person was provoked to lose his or her self-control, the judge is required by section 3 of the 1957 Act to leave the partial defence to the jury even where no jury could reasonably conclude that a reasonable person would have reacted as the defendant did. Where there is sufficient evidence for the issue to be considered by the jury, the burden will be on the prosecution to disprove it. This is the same burden of proof as other defences, including self-defence.

341. *Subsection (7)* sets out that, when the defence is successful, the defendant will be guilty of manslaughter instead of murder.
342. *Subsection (8)* provides that even if one party to a killing is found not guilty of murder on the grounds of the partial defence of loss of self control, this does not affect the position of any other person who may be liable for murder in respect of the killing.

### **Section 55: Meaning of “qualifying trigger”**

343. *Section 55* defines the term “qualifying trigger” for purposes of section 54. Under section 54 (1)(b) the loss of self-control must have a qualifying trigger in order for the partial defence to apply.
344. *Subsections (2) to (5)* set out that the qualifying triggers for a loss of self-control are where the loss of self-control was attributable to a fear of serious violence, to certain things done or said (or both) or to a combination of both of these.
345. *Subsection (3)* deals with cases where the defendant lost self-control because of his or her fear of serious violence from the victim. As in the complete defence of self-defence, this will be a subjective test and the defendant will need to show that he or she lost self-control because of a genuine fear of serious violence, whether or not the fear was in fact reasonable. The fear of serious violence needs to be in respect of violence against the defendant or against another identified person. For example, the fear of serious violence could be in respect of a child or other relative of the defendant, but it could not be a fear that the victim would in the future use serious violence against people generally.
346. *Subsection (4)* sets out when a thing or things done or said (or both) can amount to a qualifying trigger for the loss of self-control. The thing(s) done or said must amount to circumstances of an extremely grave character and cause the defendant to have a justifiable sense of being seriously wronged. Whether a defendant’s sense of being seriously wronged is justifiable will be an objective question for a jury to determine (assuming that there is sufficient evidence for the defence to be left to the jury).
347. *Subsection (4)* therefore sets a very high threshold for the circumstances in which a partial defence is available where a person loses self-control in response to words or actions. The effect is to substantially narrow the potential availability of a partial defence in cases where a loss of control is attributable to things done or said compared to the current partial defence of provocation (where no threshold exists in relation to the provoking circumstances).
348. *Subsection (5)* allows the loss of self-control to be triggered by a combination of a fear of serious violence and a thing or things done or said which constitute circumstances of an extremely grave character and cause the defendant to have a justifiable sense of being seriously wronged.
349. *Subsection (6)* makes further provision in relation to determining whether a loss of self-control has a qualifying trigger:
- *Subsection (6)(a)* provides that, when the defendant’s fear of serious violence was caused by something that the defendant incited for the purpose of providing an excuse to use violence, it is to be disregarded. The effect is that, in such a situation,

the person would not be able to claim a partial defence based on his or her fear of serious violence as referred to in section 55(3).

- Subsection (6)(b) provides that, when the defendant's sense of being seriously wronged by a thing done or said relates to something that the defendant incited for the purpose of providing an excuse to use violence, the sense of being seriously wronged is not justifiable. The effect is that, in such a situation, the person would not be able to claim a partial defence based on the relevant things done or said as referred to in section 55(4).
- Subsection (6)(c) provides that, 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. So, if a thing done or said, as referred to in section 55(4), amounts to sexual infidelity, that fact is disregarded in determining whether the qualifying trigger in section 55(4) applies. The effect is that, if a person kills another because they have been unfaithful, he or she will not be able to claim the partial defence. It is the fact of sexual infidelity that falls to be disregarded under the provision, so the thing done or said can still potentially amount to a qualifying trigger if (ignoring the sexual infidelity) it amounts nonetheless to circumstances of an extremely grave character causing the defendant to have a justifiable sense of being seriously wronged. This may arise only rarely, but an example of where it might be relevant is where a person discovers their partner sexually abusing their young child (an act that amounts to sexual infidelity) and loses self-control and kills. The fact that the partner's act amounted to sexual infidelity must be discounted but that act may still potentially be claimed to amount to the qualifying trigger in section 55(4) on the basis of the other aspects of the case (namely the child abuse).

### ***Section 56: Abolition of common law defence of provocation***

350. **Section 56** abolishes the common law defence of provocation, and consequently repeals section 3 of 1957 Act and the equivalent Northern Ireland provision, namely section 7 of the Criminal Justice Act (Northern Ireland) 1966. Section 3 supplemented the common law principles relating to provocation by providing that the issue of whether the provocation was enough to make a reasonable person do as the defendant did should be left to be determined by the jury. This has been interpreted as meaning that a judge must leave the partial defence to the jury even where the evidence is such that no jury properly directed could reasonably conclude that a reasonable person would have reacted as the defendant did. This is in contrast to the common law position that existed prior to the Homicide Act 1957, where the judge was not required to leave the issue to the jury in such circumstances.

### ***Section 57: Infanticide (England and Wales)***

351. **Section 57** amends section 1 of the Infanticide Act 1938 so that it is clear that the offence and defence of infanticide are available only in respect of a woman who would otherwise be found guilty of murder or manslaughter. Whilst it had generally been assumed in the past that infanticide could apply only in circumstances that would otherwise amount to the offence of murder, the Court of Appeal ruled in *R v Gore* [2007] EWCA Crim 2789 that section 1 may apply whenever the requirements of infanticide are made out regardless of what offence would otherwise have been committed.
352. **Section 57** limits infanticide to cases that would otherwise be murder or manslaughter through two changes. The first is to replace the words "notwithstanding that" with the word "if". This resolves an uncertainty that has existed in the past about the meaning of the term "notwithstanding that" which at different times has been interpreted as meaning "even if" and "provided that".
353. The second is to explicitly state that infanticide can apply (provided all the other criteria for infanticide apply) where the offence would otherwise be murder *or manslaughter*.

354. The combined effect of the two changes is that infanticide can apply “if the circumstances were such that but for the Infanticide Act 1938 the offence would have amounted to murder or manslaughter”.

***Section 58: Infanticide (Northern Ireland)***

355. This section makes provision for Northern Ireland equivalent to section 57.

***Section 59: Encouraging or assisting suicide: England and Wales***

356. Section 2(1) of the Suicide Act 1961 provides that a person who “aids, abets, counsels or procures” the suicide or attempted suicide of another person commits an offence (the substantive offence). By virtue of section 1 of the Criminal Attempts Act 1981 it is also an offence to attempt to aid, abet, counsel or procure the suicide or attempted suicide of another person (the attempt offence). Section 59 replaces the substantive and attempt offences with a single offence expressed in terms of “encouraging or assisting” the suicide or attempted suicide of another person. Paragraph 58 of Schedule 21 therefore disapplies the Criminal Attempts Act 1981 in respect of an offence under section 2 of the Suicide Act 1961. The section simplifies and modernises the law with the aim of improving understanding of this area of the law. It is in line with the case law relating to the existing substantive and attempt offences. The section does not change the scope of the current law, when section 2 of the Suicide Act 1961 is read in combination with section 1 of the Criminal Attempts Act 1981.
357. *Subsection (2)* replaces section 2(1) of the Suicide Act 1961. It provides that a person commits an offence if he or she does an act which is capable of encouraging or assisting another person to commit or attempt to commit suicide, and if he or she intends the act to encourage or assist another person to commit or attempt to commit suicide. The person committing the offence need not know, or even be able to identify, the other person. So, for example, the author of a website promoting suicide who intends that one or more of his or her readers will commit or attempt to commit suicide is guilty of an offence, even though he or she may never know the identity of those who access the website. The offence applies whether or not a person commits or attempts suicide.
358. *Subsection (3)* amends section 2(2) of the Suicide Act 1961 so that the language is consistent with the new section 2(1).
359. *Subsection (4)* inserts new sections 2A and 2B into the Suicide Act 1961. The new section 2A elaborates on what constitutes an act capable of encouraging or assisting suicide. New section 2A(1) provides that a person who arranges for someone else to do an act capable of encouraging or assisting the suicide or attempted suicide of another person will be liable for the offence if the other person does that act. New section 2A(2) has the effect that an act can be capable of encouraging or assisting suicide even if the circumstances are such that it was impossible for the act to actually encourage or assist suicide. An act is therefore treated as capable of encouraging and assisting suicide if it would have been so capable had the facts been as the defendant believed them to be at the time of the act (for example, if pills provided with the intention that they will assist a person to commit suicide are thought to be lethal but are in fact harmless) or had subsequent events happened as the defendant believed they would (for example, if lethal pills which were sent to a person with the intention that the person would use them to commit or attempt to commit suicide get lost in the post), or both. New section 2A(3) clarifies that references to doing an act capable of encouraging or assisting another to commit or attempt suicide include a reference to doing so by threatening another person or otherwise putting pressure on another person to commit or attempt suicide. The new section 2B provides that an act includes a course of conduct.

***Section 60: Encouraging or assisting suicide (Northern Ireland)***

360. This section makes provision for Northern Ireland equivalent to section 59.

***Section 61 and Schedule 12: Encouraging or assisting suicide: providers of information society services***

- 361. **Section 61** and Schedule 12 ensure that the provisions outlined in sections 59 and 60 above are consistent with the UK's obligations under the E-Commerce Directive.
- 362. **Schedule 12** ensures that providers of information society services who are established in England, Wales or Northern Ireland are covered by the offence of encouraging or assisting suicide even when they are operating in other European Economic Area states. **Paragraphs 4 to 6** of the Schedule provide exemptions for internet service providers from the offence in limited circumstances, such as where they are acting as mere conduits for information that is capable, and provided with the intention, of encouraging or assisting suicide or are storing it as caches or hosts.