

## HOMICIDE REFORMS UNDER THE CAJA 2009

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## COMMENCEMENT PROVISIONS

1. The following provisions came into force on the 4<sup>th</sup> October 2010 (see article 5 of the *Coroners and Justice Act 2009 (Commencement No. 4), Transitional and Saving Provisions) Order 2010* (SI 2010 No.816):
  - (a) **section 52**: persons suffering from diminished responsibility (E&W);
  - (b) **section 56(2)(a)**: repeal relating to the abolition of the common law defence of provocation);
  - (c) **section 57**: infanticide (E&W);
  - (d) **section 177(1) and schedule 21**: consequential amendments and transitional and saving provisions, insofar as they relate to paragraph 52 of that schedule<sup>1</sup>;
  - (e) **section 178 and schedule 23**: insofar as they relate to the provisions specified in Part 2 of Schedule 23 (criminal offences), namely, the repeals relating to -
    - (i) the Homicide Act 1957;<sup>2</sup>
    - (ii) the Criminal Justice Act 2003.<sup>3</sup>
2. The following provisions of the CAJA 2009 came into force on 4th October 2010 in England and Wales: see article 6 of the *Coroners and Justice Act 2009 (Commencement No. 4), Transitional and Saving Provisions) Order 2010* (SI 2010 No.816):
  - (a) **sections 54 and 55**: partial defence to murder: loss of self-control;
  - (b) **section 56(1)**: abolition of common law defence of provocation.
3. For further transitional and saving provisions, as they appear in article 7 of SI 2010 No.816, see **Appendix A** of this handout.
4. Note that para.7 of Schedule 22 to the CAJA 2009 makes it clear that the homicide reforms introduced by the provisions of Chapter 1 to Part 2 of the 2009 Act, apply in cases where the offence in question was wholly committed after the relevant provision of the 2009 Act came into force.
  7. (1) No provision of Chapter 1 of Part 2 affects the operation of-
    - (a) any rule of the common law, or

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<sup>1</sup> In Schedule 21 to the Criminal Justice Act 2003 (determination of minimum term in relation to mandatory life sentence), in paragraph 11: (a) in paragraph (d) omit “in a way not amounting to a defence of provocation”, and (b) in paragraph (e), after “self-defence” insert “or in fear of violence”.

<sup>2</sup> Namely, section 3 of the HA 1957.

<sup>3</sup> Namely, the words in Schedule 21, paragraph 11(d), to the CJA 2003: “in a way not amounting to a defence of provocation”.

- (b) any provision of an Act or of subordinate legislation, in relation to offences committed wholly or partly before the commencement of the provision in question.
  - (2) For the purposes of this paragraph an offence is partly committed before a particular time if-
    - (a) a relevant event occurs before that time, and
    - (b) another relevant event occurs at or after that time.
  - (3) “Relevant event” in relation to an offence means any act, omission or other event (including any consequence of an act) proof of which is required for conviction of the offence.
5. Note that in relation to the offence of encouraging or assisting suicide, *sections 59-61* inclusive, came into force on the 1<sup>st</sup> February 2010 (see the *Coroners and Justice Act 2009 (Commencement No. 3 and Transitional Provision) Order 2010* (SI 2010/145). Transitional provisions are set out in this handout (and see *Appendix B*).
6. It seems that the aim of the (then) Government, in relation to Diminished Responsibility, was to “modernise and clarify the law rather than alter the scope of cases caught by the partial defence”.<sup>4</sup> In fact, revised s.2 HA 1957 differs markedly from the original provision, and the scope of the availability of the partial defence has changed. The government’s aim, in relation to the new ‘Loss of Self-control’ partial defence, was “to raise the threshold generally, so that those who kill in anger can succeed in having their conviction reduced to manslaughter only in exceptional circumstances”.<sup>5</sup> Each of the partial defences pose difficult questions of interpretation and application.<sup>6</sup>

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<sup>4</sup> Para.1.149, House of Lords, House of Commons Joint Committee on Human Rights Legislative Scrutiny: Coroners and Justice Bill Eighth Report of Session 2008-09. “We do not believe that the changes we are proposing to diminished responsibility will change the numbers enormously; it is really just a clarification of the way in which that defence works.” [Maria Eagle, Parliamentary Under-Secretary of State for Justice, Hansard, Public Bill Committee, 3 February 2009, Q.11].

<sup>5</sup> Maria Eagle (Parliamentary Under-Secretary of State for Justice), Hansard, Public Bill Committee, Tuesday 3 February 2009, Q.11.

<sup>6</sup> This handout builds on earlier drafts for lectures given at the Sweet & Maxwell Conference, in collaboration with 25 Bedford Row, (June 2010), and at 25 Bedford Row, London (September 2010), and at Durham Castle (30<sup>th</sup> September 2010). The author expresses his thanks to Professor David Ormerod, Professor Alan Reed (University of Sunderland), and Nicola Wake (Lecturer, University of Sunderland). The handout has benefited from invaluable discussions and talks at the Durham Conference (*Panacea or Pandora's Box for Partial Defences?*, Universities of Durham and Sunderland):

<http://www.sunderland.ac.uk/faculties/bl/newsevents/news/news/index.php?nid=1002>.

### DIMINISHED RESPONSIBILITY

7. From the 4<sup>th</sup> October 2010, s.52(1) of the CAJA 2009 replaces the pre-existing definition of “diminished responsibility”, as it appears in s.2(1) of the Homicide Act 1957 (“1957 Act”), with new subs.(1), (1A) and (1B) to that Act.
8. New s.2(1), (1A) and (1B), HA 1957 provide as follows:
  - (1) A person (“D”) who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which
    - (a) arose from a recognised medical condition,
    - (b) substantially impaired D’s ability to do one or more of the things mentioned in subsection (1A), and
    - (c) provides an explanation for D’s acts and omissions in doing or being a party to the killing.
  - (1A) Those things are
    - (a) to understand the nature of D’s conduct;
    - (b) to form a rational judgment;
    - (c) to exercise self-control.
  - (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D’s conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.”
  - (2) In section 6 of the Criminal Procedure (Insanity) Act 1964 (c. 84) (evidence by prosecution of insanity or diminished responsibility), in paragraph (b) for “mind” substitute “mental functioning”.
9. The original provision (s.2 HA 1957) defines diminished responsibility, as:

“...such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired [D’s] mental responsibility for his acts and omissions in doing or being a party to the killing”.<sup>7</sup>

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<sup>7</sup> The concept of “diminished responsibility” has long been part of the law of Scotland: see *Galbraith v HM Advocate* [2001] ScotHC 45: “[23] This concept of ‘diminished responsibility’ is often thought to have entered our law in Lord Deas’s charge to the jury in *H. M. Advocate v. Dingwall* (1867) 5 Irv. 466.....we may easily imagine that ‘diminished responsibility’ has been part of the everyday linguistic furniture of our law since the time of Lord Deas. But that is not so... [24]...[25]... In Scotland... the first judge to use the actual phrase was Lord Justice General Normand in *Kirkwood v. H.M. Advocate* 1939 J.C. 36 at p. 37....Lord Normand was in fact reflecting the words used by the Dean of Faculty, that the appellant ‘was of diminished responsibility’ (Transcript of the proceedings in Edinburgh High Court on 8 November 1938, p. 58, 1939 Justiciary Papers No. 5, Advocates Library). Thirty

10. The modernised definition of diminished responsibility includes the following requirements, namely, that the defendant:
  - (a) suffered from an “abnormality of mental functioning” (new s.2(1) of the 1957 Act);
  - (b) that the abnormality arose from a “recognised medical condition” (s.2(1)(a));
  - (c) that the abnormality “substantially impaired D’s ability” (s.2(1)(a)) to:
    - (i) “understand the nature of D’s conduct” (s.2(1A)(b)); and/ or
    - (ii) “form a rational judgment” (s.2(1A)(b)); and/or
    - (iii) “exercise self-control” (s.2(1A)(c), and see *Byrne* [1960] 2 QB 396; and *Khan* [2009] EWCA Crim 1569).
  - (d) that the abnormality “provides an explanation for D’s acts and omissions in doing or being a party to the killing” (s.2(1)(c)).
11. An “abnormality of mental functioning” will provide an explanation for D’s conduct, “only if it causes, or is a significant contributing factor in causing D to carry out that conduct” (new s.2(1 B)).
12. Where D proves (on a balance of probabilities) that by virtue of s.2(1) he is not liable to be convicted of murder (s.2(2)), D will be convicted of manslaughter (s.2(3)). The sentencer is thereby afforded discretion to sentence in a flexible way having regard to the circumstances of the case in question.

### **The case for revising the partial defence, and the Government’s approach**

13. The Law Commission found that the defence of diminished responsibility “does not play a central role in murder cases, being successful in fewer than 20 cases annually”.<sup>8</sup> It seems that the number of successful pleas has fallen markedly since the 1980s.<sup>9</sup>
14. The original 1957 Act definition of diminished responsibility has long been criticised on the following grounds (among others):
  - i. Where D’s mental responsibility has been substantially impaired by reason of D’s abnormality of mind, and which ought to reduce D’s

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years earlier, the phrase, as such, had been found in the reporter's headnote, rather than in Lord Guthrie's charge to the jury, in *H. M. Advocate v. Edmonstone* 1909 2 S.L.T. 223.”

<sup>8</sup> Law Com.304, para.5.84.

<sup>9</sup> see Law Com.304, para.3.84, fn.64; citing R.D. MacKay, *Mental Condition Defence in the Criminal Law* (1995), p.181

culpability for the killing, it is arguable that even a verdict of manslaughter is not necessarily a logical outcome.<sup>10</sup>

- ii. The expression “abnormality of mind” is not a recognised psychiatric condition.<sup>11</sup> Psychiatrists often struggle to determine whether their findings and diagnosis of an accused’s mental condition satisfies the language of s.2 of the 1957 Act (as originally enacted).
  - iii. There had been criticism (notably from Dr Eileen Vizard) that the original definition of diminished responsibility was defective in relation to children and young people because it omitted reference to “developmental immaturity” (a view shared, it seems, by *Nao* which criticised C.P. No.173 for failing sufficiently to recognise the distinctive needs of children between the ages of 10 and 17).<sup>12</sup> It will be seen that new s.2(1) of the 1957 Act also does not refer to developmental immaturity; this is deliberate (for the reasons discussed below).
15. In its Consultation Paper (CP 173), the Law Commission supported a definition of diminished responsibility that was modelled on a definition that had been adopted by New South Wales in 1997.<sup>13</sup>
  16. In Law Com.304, the Commission revised its proposed definition of diminished responsibility so that D would be convicted of second-degree murder if, at the time that D played his/her part in the killing, D’s capacity to: (i) understand the nature of his/her conduct; or (ii) form a rational judgement; or (iii) control himself/herself, was substantially impaired by:
    - (a) an abnormality of mental functioning arising from a recognised medical condition;
    - (b) developmental immaturity in a person *under the age of 18*; or
    - (c) a combination of each;and the abnormality, the developmental immaturity, or the combination of both, provides an explanation for D’s conduct in carrying out or taking part in the killing (para.5.112).
  17. It is important to understand at the outset that the Law Commission treated an “abnormality of mental functioning”, and “developmental immaturity”, as discrete grounds on which a plea of diminished responsibility could be brought in, but

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<sup>10</sup> See Law Com.304, para.5.110.

<sup>11</sup> See Law Com.304, para.5.111; CP 177, para.6.4.

<sup>12</sup> See Law Com.290, paras 5.102-103.

<sup>13</sup> CP 173, p.116; and see CP 177, para.6.42.

there could also be cases where the two grounds run alongside each other, or in combination.<sup>14</sup>

18. It will be seen from the above that new subss.2(1) and (1B) of the 1957 Act constitute a departure from the Law Commission's recommended definition (Law Com.304) in at least two significant respects.
  - (1) Developmental immaturity in a person under the age of 18, is *not* expressly included in the modernised definition of diminished responsibility. However, it might just be capable of being brought within the definition of a "recognised medical condition".
  - (2) Under the Law Commission's formulation of diminished responsibility it would have been sufficient for D to show that the abnormality of mental functioning provides *an explanation* for D's conduct in carrying out the killing. However, Parliament has (by virtue of s.2(1 B) of the 1957 Act) added the qualification that the abnormality "*causes* or is a significant *contributory factor in causing*" D to act as he did.

#### **Diminished responsibility: no longer involving a moral question?**

19. The revised definition of diminished responsibility may prove to be a great deal more profound than a quick reading of s.52 of the 2009 Act, and the accompanying Explanatory Notes, suggest. Although the 2009 Act is headed "persons suffering from diminished responsibility", the key word – "responsibility" – is wholly absent from new subss.2(1)-(1B) of the 1957 Act. As originally worded, the focus of s.2(1) of the 1957 Act was whether D's mental *responsibility* for his acts was substantially impaired by reason of his/her abnormality of mind.
20. In *Byrne*<sup>15</sup> Lord Parker CJ contrasted "abnormality of mind" with the expression "defect reason" for the purposes of the *McNaughten Rules*. The court held that an "abnormality of mind" was wide enough to cover "the mind's activities in all its aspects, not only the perception of physical acts and matters, and *the ability to form a rational judgement whether an act is right or wrong* but also the ability to exercise willpower to control physical acts in accordance with that rational judgment" [emphasis added].
21. New s.2(1A)(a) is also concerned with D's ability to "form a rational judgement" (etc.) but, whereas old s.2 of the 1957 Act required D's *mental responsibility* for acting as he/she did to be substantially impaired, new s.2(1) requires D to show

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<sup>14</sup> As stated in CP 177 and Law Com.304.

<sup>15</sup> [1960] 2 QB 396.

substantial impairment of his/her ability to do any of the things mentioned in new s.2(1A).

22. The impairment of D's mental responsibility had been "a moral question of degree and essentially one for the jury".<sup>16</sup> Note the words "moral responsibility", not "legal responsibility". This is because Diminished Responsibility proceeds of the basis that D had performed the conduct element of the *actus reus* with the *mens rea* for murder. That moral question is not a statutory requirement under new s.2 of the 1957 Act. When in force, new s.2(1) of the 1957 Act will no longer involve a moral question, but a factual one.

### Abnormality of mental functioning

23. In Law Com 304 (para.5.112), the Law Commission recommended replacing "abnormality of mind" with an "abnormality of mental functioning" that arose from "a *recognised* medical condition".
24. That recommendation constitutes a significant shift from what had been proposed in CP 177, namely, that the source of the abnormality should be an "*underlying... pre-existing mental or physiological condition*" (para.10.21; emphasis added). This is broader than a "medical condition" because the former is:

"...a mental condition that obtains independent of the external circumstances that gave rise to the commission of an offence ... it will include cases in which the origins of the condition itself lie in adverse circumstances with which the offender has had to cope" (CP 177, para.6.54; emphasis added).
25. Whether there is a difference in practice between a "recognised medical condition" and an "underlying...pre-existing mental or physiological condition" remains to be seen:-
  - a. Arguably, the proposal in CP 177 might have overlapped with the partial defence of provocation (now "loss of control"<sup>17</sup>: see ss.55-56 of the 2009 Act) in cases where, for example, a battered spouse killed her/his cohabitee after years of abuse and depression (but consider CP/177, para.6.55).
  - b. If the expression a "Recognised Medical Condition" is as broad as this handout suggests that it might be, then practitioners will need to consider

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<sup>16</sup> Smith & Hogan, *Criminal Law*, 12th edn, OUP, p.511. In Scotland, what must be "substantially impaired" is D's ability "as compared with a normal person, to determine or control his acts": *Galbraith v HM Advocate* [2001] ScotHC 45; and see *Caldwell v HM Advocate* [2009] HCJAC 44.

<sup>17</sup> More accurately: 'Loss of self-control manslaughter'.

whether and to what extent, the modernised version of Diminished Responsibility, and the new ‘Loss of Self-Control’ defence, overlaps. This is because Parliament has enacted that a loss of self-control need not be ‘sudden’,<sup>18</sup> and that the test to be applied by the jury in such a case, is whether a person of the defendant’s sex and age, with a normal degree of tolerance and self-restraint, *and in the circumstances of the defendant*, might have reacted in the same or in a similar way.<sup>19</sup> If one circumstance is that D killed whilst suffering from a “recognised medical condition”, then that circumstance may be relevant for the purposes of both the partial defence of loss of self control (s.54, CAJA 2009) and the partial defence of Diminished Responsibility. However, whereas the burden is on the prosecution to rebut a defence of ‘Loss of Self-control’,<sup>20</sup> the burden of establishing Diminished Responsibility rests on the defendant.<sup>21</sup>

- c. The Royal College of Psychiatrists supported the narrower formulation because the restriction would “ensure that any such defence was grounded in *valid medical diagnosis*”.<sup>22</sup>

### Recognised medical condition

26. Revised s.2(1)(a) ensures that the defence of diminished responsibility is founded on valid medical diagnoses. The Royal College of Psychiatrists stated that this would “*also encourage reference within expert evidence to diagnosis in terms of one or two of the accepted internationally classificatory systems of mental conditions*”:

“... (i.e. the World Health Organisation: International Classification of Diseases (ICD-10); and the American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders (DSM-1V); see CP 19/08 fn.13) without explicitly writing those systems into the legislation” (Law Com.304; para.5.114).
27. Familiar psychotic disorders, and neurotic disorders (such as post-traumatic stress) are likely to meet this condition. It is conceivable that a “Recognised Medical Condition” will include disabilities of cognition, perception, mood (e.g. bi-polar, or mania), or of volition (e.g. impulsive violent reactions).
28. The revised definition of diminished responsibility is intended to prevent “idiosyncratic diagnosis”, being advanced as a basis for a plea of diminished

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<sup>18</sup> Section 54(2), CAJA 2009.

<sup>19</sup> Section 54(1)(c), CAJA 2009.

<sup>20</sup> Section 54(5), CAJA 2009.

<sup>21</sup> Section 2(2), Homicide Act 1977.

<sup>22</sup> Law Com.304, para.5.114; emphasis added.

responsibility.<sup>23</sup> The Government accepted the Law Commission's proposals regarding this aspect of the defence.<sup>24</sup>

29. During the debates in General Committee, the Government recognised that it is important that the legislation must be sufficiently flexible to cater for emerging medical conditions. It expressed the view that it is open to the defence to call a "recognized specialist who has had their work peer-reviewed, although it has not quite got on the list", and that it would be for the jury to decide whether the evidence met the partial defence requirements:<sup>25</sup> see also Home Office Circular 2010/13, para.12.
30. The organisation *Dignity in Dying* has argued that the new definition of diminished responsibility will create unjust outcomes for those who "have acted rationally in response to persistent requests from a seriously ill loved one".<sup>26</sup> A contrary view is that the new definition of diminished responsibility may embrace cases where a person has become clinically depressed as a result of long-term care for a partner who has become increasingly ill.<sup>27</sup>

### **Developmental immaturity: outside the scope of diminished responsibility?**

#### *'Arrested and retarded development' contrasted with 'developmental immaturity'*

31. One of the four aetiologies specified in the original definition of diminished responsibility in the 1957 Act is that D has an "arrested or retarded development of mind".
32. The history of the expression "arrested or retarded development of mind", is set out in detail by the Law Commission in CP 173. In summary, persons who were "mentally deficient", "from birth or from an early age", came within the scope of the Mental Deficiency Act 1913. Such persons were characterised as having never possessed a normal degree of intellectual capacity but, the Mental Deficiency Act 1913 did not contain a legal concept to describe this characteristic, and it was in the Mental Deficiency Act 1927 that the phrase "arrested or *incomplete* development of mind" first appeared; its purpose was to define "mental

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<sup>23</sup> Law Com.304, para.5.114.

<sup>24</sup> CP 19/08, para.49.

<sup>25</sup> Hansard, col.414, March 3, 2009.

<sup>26</sup> Joint Committee on Human Rights, 8th Report, 2008/2009, para.1.150; evidence 44-45.

<sup>27</sup> Public Bill Committee, February 3, 2009, written evidence (CJ/01); Joint Committee on Human Rights, 8th Report, 2008-2009, para.1.151.

defectiveness". The 1957 Act substituted "retarded" for "incomplete" and hence the expression "arrested or retarded development of mind".<sup>28</sup>

33. It is against that background that the Law Commission stated in CP 177 that this aetiology does not include "immaturity and the effect of traumatic events other than those involving injury".<sup>29</sup> It is important to note that "developmental immaturity" is not an abnormal condition, but a stage or process of mental development that has not yet finished.
34. There was criticism from Dr Eileen Vizard (and others) that the original definition of diminished responsibility was defective in relation to children and young people because it omitted reference to "developmental immaturity".

*Developmental immaturity: proposals for reform*

35. The Commission found that there had been "very little systematic analysis of the aetiological components by the English courts".<sup>30</sup> Under the original/current provision of the 1957 Act, the circumstances in which a person whose mental age fell far below his/her chronological age, was able to plead diminished responsibility successfully, is unclear.
36. The Commission had proposed that developmental immaturity in a defendant under the age of 18 years, should become a ground in itself on which a verdict of diminished responsibility can be brought in, alongside or combined with an abnormality of mental functioning.<sup>31</sup> Had the Law Commission's proposals in Law Com.304 been enacted, a defendant who was aged 18 or over, at the time of the killing, would find that the partial defence of diminished responsibility on the grounds of his *developmental immaturity* was not available to him/her (and consider *R. v Raver*<sup>32</sup>). It is worth repeating that the Law Commission treated an "abnormality of mental functioning", and "developmental immaturity", as discrete grounds on which a plea of diminished responsibility could be brought in.
37. The Criminal Bar Association of England and Wales responded to CP 177, stating that in its opinion "developmental immaturity" should be added as a possible source of diminished responsibility, irrespective of whether the accused's

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<sup>28</sup> CP 173, para.7.49-52; and see fn.65.

<sup>29</sup> Law Com. CP, 177, para.6.34, fn.27.

<sup>30</sup> CP 173, para.7.45.

<sup>31</sup> CP 177, para.6.84.

<sup>32</sup> [1982] Crim LR 51; albeit a case of provocation.

development was “arrested or retarded”, but that it could see no reason why developmental immaturity should be restricted by physical age:<sup>33</sup>

“If the concept, that this is a good ground for the finding as a fact that responsibility is diminished, is correct, then that is a matter of expert evidence. Either developmental immaturity is present to the requisite degree or it is not. We can see no sound principle for allowing for its presence up to an arbitrarily fixed age but not beyond that age. We are not aware of any research which suggests that it is wrong to adopt the common sense view that very severe developmental immaturity may wane as an excuse far later than mild developmental immaturity. It is a question of fact and degree in individual cases rather than of historical date of birth.”

38. Some consultees to CP/177 felt that including developmental immaturity as a ground of diminished responsibility was “too generous to those who had killed with the fault element for first degree murder”.<sup>34</sup> The Law Commission accordingly recommended lowering the age at which D ceases to be eligible to plead diminished responsibility on the grounds of developmental immaturity, to 18 years of age (the Royal College of Psychiatrists’ recommended 21 years of age).<sup>35</sup>
39. The Law Commission observed that experts might find it impossible to distinguish between the impact of *developmental immaturity* on D’s functioning and the impact of a *mental abnormality* on that functioning process. It concluded that it was “wholly unrealistic and unfair” to expect medical experts to assess the impact of mental abnormality whilst disregarding developmental immaturity.<sup>36</sup>
40. The Government was not convinced that the issue of developmental immaturity created significant problems in practice, and that there was a risk that to widen the defence to include developmental immaturity, would catch inappropriate cases (CP 19/08; para.53). It will be seen that new s.2 of the 1957 Act says nothing about either ‘developmental immaturity’ or ‘arrested or retarded development’.

#### *Developmental immaturity under new s.2 HA 1957*

41. It seems clear that arrested or retarded development constitutes a “recognised medical condition” for the purposes of new s.2(1) HA 1957; but would developmental immaturity constitute such a condition?

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<sup>33</sup> CBA News, Issue 3, September 2006, p.6).

<sup>34</sup> Law Com.304, para.5.129.

<sup>35</sup> See paras 5.125, and 5.129, fn.90.

<sup>36</sup> Law Com.304, para.5.128.

42. It is arguable that there could be cases where D might be able to bring his/her developmental immaturity within the rubric of a “recognised medical condition” for the purposes of new s.2(1), whereas if the developmental immaturity is the result only of social and/or environmental influences, then it seems likely D will not be able to meet the requirement under new s.2(1)(a). In his powerful paper, “*Response to Ministry of Justice Consultation Paper ‘Murder, Manslaughter and Infanticide’: proposals for reform*” (CP 19/08), Professor John Spencer QC accepted that the Government was right in so far as the expression “developmental immaturity” means “the defendant’s mental age was significantly below his physical age”. But, Professor Spencer described as “grossly unfair” rules that allow a man aged 40, with a mental age of 10, a partial defence of diminished responsibility on the grounds that his developmental immaturity amounts to a “recognized medical condition”, whereas a child who is actually aged 10 will not be able to avail himself of this defence unless (apart from his age) he has some other recognized medical condition that brings him within the scope of new s.2(1) of the 1957 Act.
43. Interestingly, Professor John Spencer QC has reported that a psychiatrist and a psychologist stated at a Stakeholders’ Meeting that a person who is “developmentally immature” in the sense that “the defendant’s mental age was significantly below his physical age would be seen as suffering from a ‘recognized medical condition’”.<sup>37</sup> However, what might actually have been described at the meeting was not “developmental immaturity”, but “arrested or retarded development” (i.e. the pre-existing language of s.2, HA 1957).
44. Given the abolition of the *doli incapax* defence for children aged between 10-14 years (*T* [2009] UKHL20) it is unclear whether it will be harder to contend that new s.2 of the 1957 Act permits the separation of the psychological cause of a killing carried out by D, from his/her legal responsibility for the killing notwithstanding D’s retarded development with a mental age of between 10 to 14 years (consider G. Sullivan, *Intoxicants and Diminished Responsibility*<sup>38</sup>).

#### **Causation: linking D’s abnormality with D’s act of killing V**

45. An “abnormality of mental functioning” will provide an explanation for D’s conduct (for the purposes of s.2(1)(c)), if it causes, or is a significant contributory factor in causing, D to kill or to be a party to the killing (see s.2(1 B)).
46. It is submitted that in the majority of cases, where the partial defence of diminished responsibility is raised, the causal link between the abnormality of

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<sup>37</sup> “Response to Ministry of Justice Consultation Paper ‘Murder, Manslaughter and Infanticide’: proposals for reform”, para.34.

<sup>38</sup> [1994] Crim L.R.156.

mental functioning and D's act of killing, or being a party to the killing, will usually be self-evident. However, there might be cases where proving a causal connection is problematic.

47. Jo Miles has suggested that, "from a psychiatric perspective proving even a contributory causal link can be extremely difficult, if not impossible, to do in practice" ("*A dog's breakfast of homicide reform*";<sup>39</sup> and see the speech of Baroness Murphy, *Hansard*, June 30, 2009 <sup>40</sup>).
48. However, it is submitted that there are two reasons why concerns about the enactment of a causation requirement in s.2(1 B) of the 1957 Act ought not to be overstated.
49. The first reason is that although expert psychiatric opinion evidence (the "psychiatric perspective"<sup>41</sup>) will obviously be relevant to a determination of the matters specified in new s.2(1) of the 1957 Act, it will be for the jury to decide whether those matters are in fact proved. It is submitted that the Advice of the Judicial Committee given by Lord Keith of Kinkel in *Walton v The Queen*,<sup>42</sup> remains relevant, namely, that "upon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case" (and see *Khan*,<sup>43</sup> noting, in particular, the observations of the Court at para.18 of the judgment).
50. Secondly, it is at least arguable that the causation requirement does no more than give legislative effect to the decision and reasoning of the House of Lords in *Dietschmann*,<sup>44</sup> in which their Lordships held that s.2(1) of the 1957 Act (as originally enacted) did not require the existence of an abnormality of mind to be the sole cause of the defendant killing or being a party to the killing (para.18). The issue has frequently arisen in cases where a defendant (D) killed at a time when: (a) D had suffered from an abnormality of mind; and (b) D had taken alcohol before the killing. Lord Hutton opined that "even if the defendant would not have killed if he had not taken drink, the causative effect of the drink does not necessarily prevent an abnormality of mind suffered by the defendant from substantially impairing his mental responsibility for his fatal acts" (para.18). It is submitted there is some support for this argument in HO Circular 2010/13, para.8, which states that "*The aim is that the defence should not be able to succeed where the defendant's*

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<sup>39</sup> Archbold News, 2009, Issue 6.

<sup>40</sup> HL, cols 177-180.

<sup>41</sup> The expression used by Jo Miles in her article, "*A dog's breakfast of homicide reform*", referred to above.

<sup>42</sup> [1978] AC 788 (at p.793F).

<sup>43</sup> [2009] EWCA Crim 1569.

<sup>44</sup> [2003] UKHL10.

*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]*".

51. Each case will therefore turn on its own facts. As Lord Hutton remarked in *Dietschmann*, "no doubt in many cases (as in *Fenton*)<sup>45</sup> if the jury concluded that the defendant would not have killed if he had not taken drink they will also find that his abnormality of mind had not substantially impaired his mental responsibility for his fatal acts" (para.34). *Dietschmann* was not a case that involved "alcohol dependence syndrome", and the distinction between the aetiology of the abnormality of the mind (or an abnormality of mental functioning arising from a recognised medical condition), and a transient state of intoxication, needs to be kept in mind; and see *Tandy*,<sup>46</sup> *Wood*,<sup>47</sup> *Stewart*,<sup>48</sup> see also, G. Sullivan, "*Intoxicants and Diminished Responsibility*".<sup>49</sup>
52. Although, in Report No.304, the Law Commission makes no reference to *Dietschmann*,<sup>50</sup> it seems likely that the inclusion of the words "an explanation" in the Law Commission's recommended definition of diminished responsibility,<sup>51</sup> and in new s.2(1B) of the 1957 Act, was intended to produce results consistent with that decision: and see *Fenton*,<sup>52</sup> *Gittins*.<sup>53</sup>
53. It will be noted that in CP 173, the Law Commission was particularly concerned about the second limb of s.2(1) of the 1957 Act (as originally worded), and that a "*possible avenue would be to reformulate the test in terms of causation. The focus would no longer be on whether there was 'substantial impairment of mental responsibility' but whether the defendant's 'abnormality of mind' was a significant cause of his acts or omissions in doing or being a party to the killing*".<sup>54</sup> But, almost a year later, the Law Commission recommended that s.2 of the 1957 Act ought to remain unreformed pending any full consideration of murder,<sup>55</sup> noting that there was no substantial support of any of the alternative formulations which had been canvassed in the consultation paper (para.5.87).

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<sup>45</sup> (1975) 61 Cr. App. R. 261

<sup>46</sup> [1989] 1 All ER 267.

<sup>47</sup> [2008] EWCA Crim 1305.

<sup>48</sup> [2009] EWCA Crim 593.

<sup>49</sup> [1994] Crim LR 156.

<sup>50</sup> The case is discussed in CP 173 and Law Com.290

<sup>51</sup> Law Com.304; para.5.112

<sup>52</sup> (1975) 61 Cr. App. R. 261.

<sup>53</sup> [1984] QB 698.

<sup>54</sup> para.7.92.

<sup>55</sup> Law Com.290, para.8.86.

54. In Law Com.304, the Commission reported that leading experts such as Professor Mackay advised against the introduction of a strict causation requirement and although the Royal College of Psychiatrists did not object to the requirement, it cautioned against “*creating a situation in which experts might be called on to ‘demonstrate’ causation on a scientific basis, rather than indicating from an assessment of the nature of the abnormality, what its likely impact would be on thinking emotion, volition, and so forth*”.<sup>56</sup> Although the Law Commission acknowledged that the final choice of words was a matter for the legislator, it was of the view that an abnormality of mental functioning that was shown to be “an explanation” for D’s conduct, ensures that there is an “appropriate connection” with the killing. It would leave open the possibility that other causes or explanations (e.g. provocation/loss of self-control) may have operated “without prejudicing the case for mitigation”.<sup>57</sup>
55. The Government agreed with the Law Commission that it would be “*impracticable to require abnormality to be the sole explanation [for D’s acts]*” and that there must be “*some connection between the condition and the killing in order for the partial defence to be justified*”.<sup>58</sup> No further elaboration of the Government’s thinking appears in its consultation paper or in the Explanatory Notes to the 2009 Act.

#### **Substantial impairment: new s.2(1)(b) of the 1957 Act**

56. It is well established that impairment, for the purposes of old s.2 HA 1957, need not be total but must be more than trivial or minimal.<sup>59</sup> There is no reason to think that new s.2(1)(b) will be construed differently. The impairment must relate to one or more of the things mentioned in new s.2(1A) of the Act.

#### **Diminished responsibility and the ‘benign conspiracy’**

57. Concern has been expressed that the revised, tighter, definition of diminished responsibility might reduce the potential usefulness of the defence as a way of giving judges discretion when sentencing persons who have killed, but who ought not to be stigmatised as “murderers” (see, for example, Jo Miles, “*The Coroners and Justice Act 2009: a dog’s breakfast of Homicide Reform*”).<sup>60</sup> The Law Commission referred to cases where a conviction for murder could only be avoided by a

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<sup>56</sup> Law Com.304, para.5.123.

<sup>57</sup> Law Com.304; para.5.124.

<sup>58</sup> CP 19/08, para.51; and see Hansard, col.414, March 3, 2009, per Maria Eagle.

<sup>59</sup> See *Lloyd* [1967] 1QB 175; and see *R v R* [2010] EWCA Crim 194, and see Smith and Hogan, *Criminal Law*, D. Ormerod, p.511, OUP

<sup>60</sup> Archbold News, Issue 6, 2009.

“benign conspiracy” between psychiatrists, the defence, the prosecution and the court, to bring cases within the limits of diminished responsibility.<sup>61</sup>

58. Given that the existing construction of the offences of murder and manslaughter remain untouched by the 2009 Act, and that the legislator has not excepted killings which have occurred in extenuating circumstances from the mandatory requirement to impose a sentence of life imprisonment for murder, it is unlikely that the revised definition of diminished responsibility will see the end of a practice that has (it is submitted) worked satisfactorily. The burden of proving the partial defence of diminished responsibility remains on the accused, and decisions by prosecutors to accept such a plea are not taken lightly.
59. The existence and exercise of discretion, within the criminal justice process, has much to commend it.<sup>62</sup> The use of discretion, exercised judiciously, is also apt to deal with borderline cases (for example, some ‘mercy killing’ cases, or where a jury is likely to be sympathetic to a defendant in any event, for example, the battered spouse who was suffering from post-traumatic stress disorder, or depression). The so-called “benign conspiracy” is capable of bringing about a just and sensible conclusion to cases that warrant neither the label “murder” nor a mandatory life sentence of imprisonment.<sup>63</sup> The simplest way to end the “benign conspiracy” is to end the mandatory sentence of life imprisonment in cases of murder.
60. During the passage of the Coroners and Justice Bill in the House of Lords, Lord Lloyd of Berwick moved an amendment to make provision where the killing occurred in “extenuating circumstances”,<sup>64</sup> so that, in a trial for murder, “the trial judge may in the course of his summing up, direct the jury that if they are satisfied that the defendant is guilty of murder, but are of the opinion that there were extenuating circumstances, they may on returning their verdict add a rider to that effect”, with the result that the judge would “not be obliged to pass a sentence of life imprisonment “but may pass such other sentence as he considers appropriate”.

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<sup>61</sup> Law Com.290, para.2.34.

<sup>62</sup> See the debate of David Howarth MP, Hansard, HC col.412, March 3, 2009.

<sup>63</sup> In this regard, the comments of Professor John Spencer QC are noteworthy: “I think the vagueness of the present section 2 is in truth a merit, rather than a defect. Personally I share the view, once expressed by the Scottish Law Commission [Quoted in Law Commission, No. 290 (Report on Partial Defences), §5.16] that diminished responsibility is really ‘a device to enable the courts to take account of a special category of mitigating circumstances in cases of murder.’ The more tightly the statute that provides for it is drafted, the less effective it is as vehicle for enabling the mandatory life sentence to be avoided in cases where mitigating circumstances exist.”: *Response to Ministry of Justice Consultation Paper ‘Murder, Manslaughter and Infanticide’: proposals for reform*, para.28.

<sup>64</sup> Hansard, HL col.1008, October 26, 2009.

61. The amendment was strongly supported a number of distinguished peers that included a former Law Lord, a retired Lord Chief Justice, Baroness Butler-Sloss, Baroness Warnock, Lord Pannick, Lord Goodhart, and Lord Carlile of Berriew.
62. The Government's position was that at the heart of the debate was a single issue, "[e]ither the mandatory sentence stays or it goes" but that the amendment, as a way of circumventing it, was not the solution to the problem.<sup>65</sup> It preferred the equally principled arguments of the Law Commissioner, Professor Jeremy Horder, that the proposed approach "rips the heart out of the mandatory sentence".<sup>66</sup>
63. The amendment was defeated; the mandatory sentence for murder remains (see J.R. Spencer QC, "*Lifting the life sentence*"<sup>67</sup>).

### **The revised defence of diminished responsibility and the structure of homicide offences**

64. The revised partial defence of diminished responsibility, as enacted by s.52 of the 2009 Act, is intended to operate within the existing structure of homicide offences and not as part of a revised structure of homicide offences as recommended by the Law Commission in Law Com.304.
65. The Law Commission had recommended that diminished responsibility should be a partial defence that, if successful, would have the effect of reducing first-degree murder to second-degree murder, but it would not reduce the offence to manslaughter.<sup>68</sup>
66. Part of the reasoning of the Commission appears to rest in the fact that medical experts perceive their role, when presenting their evidence, as being relevant primarily to sentence, rather than to the drawing of distinctions between offences (and hence verdicts).<sup>69</sup> For example, in their response to the Law Commission's Consultation Paper, the Royal College of Psychiatrists stated:

"[W]here the law does not attempt to construct 'discrete' defined 'mental condition constructs', within an adversarial legal process, but allows for a 'graded' approach to justice within sentencing, there is far less mismatch between law and psychiatry. That is, abandonment of 'trials of mental responsibility', and substitution of judicial consideration of medical evidence expressed in its own terms, is likely not only to all but abolish

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<sup>65</sup> Hansard, col.1027, October 26, 2009.

<sup>66</sup> See Hansard, col.1026, October 26, 2009.

<sup>67</sup> *Archbold News*, Issue 5, 2009.

<sup>68</sup> Law Com.304, para.5.83.

<sup>69</sup> See Law Com.304, para.5.89.

the ‘mismatch’ but also to enhance justice, so far as it depends upon the application of medical evidence.” (See Law Com.304, para.5.89.)

67. Whereas first-degree murder would have carried a mandatory life penalty (under the terms of the Law Commission’s proposals), an offence of second-degree murder would carry a discretionary life sentence.
68. The Law Commission appears to have accepted the reasoning of the Royal College of Psychiatrists in favour of the “abandonment of trials of mental responsibility, and substitution of judicial consideration of medical evidence expressed in its own terms”.<sup>70</sup>
69. The Commission concluded that it is right to ensure (cases of insanity aside) that psychiatric evidence is made relevant to verdict, but only when the mandatory sentence of life imprisonment is at issue, namely, first-degree murder (Law Com.304, para.5.90).
70. Given that the 2009 Act does not restructure existing homicide offences, Parliament had little option other than to leave untouched the existing rule that a successful plea of diminished responsibility will reduce the offence of murder to one of manslaughter.
71. Accordingly, it is submitted that one cannot abandon ‘trials of mental responsibility’ in cases where D ought not to be held criminally culpable and labelled a “murderer” if D’s conduct is explained by an abnormality of mental functioning that substantially impaired D’s ability to act (e.g.) rationally.
72. The Law Commission point out that diminished responsibility is handled only as a sentencing matter in Germany, France, and by the state of Victoria.<sup>71</sup> But there are practical considerations that militate against diminished responsibility ceasing to be a partial defence.
73. Given that there will be cases where a plea of diminished responsibility, and loss of self-control (formerly, “provocation”), will be run together, the jury ought not, as a matter of law, be forced to choose between them.<sup>72</sup>

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<sup>70</sup> Law Com.304, para.5.89.

<sup>71</sup> Law Com.304, para.5.94.

<sup>72</sup> Law Com.304, para.5.104.

### **The role of experts and diminished responsibility**

74. Although it is for the jury to decide whether D's ability to do one or more of the things mentioned in new s.2(1A) of the 1957 Act was substantially impaired, it seems likely (as anticipated by the Law Commission in CP 173) that the medical expert will be expected to testify to the nature of the abnormality of mental functioning and "*from the medical viewpoint, whether it caused or materially contributed to the killing*".<sup>73</sup>
75. In its '*Murder Report*', the Law Commission, fortified by the view of the Royal College of Psychiatrists, suggested that it is for the jury to say whether they regard the relevant capabilities of D to have been "substantially impaired".<sup>74</sup>
76. The Royal College believed that medical experts ought not to be called upon to express an opinion on the ultimate issue.<sup>75</sup> However, it is submitted that, in practice, it will often be difficult for an expert not to express an opinion that is in fact decisive of the ultimate issue.

### **PARTIAL DEFENCE TO MURDER: LOSS OF SELF-CONTROL**

77. From the 4<sup>th</sup> October 2010, s.56 of the 2009 Act abolished the common law defence of provocation, and s.3 of the 1957 Act and s.7 of the Criminal Justice Act (Northern Ireland) 1966, ceases to have effect (s.56(2) of the 2009 Act).
78. Note the commencement and transitional provisions (see the opening paragraphs of this handout).
79. Section s.56 of the CAJA 2009, provides:
- (1) The common law defence of provocation is abolished and replaced by sections 54 and 55.
  - (2) Accordingly, the following provisions cease to have effect
    - (a) section 3 of the Homicide Act 1957 (c. 11) (questions of provocation to be left to the jury);
    - (b) section 7 of the Criminal Justice Act (Northern Ireland) 1966 (c. 20) (questions of provocation to be left to the jury).

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<sup>73</sup> CP 173, para.7.92; and see Hansard, col.415, March 3, 2009, per Maria Eagle.

<sup>74</sup> Law Com.304, para.5.198.

<sup>75</sup> See paras 5.118-120; and see *Khan* [2009] EWCA Crim 1569.

80. A new partial defence to murder, 'loss of self-control', is created by ss.54 and 55 of the 2009 Act.
81. Section 54 of the CAJA 2009 provides:
- (1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if
    - (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
    - (b) the loss of self-control had a qualifying trigger, and
    - (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
  - (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
  - (3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
  - (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
  - (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
  - (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.<sup>76</sup>
  - (7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.
  - (8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.
82. It will be seen that Parliament has retained the requirement that the killing of V by D resulted from the latter's *loss of self-control* (s.54(1)(a)) but, s.54 stipulates that the loss of self-control must be *due to one of three 'qualifying triggers'* described in s.55 (see the subheading "Qualifying Triggers" below):

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<sup>76</sup> Contrast with *Van Dongen and Van Dongen* [2005] EWCA Crim 1728.

- (i) D feared serious violence from V, or another identified person (ss.54(1)(b) and 55(3)).
  - (ii) D's conduct was attributable to a thing said and/or done which constituted circumstances of an "extremely grave character" that caused D to have a "justifiable sense of being seriously wronged" (ss.54(1)(b) and 55).
  - (iii) The third trigger is merely a combination of the aforementioned circumstances (ss.54(1)(b) and 55(5)).
83. The defendant who succeeds in his/her defence under s.54 of the 2009 Act, is to be convicted of manslaughter rather than of murder (s.54(7)).

### When the "loss of self-control" defence is not available

84. Section 54 specifies circumstances in which the defence is not available:

- (a) The defence will fail unless a person of D's sex and age, with a normal degree of tolerance and self-restraint, might have reacted in D's circumstances, in the same or in a similar way to D. This is the combined effect of s.54(1)(c) and (3).
- (b) The defence is not available if D acted with a "considered desire for revenge" (s.54(4)). Although the phrase "considered desire for revenge" was only "suggestive of an approach" (para.5.27), it has been employed in s.54(4).
- (c) D's fear of serious violence (or sense of being seriously wronged) is to be disregarded if D brought that state of affairs upon himself by, for example, looking for a fight by inciting something to be said or done for the purpose of providing an excuse to use violence (s.55(6)(a) or (b), as the case may be).

This puts an end to speculation that, following the decision in *Johnson*<sup>77</sup> (not following dicta of the Privy Council in *Edwards*<sup>78</sup>) that D might have a defence where he deliberately induces provocation (see Smith and Hogan, *Criminal Law*<sup>79</sup>). This is in line with the Law Commission's thinking that D's reaction "must not have been engineered by him or her through inciting the very provocation that led to it, and should not reflect a considered desire for revenge".<sup>80</sup>

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<sup>77</sup> [1989] 1 W.L.R. 740

<sup>78</sup> [1973] A.C. 648

<sup>79</sup> 12th edn, OUP, p.505.

<sup>80</sup> Law Com.304, para.5.20.

It is not clear whether the courts will interpret this provision in a broad or narrow sense:<sup>81</sup>

In its narrower sense it would refer to a situation in which a defendant has formed a premeditated intent to kill or cause grievous bodily harm to the victim and incites provocation by the victim so as to provide an opportunity for attacking him or her. In that situation the “provocation” by the deceased will not in truth have been the cause of the fatal attack, which the defendant already intended. In a broader sense, self-induced provocation could also include a situation in which the defendant exposes himself or herself to the likelihood of provocation and then retaliates by killing the provoker. The conduct which exposes the defendant to the provocation might in itself be morally laudable (for example standing up for a victim of racism in a racially hostile environment), morally neutral or morally evil (for example blackmail). We can see strong arguments for a rule of law precluding self-induced provocation in the narrower sense from affording a partial defence to murder, and we can see no good argument to the contrary. To exclude from a defence of provocation all forms of conduct which might fall within the broader sense of self-induced provocation would in our view go too far.

- (d) Controversially, “the fact that a thing done or said constituted sexual infidelity is to be disregarded” (s.55(6)(c)).

In the House of Lords, the Parliamentary Under-Secretary of State, Lord Bach, accepted that the development of case law and the outcomes of more recent cases suggest that pleas of provocation on the basis of sexual infidelity “normally now fail” but that para.(c) is intended to spell out “that it is unacceptable for a defendant who has killed an unfaithful partner to rely on that unfaithfulness to try to escape a murder conviction”.<sup>82</sup> See also the speech of Lord Hoffman in *Morgan (Smith)*<sup>83</sup> in which he said that

“Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted upon the woman herself or her new lover...But section 3 prevents an English judge from doing so”.

There has been strong criticism of s.55(6)(c).<sup>84</sup> During debates in the House of Lords, Lord Henley suggested that the presence of para.(c) “is more to do with gesture politics than serious reform of the defence of

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<sup>81</sup> Law Commission, *Partial Defences to Murder* (HMSO, 2004), Law Com. Consultation Paper No.290, [Para.3.139]. My thanks to Nicola Wake for her comments on this issue.

<sup>82</sup> Hansard, col.1062, October 26, 2009.

<sup>83</sup> [2000] UKHL 49; [2001] 1 AC 146; [2000] 4 All ER 289; [2000] 3 WLR 654.

<sup>84</sup> For example, Jo Miles, “A *dog's breakfast of homicide reform*”, Archbold News, 2009, Issue 6, 2009, p.7.

provocation”,<sup>85</sup> and Lord Thomas of Gresford described the paragraph as “illogical and not desirable”.

The wording of this provision has also been criticised; how, for example, can “a thing said” be said to “constitute” sexual infidelity?<sup>86</sup> Whilst this is a legitimate point, one anticipates that para.(c) will be construed purposively so that things said or done *that relate* to sexual infidelity will come within this paragraph. Whether sexual infidelity can be disregarded in all cases remains to be seen, but it would be in line with the Government’s stance to suggest that acts that stem from, e.g. sexual jealousy or envy, are to be disregarded. However, it would be unrealistic and unacceptable to expect a jury to engage in mental gymnastics. Thus, in a case where the killer had lost his/her self-control as a “slow burn” response to circumstances that include sexual infidelity, it would be unrealistic to expect the jury to disentangle events and leave out of the reckoning circumstances that relate to sexual infidelity: one event might explain another.

85. Section 54 has been worded so that the partial defence has a “much more limited application” than the common law defence of provocation. The Government’s stated aim is to “[raise] the threshold” so that words and conduct would constitute a defence “only in exceptional circumstances”.<sup>87</sup> The type of case which the government anticipated would fall below the threshold, is *R v Doughty*.<sup>88</sup>

In respect of the *Doughty case*, as far as we are concerned, it is not intended that that kind of case - unless it can fit into diminished responsibility - ought to count as provocation. We are trying to put the bar higher and not to bring it down.<sup>89</sup>

86. Although ss.54-56 make no reference to “exceptional circumstances”, the statutory defence will, in practice, have limited application by reason of the requirement of “loss of self-control” and the use of qualifying expressions such as “extremely grave character” and a “sense of being seriously wronged” (see, for example, s.55(4)).

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<sup>85</sup> Hansard, col.1061, October 26, 2009

<sup>86</sup> See Jo Miles, “A *dog’s breakfast of homicide reform*”, Archbold News, 2009, Issue 6, 2009, p.7; and see the speech by Lord Henley, Hansard, col.1061, October 26, 2009.

<sup>87</sup> CP 19/08, para.34.

<sup>88</sup> (1986) 83 Cr.App.R. 319. In that case, a baby had cried persistently despite being fed, changed and other attempts made to settle him. D lost his temper, and had tried to silence the child by covering his head with cushions and kneeling on them.

<sup>89</sup> Maria Eagle (Parliamentary Under-Secretary of State for Justice), Hansard, Public Bill Committee, Tuesday 3 February 2009, Q.11.

## Loss of self-control need not be sudden: what does “loss of self-control” mean?

### *General considerations*

87. An important feature of the s.54 partial defence is that unlike the partial defence of provocation, s.54(2) removes the pre-existing requirement that the defendant suffered a “sudden” loss of self-control (*Duffy*<sup>90</sup>). For the reasons set out below, it is submitted that loss of self-control need not be temporary. One would therefore expect the defence to be available to those who react in a lethal way following a “slow burning” set of circumstances, for example, the battered spouse who, after years of having been tormented and abused by V, loses self-control and kills V.
88. Even at common law, this requirement was tempered by decisions such as *Ahluwalia*,<sup>91</sup> and *Thornton*,<sup>92</sup> to bring within the defence those persons whose reaction to circumstances was delayed rather than instantaneous.
89. Given that D must be judged on the basis that he/she possesses a “normal degree of tolerance and self restraint” (s.54(1)(c)), it would not be out of keeping with the structure of the statutory defence were the court to hold that the period available to D to reflect and to cool off, can be taken into account by fact finders when considering whether D had lost his/her self-control at the moment that V was killed. That is not to say that D would not be afforded generous latitude in appropriate cases when a judge is required to decide whether the defence is available or not (see s.54(6)), and whether D had lost his/her self-control (consider *Thornton*,<sup>93</sup> *Pearson*,<sup>94</sup> *Baillie*,<sup>95</sup> *Ibrams*,<sup>96</sup> and consider P. Brett, “*The Physiology of Provocation*”;<sup>97</sup> J. Horder, *Excusing Crime*; and see Smith and Hogan, *Criminal Law*,<sup>98</sup>). In any event, it is submitted that care should be taken to ensure that expressions such as “time for reflection” and “time to cool off” do not water down or neutralise the effect of s.54(2) of the 2009 Act, namely, that the loss of self-control need not be sudden.
90. In a valuable article, “*Anger and Fear as Justifiable Preludes for Loss of Self-Control*”,<sup>99</sup> Professor Susan S.M. Edwards suggests that “*the battered women defence will do better to develop an argument around the concept of cumulative fear under s. 55(3)*”, but pointing out

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<sup>90</sup> [1949] 1 All ER 932.

<sup>91</sup> (1993) 96 Cr. App. R 133.

<sup>92</sup> [1992] 1 All ER 306.

<sup>93</sup> [1992] 1 All ER 306,

<sup>94</sup> [1992] Crim LR 193.

<sup>95</sup> [1991] Crim LR 383.

<sup>96</sup> (1981) 74 Cr App. R 154

<sup>97</sup> [1970] Crim LR 634

<sup>98</sup> 12th edn, OUP, p.494.

<sup>99</sup> JoCL 74 (223).

that, like anger, fear will only qualify if the violence is severe. Although this is indeed an “immediate limiting factor”, it is submitted that the new provisions make it more likely than hitherto that a battered woman (or man) would succeed in mounting a partial defence to murder. Whilst it is true that “[a] *battered woman's reaction to her abuser's violence does not necessarily follow from the severity of the last act of violence, but flows from her perception of the severity of the threat he poses to her life*”, s.54(3) makes it clear that the jury is required to take into account “all of D’s circumstances”.<sup>100</sup> It is further submitted that by “violence” the 2009 Act is not confined to bodily violence or bodily harm, but includes abuse that inflicts serious psychological harm too.

91. Professor Edwards suggests that, in relation to battered women, the CAJA 2009, has – in the context of the second qualifying trigger - shifted the nuance away from “*the psychology of the victim (the Walker formulation) onto the circumstances bearing down upon her*”.<sup>101</sup> Whether this proves to be the case depends on the construction of the expression “justifiable sense of being seriously wronged” as it appears in s.55(4)(b), and the factors which fact finders are entitled to take into account when deciding whether D’s “sense” was “justifiable”.
92. Professor Edwards has voiced concern that “*the new legal defence goes only so far leaving battered women who kill at the mercy of the jury assessment of ‘justifiable’, thus failing at the final hurdle*”, and that “*We no longer speak of characteristics, only circumstances*”.<sup>102</sup> It is important to stress that (unsurprisingly) there is no general requirement – for the purposes of this partial defence - that the *lethal response* of the accused was ‘justifiable’. In relation to the second qualifying trigger (s.55(4)) there is indeed a requirement that the extremely grave circumstances caused D to have a “*justifiable*

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<sup>100</sup> Other than those that bear on D’s general capacity for tolerance or self-restraint.

<sup>101</sup> A summary of the ‘Walker formulation’ was given by the New Zealand Law Commission in Report 73, as “Walker hypothesised that women who experienced domestic violence which they were unable to control would, over time, develop a condition of ‘learned helplessness’, which would prevent them from perceiving or acting on opportunities to escape from the violence.”: para.5, *Some Criminal Defences with Particular Reference to Battered Defendants*

A discussion, and criticism, of ‘battered women’s syndrome’, appears in that Report. The NZLC recommended that “We recommend that the term “battered woman syndrome” or any use of the term “syndrome” in this context be dropped and that reference be made instead to the nature and dynamics of battering relationships and the effects of battering.” [para.13].

See also the Law Commission of England and Wales, *Partial Defences to Murder* (2003), para.10.94: “It is recognised that abused women may suffer from mental health difficulties, such as depression, anxiety and post traumatic stress disorder. However, from our research to date there appears to be no generally accepted medical position on ‘battered woman syndrome’. It is not a diagnosis but an explanation of how some women are affected by being in an abusive relationship. We do not see that it is a concept that would satisfactorily form the basis of a specific defence. Furthermore, defences to murder ought to be based on principles of general application.”

<sup>102</sup> *Anger and Fear as Justifiable Preludes for Loss of Self-Control*, JoCL 74 (223). Note that characteristics are relevant to the extent mentioned in s.54(1)(c), CAJA 2009.

*sense* of being seriously wronged” (s.55(4)(b)), but this is an appeal to the empathy of fact-finders rather than a requirement that the accused must show that he/she responded to circumstances on correctly reached conclusions. In any event, it is important to remember that the burden of *disproving* the partial defence of loss of self-control, rests on the prosecution. The question thus becomes “has the prosecution proved that D did not have a justifiable sense of being wronged”.

93. Much has been written about the position of battered women (and rightly so) but it should also be remembered that these provisions will apply, as they are intended to apply, to all persons who lose their self-control in the circumstances set out in ss.54 and 55 of the 2009 Act and, accordingly, the interpretation of these provisions should not become skewed by focussing on one vulnerable group of persons to the possible detriment of others. As stated elsewhere in this handout, a significant weakness (arguably) of the new provisions concerns the government’s insistence on including a requirement that D lost his/her self-control (given the research that suggests that men and women respond differently to acts that are - loosely stated - “provocative”): for a useful discussion, see Professor J. Horder “*Reshaping the subjective element in the provocation defence*”.<sup>103</sup>

*Loss of self-control? Or, Loss of tolerance and self-restraint?*

94. What is meant by the expression ‘loss of self-control’ for the purposes of ss.54 and 55 of the CAJA 2009? It is submitted that the expression “loss of self-control” may not be apt to describe the ultimate issue that the jury has to decide, namely, whether the defendant’s tolerance and self-restraint were overborne by his/her circumstances.
95. Construed literally, the expression “loss of self-control” denotes a reaction that is sudden. But this is precisely what Parliament has enacted a loss of self-control need not be,<sup>104</sup> and juries will have to be directed accordingly. Descriptors (often heard in cases of common law provocation) such as “snapped”,<sup>105</sup> “went berserk”, “lost the plot”, “the straw that broke the camel’s back”, are not necessarily helpful when deciding whether the partial defence under s.54 has been made out. Furthermore, such descriptors ought not to be employed as suggestive of what “loss of self-control” means for the purposes of s.54 and s.55.<sup>106</sup> An explosion of

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<sup>103</sup> Oxford Journal of Legal Studies, 2005, p.123.

<sup>104</sup> Section 54(2), CAJA 2009.

<sup>105</sup> Nor, for that matter, “the final surrender of the frayed elastic”, Helena Kennedy QC, “*Eve was framed: Women and British Justice*”; Chatto & Windus, London, 1992.

<sup>106</sup> This is in the submission of the author. Susan S.M. Edwards is correct to say that defendants will continue to use such expressions to describe their state of mind: *Anger and Fear as Justifiable Preludes for Loss of Self-Control*, JoCL 74 (223).

anger, or an excessive lethal response (e.g. stabbing V 20+ times) may be simply symptomatic of a slow-burning state of affairs (circumstances).

96. Given that loss of self-control need not be sudden, does it remain a requirement of the s.54 partial defence that the loss of self-control was at least “temporary”? The issue arises because, in *Duffy*, Devlin J had spoken of provocation as involving “a sudden *and temporary* loss of self-control” – a phrase that enjoyed the approval of the Court of Appeal in a number of cases: see, for example, *Ahluwalia*,<sup>107</sup> citing *R. v. Ibrams and Gregory*,<sup>108</sup> *Whitfield*,<sup>109</sup> *R. v. Thornton*.<sup>110</sup> Having regard to the structure of ss.54-56 CAJA 2009, which puts at the forefront of the jury’s enquiry an examination of the circumstances of the defendant insofar as they relate to the killing, it would artificially restrict that enquiry to impose a requirement that loss of self-control must be “temporary”. Such a requirement might work an injustice in cases where D killed V as a slow burn response to one of the sets of circumstances set out in s.55 (the qualifying triggers).
97. It is submitted that rather than endeavouring to analyse the expression “loss of self-control”, and to break it down into component parts, the right approach is:
- (1) To determine whether D’s conduct is attributable to any of the sets of circumstances set out in s.55,<sup>111</sup> and
  - (2) To apply the test set out in s.54(1)(c), namely, whether a person of the defendant’s sex and age (with a normal degree of tolerance and self-restraint) *in the circumstances of the defendant might* have reacted in the same or in a similar way.<sup>112</sup> The word “reacted” in s.54(1)(c) may be said to imply that a loss of self-control is sudden. But, whether the killing was carried out in the heat of the moment, or was planned (but not a considered desire for revenge), the focus is on D’s reaction to *circumstances*. Accordingly, circumstances, and their effect on D, are at the heart of ss.54. Parliament has made it clear that “*the reference to ‘the circumstances of D’ is a reference to all of D’s circumstances other than those whose only relevance to D’s conduct is that they bear on D’s general capacity for tolerance or self-restraint*” (s.54(3)).<sup>113</sup>

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<sup>107</sup> [1992] EWCA Crim 1.

<sup>108</sup> (1982) 74 Cr. App. R. 154.

<sup>109</sup> (1976) 63 Cr. App. R. 39.

<sup>110</sup> (1992) 1 All E.R. 306.

<sup>111</sup> The “qualifying triggers”.

<sup>112</sup> Section 54(1)(c), CAJA 2009. This provision is not simply a restatement of the position at common law (e.g. *Holley*) because that provision requires fact-finders to have regard to the “*circumstances of D*”, and not just his characteristics.

<sup>113</sup> Distinguishing between cases where D possesses a bad tempered disposition, and cases where D’s temperament has been conditioned by circumstances culminating in a loss of self control, may not always be easy.

98. *Duffy* was a case of a woman who killed her abuser. In that case Devlin J said “*What matters is whether this girl had the time to say: ‘Whatever I have suffered, whatever I have endured, I know that Thou shalt not kill’*”.
99. In *Duffy*, Devlin J had also remarked that “*the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negate a sudden temporary loss of self-control which is the essence of provocation..*” (emphasis added). Although s.54(4) CAJA 2009 similarly provides that the defence of ‘loss of self-control’ is unavailable to D if he/she acted “in a considered desire for revenge”, it is arguable that the justification for the existence of this provision is that such a desire is inconsistent with the notion of loss of self-restraint, rather than for the reasons set out in *Duffy*, which proceeded on the basis that a loss of self-control had to be ‘sudden’ – the very thing which s.54(2) states “loss of control” need not be.
100. In *Ahluwalia*,<sup>114</sup> the appellant had endured years of violence and humiliation from V. She threw petrol in V’s bedroom and set it alight. V sustained severe burns and died from his injuries six days later. The appellant did not give evidence and no medical evidence was adduced on her behalf. The trial judge left the issue of provocation to the jury. His references to “sudden and temporary loss of self-control” were held, by the Court of Appeal, to be correct and in accordance with well established law. Her appeal against conviction for murder was allowed on other grounds.
101. It is submitted that not every statement of principle expressed in *Ahluwalia* remains true for the purposes of the s54 defence:-
- a. “*Time for reflection may show that after the provocative conduct made its impact on the mind of the defendant he or she kept or regained self-control*”. Although Professor Susan Edwards may be proved right in saying that a lapse of time “will nevertheless be taken into consideration” as part of D’s circumstances,<sup>115</sup> the actual significance of a lapse of time is debatable. Devlin J saw its significance as evidence that D had time to regain self-control and to reflect that “*[w]hatever I have suffered, whatever I have endured, I know that Thou shalt not kill*”.
- Parliament has departed from that approach, not least by virtue of s.54(2) CAJA 2009. There may be cases where, for example, D’s fear of serious violence from V was so great that D believed that killing V as the

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<sup>114</sup> (1993) 96 Cr.App.R. 133.

<sup>115</sup> Anger and Fear as Justifiable Preludes for Loss of Self-Control, JoCL 74 (223).

only way to rid D of that fear.<sup>116</sup> D is entitled to be acquitted if (applying s.54(1)(c)) the jury concluded that a person, in those circumstances, *might have reacted* in the same or in a similar way to D.

Time for reflection may be relevant to the extent that the jury would be entitled to take into account whether D had considered and weighed up other options e.g. seeking legal redress.

- b. “*The passage of time following the provocation may also show that the subsequent attack was planned or based on motives, such as revenge or punishment*”. Motives based on revenge or punishment would not afford D a defence under s.54 CAJA2009. However, it is less clear whether even a planned attack would fall outside the scope of s.54.

102. It is important to bear in mind that s.54(1)(c) is not confined to the *characteristics* of D: see “*No statutory ‘reasonable person’ test*” (below).
103. The new partial defence removes the “immediacy dilemma” that the common law defence of provocation created,<sup>117</sup> and provides better protection from a conviction for murder for persons (whether men or women) who have been subjected to sustained abuse (notably serious violence).
104. The meaning of “loss of self-control”, for the purposes of ss.54-56, is made more difficult to analyse by virtue of the existence of the first qualifying trigger (fear of serious violence from V). As Professor Edwards has pointed out, fear is “an enduring underlying state”.<sup>118</sup> However, persons such as battered women will only be able to rely on s.54 CAJA, if (a) the expression “loss of self-control” is given a generous interpretation (perhaps “loss of tolerance and self-restraint would have been more appropriate) and, (b) that, in any event, “loss of self-control” need not be temporary. But, such a construction would also encompass less deserving cases (arguably), e.g., where D (a drug dealer) fears further serious violence from V (another drug dealer), and kills him.

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<sup>116</sup> Several submissions were made to the New Zealand Law Commission along the lines that: “...violence within a battering relationship is often just part of a general strategy to maintain power and control over the intimate partner. Successfully negotiating a particular incident of physical violence by calling the police, leaving the room or leaving the relationship at a particular point in time may not be the end of the matter. A woman may have done all of these things many times in respect of particular incidents of violence without ultimate relief from the constant threat of violence in her life. In fact, these actions may be instrumental in escalating the terror she lives with. Other submitters made similar observations.”: *Some Criminal Defences with Particular Reference to Battered Defendants*. New Zealand Law Commission, Report 73; and see Julia Tolmie, *Battered Defendants and the Criminal Defences to Murder – Lessons from Overseas*, [2002] Waikato Law Review 6.

<sup>117</sup> J. Horder “*Reshaping the Subjective Element*” (2005) 25 OJLS 127

<sup>118</sup> Anger and Fear as Justifiable Preludes for Loss of Self-Control, JoCL 74 (223).

### *Mercy killings*

105. In *R v Cocker*,<sup>119</sup> C's wife (V) suffered from an incurable disease, and had become severely incapacitated. She repeatedly begged C to kill her. C used a pillow to suffocate V after the latter woke him by clawing at his back, and demanded that he kill her. C told the jury that his wife's conduct that morning, and her entreaties, became too much for him. C pleaded guilty to murder following the judge's ruling that there was no evidence that C had been provoked. C's application for leave to appeal was dismissed on the grounds that C's conduct was the opposite of provocation: he had not lost his self-control.
106. Whether D on the facts in *Cocker* now has a defence under s.54 CAJA 2009, depends in part on the interpretation of the objective test in s.54(1)(c). One hurdle, that the loss of self-control must be sudden (s.54(2)) has gone. But its riddance also suggests that the expression "loss of self-control" is not to be construed literally: the focus of fact-finders is on D's *circumstances* – i.e. the state of affairs in which D killed. The test, in s.54(1)(c), relates to a person's "normal degree of *tolerance and self-restraint*". Arguably, those words are not confined to cases where D loses control of his/her mind (manifested by D having 'snapped', or 'exploded', or 'lost the plot'). It is perfectly true that if the new partial defence would now encompass cases such as *Cocker*; the defence may well overlap with a plea of Diminished Responsibility. D's state of mind might constitute a "recognised medical condition" for the purposes of the modernised partial defence of Diminished Responsibility, and it may be a relevant "circumstance" for the purposes of the 'loss of control' defence. But if these defences exist as concessions to human frailty, so that judges are not bound to impose a mandatory sentence of life imprisonment, it might be said that the fact that the defences overlap does not matter.

### No statutory "reasonable person" test

#### *The position at common law*

107. The scope of the common law defence of provocation is subject to three qualifiers:
- First, mere circumstances (rather than something said or done) no matter how provocative, do not constitute a defence to murder (see Smith and Hogan, *Criminal Law*).<sup>120</sup>
  - Secondly, s.3 of the 1957 Act requires that the provocation was enough to make a reasonable person act as the defendant did.

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<sup>119</sup> [1989] Crim.L.R. 740.

<sup>120</sup> 12th edn, OUP, p.491.

- Thirdly, case law imposes a requirement that D possesses the characteristics, qualities and power of self restraint, which the law expects D to have (see *Bedder v DPP*<sup>121</sup> (overruled by s.3 of the 1957 Act and not followed in *Camplin*<sup>122</sup>); *Morgan Smith*<sup>123</sup> (not followed in *Attorney General from Jersey v Holley*<sup>124</sup>).
108. The first qualifier is relatively straightforward. But a complex relationship exists between the second and third qualifiers that have created a dilemma for the courts. Should the focus be on the *gravity of the provocation*, so that the defence is only available if a specified threshold is reached, or should the focus be on the *characteristics of the hypothetical reasonable person* who is expected to withstand and to display restraint despite the provocation? A further issue is whether D has characteristics that ought to be taken into account when assessing the gravity of the provocation or whether they should be disregarded.
109. In *Camplin*, Lord Diplock said that a reasonable person is “*a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused’s characteristics as they think would affect the gravity of the provocation to him*”.
110. In *Holley*, the majority of their Lordships aligned themselves with Lord Diplock’s description in *Camplin* of the reasonable person.
111. The distinction (drawn in cases such as *Camplin* and *Holley*) between characteristics that are relevant to: (i) the issue of self-control; and (ii) the gravity of the provocation, has long divided the judiciary and academics (consider A.J. Ashworth, “*The Doctrine of Provocation*”<sup>125</sup>). Professor Susan Edwards has argued that on a strict reading of the decision in *Holley*, it would not be possible (under s.3 of the 1957 Act, now repealed) to argue that a battered woman’s capacity for self-control is lowered by reason of the effects of abuse and that she “will have to present her loss of self-control as reasonable, relying only on the gravity to her of the provocation”.<sup>126</sup>

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<sup>121</sup> [1954] 1 WLR 1119.

<sup>122</sup> [1978] 67 Cr App R 14.

<sup>123</sup> [2001] A.C. 146.

<sup>124</sup> [2005] 2 A.C. 580

<sup>125</sup> Cambridge Law Journal, Vol.35, Issue 2, November 1976, pp.292-320.

<sup>126</sup> (“Justice Devlin’s legacy: a battered woman ‘caught’ in time” [2009] Crim LR 851

*The position under s.54(1)(c), CAJA 2009: the objective element: Holley 'versus' Morgan ?*

112. Parliament has not enacted a “reasonable person” test. Instead, the objective requirement enacted in s.54(1)(c) is that

“a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D”.

113. Nowhere in ss.54-56 do the words “reasonable” or “reasonable person” appear. The reason for the omission may be based on a passage in the dissenting opinion of Lord Hobhouse in *Morgan (Smith)*, when he suggested that the phrase “reasonable man”, although used in s.3 of the Homicide Act 1957, is “*better avoided as not assisting the understanding of the criterion ‘ordinary powers of self-control’*”.

114. Lord Hobhouse also suggested that the word “characteristic” should be avoided altogether. Not only does that word not appear in s.3 of the 1957 Act, it was (he said) a “persistent source of confusion” and that what matters is the “objective standard of ordinariness”. The new provisions also make no reference to the “*characteristics* of the defendant”. But, the new provisions do refer to the “*circumstances*” of the defendant.

115. Parliament has repealed s.3 of the Homicide Act, and thus, the notion of the ‘reasonable man’, as described in that section, has gone.

116. *Holley* may no longer be apt to describe the test to be applied under s.54(1)(c). Consider the following example at para.17 of Home Officer Circular 2010/13 (emphasis added):

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.

117. It will be seen from the above example, that

- (1) the lethal response was not sudden;
- (2) D’s *circumstances* are relevant;

- (3) D's sex and age are relevant. Note that matters which pertain to D's "sex" also seem to be relevant, e.g. relative physical strength between D and V. Similarly, in relation to "age", it is arguable that matters such as dementia can be taken into account;
- (4) that s.54(1)(c) speaks of "tolerance" and "self-restraint", i.e. capacities that have been overcome by circumstances that constitute at least one "qualifying trigger".

118. Point (1), above, has been discussed. Points (2) to (4) are further considered below.

### *Circumstances and characteristics*

119. Section 54(1)(c) includes not only the *characteristics* of the defendant (sex, age, tolerance and restraint), but also the *circumstances* in which D acted. This may have the effect of blurring the traditional distinction between characteristics that go to (a) the gravity of the provocation, and (b) D's capacity for self-control. It is arguable that the emphasis has now shifted from an assessment of the effect that the accused's characteristics on his conduct, to an assessment of the significance of his circumstances as an explanation for his/her loss of self-control. For example, where D kills his/her abuser, the history of abuse forms part of D's *circumstances*, and it is thus no longer necessary to look for manifestations of that abuse as a *characteristic* of the accused that goes to the gravity of the provocation.<sup>127</sup> Further examples of the blurring of the edges between characteristics and circumstances include pregnant women (a circumstance or characteristic?, pre-menstrual tension, the menopause, dementia, fatigue (but not 'grumpy old man' syndrome!).<sup>128</sup>
120. Accordingly, the words "in the circumstances of D" may enable a jury to adopt a more empathetic approach when judging D's response than might have been possible under s.3 as interpreted in *Holley*.<sup>129</sup>
121. It is important to note that s.54(3) clarifies s.54(1)(c) so that the reference to "the circumstances of D" includes "all of D's circumstances" except those that bear on D's "general capacity for tolerance and self-restraint" (e.g. a propensity to violent outbursts). The distinction is arguably easier to state than it is to apply it in

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<sup>127</sup> See Amanda Clough, *Loss of Self-control as a Defence: The Key to Replacing Provocation*, JoCL 74 (118); "...'Circumstances' suggests being able to consider prior abuse as an external element rather than having to try and deem it as a characteristic by internalising it as some kind of syndrome or character flaw."

<sup>128</sup> See, Susan S.M. Edwards, *Anger and Fear as Justifiable Preludes for Loss of Self-Control*, JoCL 74 (223): Sex-characteristics to circumstances; Age-a characteristic or circumstance?

<sup>129</sup> "A dog's breakfast of homicide reform", Archbold News, 2009, Issue 6, 2009 p.8.

practice. Suppose D suffers from paranoia and kills V in the face of what D perceives to be a threat of serious violence from V (see s.55(3), CAJA2010). If the issue of fear is to be subjectively determined, should D's exaggerated fear be treated as a '*circumstance of D*' (for the purposes of s.54(1)(c)), or does it merely bear on D's general capacity for tolerance or self-restraint (s.54(3))?

*Which 'circumstances' are relevant?*

122. What constitutes "circumstances" for the purposes of s.54(1)(c) and s.54(3)? The prefix "circum" suggests that a 'circum-stance' concerns an external condition or event, and not what has traditionally been described as a "characteristic" of a person or thing.
123. If a person has brain damage, or is a chronic alcoholic, is that condition aptly described as a "circumstance"? Or, is the expression "the circumstances of D" descriptive of a 'state of affairs' that is capable of including what might otherwise be described as a person's "characteristics"?

*Sex and age*

124. The reference in s.54(1)(c) CAJA 2009, to "D's sex and age" is consistent with statements made in, e.g. *Camplin* and *Holley*, that the "powers of self-control possessed by ordinary people vary according to their age and...their sex (*Holley*; para.13).
125. For the purposes of s.54(1)(c), the words "sex" and "age", are capable of a narrow, or wide, construction. In the case of *Camplin*, Lord Diplock defined the "reasonable man" as a person "*having the power of self-control to be expected of an ordinary person of the sex and age of the accused but, in other respects, sharing such of the accused's characteristics as [the jury] think would affect the gravity of the provocation*". In the case of *Morgan*, Lord Millett, opined that the inclusion of "sex" in Lord Diplock's definition, was merely intended to make the test non-gender specific. It was therefore not intended to embrace related characteristics such as where a female defendant was pregnant, or going through the menopause.
126. The inclusion of "age", as a relevant characteristic of the 'reasonable man' for the purposes of s.3 HA 1957, was again the product of the reasoning of the House of Lords in *Camplin*. In that case, the defendant was 15 years of age at the time of the killing. The inclusion of age, was justified partly on policy grounds, that it would be wrong to put "an old head on young shoulders" and, on the grounds that chronological age was just part of the 'normal' order of things. However, it seems that a defendant aged, say 40, who had a mental age of 15, could not ask the jury

to take his mental age into account. The case of *Raven*, which is a decision to the contrary, did not find favour with the minority of their Lordships in *Morgan*, or (by implication) by the majority in *Holley*.

127. It could therefore be argued that the references to “sex” and “age” in s.54, were merely taken from Lord Diplock’s speech opinion in *Camplin*.

### *Tolerance and self-restraint*

128. What constitutes a “normal degree of tolerance and self-restraint” (see s.54(1)(c), CAJA 2009), is a matter for the jury to determine according to its judgment and its collective experience of life.
129. It is submitted that the words “*tolerance and self-restraint*”, as they appear in s.54(1)(c), are not confined to cases where D lost the control of his/her mind (manifested by D having ‘snapped’, or ‘exploded’, or ‘lost the plot’). It is therefore submitted that the expression “loss of self-control” is not apt to describe the ultimate issue that the jury has to decide (i.e. the test in s.54(1)(c)). In other words, the s.54 partial defence is rooted in D’s loss of tolerance and self-restraint – not loss of self control (and see the discussion in relation to *R v Cocker*,<sup>130</sup> (above)).
130. The question may arise whether the use of the word “circumstances” - as it appears in s.54(1)(c) - merely refers to the circumstances that constitute the qualifying trigger,<sup>131</sup> and that the only relevant *characteristics* that may be taken into account, for the purposes of applying the test, are the sex and age of the defendant, but otherwise having a normal degree of tolerance and self-restraint.
131. The alternative, wider, construction is that the jury can temper the criterion of ‘normal degree of tolerance’ with compassion having regard to the defendant’s personal circumstances *and* (what we have previously called) his “characteristics”. This wider interpretation is based on the argument that s.54 puts the emphasis on circumstances rather than characteristics.
132. But, if the wider interpretation is to be preferred, then where is the line to be drawn? If “battered woman syndrome”, chronic alcoholism, mental impairment, pre-menstrual tension, are regarded as “circumstances” that may be taken into

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<sup>130</sup> [1989] Crim.L.R. 740.

<sup>131</sup> The revised test in s.54(1)(c), is engaged if, and only if, there is evidence that the defendant’s loss of self-control was attributable to at least one of three “qualifying triggers” set out in s.55 of the 2009 Act, for example, fear of serious violence from the victim. However, the qualifying triggers depend on proof of the existence of circumstances described in s.55, for example, that things were said or done that “constituted circumstances of an extremely grave character”.

account for the purpose of s.54(1)(c), is there any logical reason why transitory drunkenness, recreational drug intoxication, or drug induced paranoia, should not also be included?

133. How do we distinguish between circumstances that bear on the defendant's "general capacity for tolerance and self-restraint" (see s.54(3)) - for example, his bad temper when drunk - and circumstances that bear on the issue of whether the defendant's loss of self-control was attributable to at least one "qualifying trigger". For example, a defendant may have had a genuine fear of serious violence from the victim (but see above). Even if fear is to be subjectively determined, will the courts hold that the first qualifying trigger is not available where D's fear of serious violence was unwarranted, and the product of voluntary intoxication?
134. How are the expressions "*normal degree of tolerance*" (s.54(1)(c)) and "*general capacity for tolerance*" (s.54(3)) to be construed, and contrasted? They presumably do not mean the same thing. Unlike s.3 of the Homicide Act 1957, as interpreted by the courts, s.54(1)(c) looks to how a person, in the defendant's circumstances, *might have* reacted to the relevant qualifying trigger(s), rather than the higher threshold of whether a reasonable person "*would have*" reacted as the defendant did. To that extent, it is arguable that s.54(1)(c) is softer than s.3 HA, and that it permits of a more empathetic and sympathetic judgement of the defendant's lethal reaction in the face of circumstances that caused him to lose his self-control. This might be said to bolster a more generous construction of s.54 than s.3 of the Homicide Act.

### *Policy considerations*

135. As stated above, the distinction made in the cases between characteristics that are relevant to the issue of self-control, and the gravity of the provocation, has long divided the judiciary and academics.
136. In *Holley*, their Lordships accepted that the pre-existing law of provocation was unsatisfactory:

...their Lordships are not to be taken as accepting that the present state of the law is satisfactory. It is not. The widely held view is that the law relating to provocation is flawed to an extent beyond reform by the courts....Their Lordships share this view. But the law on provocation cannot be reformulated in isolation from a review of the law of homicide as a whole. [per Lord Nicholls, para.27]

137. The arguments against softening the *Holley* line,<sup>132</sup> and the introduction of a variable standard of self-control, are likely to be those stated by Lord Millett and Lord Hobhouse in their dissenting opinions in *Morgan (Smith)*. Lord Millett:
- a. “*By introducing a variable standard of self-control, it subverts the moral basis of the defence, and it is ultimately incompatible with the requirement that the accused...must have lost his self-control [and] had been provoked to lose it, for, if anything will do, this requirement is illusory.*”
  - b. The variable standard was inconsistent with the *Camplin* description of the reasonable man;
  - c. “*Persons who cannot help what they do are intended to be catered for by the defence of diminished responsibility...the diminished factor is internal to the accused, and it is inappropriate to ascribe it to provocation.*”
138. However, the majority of their Lordships in *Morgan*, and the minority in the later case of *Holley*, pointed out that the gravity of the provocation, and the defendant’s capacity for self-control, are interlinked. Put another way, they are the two sides of the same coin.
139. Lord Hoffmann, in *Morgan*, said that if it would be “too great a nicety” for juries to disregard a defendant’s sex and age when judging the defendant’s capacity for self-control, why should other characteristics of the defendant not also be taken into account on that basis? Why should age and sex be arbitrary exceptions?
140. Lord Hoffmann opined that the objective element should not disappear completely. His solution was that juries should be directed that people must exercise self-control, and that certain characteristics, such as jealousy and obsession, should be disregarded. This arguably explains s.55(6) of the 2009 Act which provides that “sexual infidelity” is to be disregarded.
141. Lord Hoffmann added that “*the judge should therefore be able to simply tell the jury that the question of whether [the accused’s] behaviour fell below the standard which should reasonably have been expected from the accused, was entirely a matter for them*”.
142. Given the above it is submitted that, in the absence of judicial guidance, practitioners ought not to assume that the combined effect of s.54(1)(c) and (3) is to codify the decision of the majority of their Lordships in *Holley*.

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<sup>132</sup> [2005] 2 A.C. 580.

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

143. Section 55 of the CAJA 2009 provides:

- (1) This section applies for the purposes of section 54.
- (2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.
- (3) This subsection applies if D’s loss of self-control was attributable to D’s fear of serious violence from V against D or another identified person.
- (4) This subsection applies if D’s loss of self-control was attributable to a thing or things done or said (or both) which
  - (a) constituted circumstances of an extremely grave character, and
  - (b) caused D to have a justifiable sense of being seriously wronged.
- (5) This subsection applies if D’s loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).
- (6) In determining whether a loss of self-control had a qualifying trigger
  - (a) D’s fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
  - (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
  - (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.
- (7) In this section references to “D” and “V” are to be construed in accordance with section 54.

### **The first trigger: fear of serious violence from the victim**

#### ***General matters***

144. The statutory defence under s.54 of the 2009 Act is wider than the pre-existing defence of provocation because whereas the latter is confined to a loss of self-control brought about by things said or done (or both) (see s.3 of the 1957 Act), s.54 provides an additional basis, namely D’s fear of serious violence from V against D or another identified person (s.55(3)).
145. The Law Commission noted that there was a time when the common law defence of provocation did encompass reactions prompted by fear (Law Com.304, para.5.49) but that was before a line of cases, in support of that proposition, “lost

its authority” when the requirements of “loss of control” and the “reasonable person” became established.<sup>133</sup>

146. In Law Com.304, the Commission recommended modifying the defence of provocation to include D’s lethal response to a fear of serious violence (para.5.55). It saw no need to give the expression “serious violence” an extended meaning or, to widen the defence to include types of violence falling short of “serious” violence (paras. 5.58-59). Alive to the fact that the ‘loss of self control’ requirement could result in unfairness to the defendant, the Commission recommended its removal, but added that the judge would be empowered not to leave the defence to the jury if he/she concluded that no reasonable jury would accept it.<sup>134</sup>
147. The Government accepted that there are “broadly” two sets of circumstances in which a partial defence to murder, on grounds akin to provocation, was appropriate for the purposes of the first trigger, namely where: (1) D kills his/ her abuser “in order to thwart” an anticipated (albeit not imminent) attack; and (2) D overreacts to what he/she perceived to be an imminent threat.<sup>135</sup> Both of the aforementioned situations will come within the ambit of the first qualifying trigger (s.55(3)) provided that what D anticipated or perceived as an imminent threat was an act of serious violence from V.
148. Jo Miles has postulated whether, if the degree of force used by the fearful defendant is objectively excessive, he/she will be deprived of the defence on the grounds that a person with a normal degree of tolerance and self restraint “would, by definition, not use excessive force”.<sup>136</sup> It is submitted that the short answer to the question is in the negative, on the grounds that s.54(1)(c) requires only that a person with the characteristics specified in sub-para.(c) “might have reacted” as the defendant did.
149. A stronger criticism of the Government’s approach is that it has linked each of the qualifying triggers in s.55 to the requirement that the defendant lost his/her self-control.

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<sup>133</sup> Law Com.304, para.5.49; citing cases such as *Buckner* (1641) style 467, and *Mawgridge* (1707) *Kell* 119

<sup>134</sup> Law Com.304, para.5.65

<sup>135</sup> CP 19/08, para.28.

<sup>136</sup> “A dog’s breakfast of homicide reform”, Archbold News, 2009, Issue 6, 2009, p.8.

150. Note that the fear must relate to violence *from the deceased* and not from a third party. The common law recognised that provocation might (in relation to things said or done) originate from a third party: *Davies*.<sup>137</sup>
151. It may be that the Courts will be driven to interpret s.55(3) generously:
- Suppose V had threatened to instruct a *third party* to kill D. If the threat had been carried out, would the violence have been “from V”? It is submitted that the answer is in the affirmative, giving s.55(3) a purposive construction.
  - Would it be sufficient that D’s fear stemmed from a report from X that V was armed with a knife or a gun and was going to kill D? In the latter situation, D feared serious violence from V notwithstanding that the information on which the fear was based came from a third party.

*The element of “fear”* <sup>138</sup>

152. For the purposes of the first qualifying trigger, the meaning of “fear”, and the notion of what ‘fear’ is, are not defined or described by the 2009 Act. It is tempting to say that the Courts would be unlikely to proffer a definition, on the grounds that it can be accepted that all persons know what fear is. At first sight, this seemingly simple proposition has much to commend it. However, the defence is not available where D acted with a “considered desire for revenge”: s.54(4).
153. There may be cases where a jury will need some guidance concerning the meaning of “fear”, for the purposes of the first qualifying trigger, in order to correctly distinguish between fear and revenge. For example, the question may arise whether D driven by “fear” or, just anger and a desire for revenge. At a time when the Law Commission contemplated a partial defence of excessive force in self-defence, the Royal College of Psychiatrists said in their response to CP No 173 (emphasis added):<sup>139</sup>

[W]e would point out that the approach adopted within the document to the relationship between provocation and self-defence, with the suggestion of a

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<sup>137</sup> [1975]1 All E.R. 890.

<sup>138</sup> The author would like to thank Nicola Wake (Lecturer, Sunderland University) for her invaluable comments on this part of the handout. The author also expresses his gratitude to Professor Susan S.M. Edwards, University of Buckingham, whose lecture at Durham Castle on the 30<sup>th</sup> September 2010, has been of great assistance (not least in relation to this section of the handout): *The Coroners and Justice Act 2009: Panacea or Pandora's Box for Partial Defences?*, a collaboration of the Universities of Durham and Sunderland. The author also expresses his thanks to Ms Fran Wright, Lecturer, Bradford University Law School, for her helpful discussions regarding this issue. None of the above persons are to be taken as endorsing the views expressed by the author in this handout.

<sup>139</sup> Para.3.99.

new partial defence of 'excessive self-defence', is based, at least partly, upon a legal misrepresentation of psychology and physiology. Hence, one way of reading the proposal to abolish the provocation defence 'in favour' of the new partial defence of self-defence is that it rests upon the assumption that 'anger' cannot be a justification for 'responsive violence', but 'fear' can be. However, this assumes that the two emotions of anger and fear are distinct. In medical reality they are not. Physiologically anger and fear are virtually identical, whilst many mental states that accompany killing also incorporate psychologically both anger and fear. Hence, the abused woman who kills in response even to an immediate severe threat will also be driven at least partly by anger at the years of abuse meted out to her, and perhaps her children. Again, the woman who waits until the man is 'helpless' to kill him, is likely not merely to be angry but also fearful that eventually he will kill her, and/or her children, and that there is no way of preventing it other than by the death of the man (partly because her cognitions have been so distorted by the years of abuse that she does not perceive the options for escape, for example legal options, at all in the same way as an ordinary person would do). Any legal solution to the current perceived problems with partial defences to murder which rested upon the assumption that fear and anger can (even usually) be reliably distinguished must, from a medical perspective, therefore fail.

154. According to Home Office Circular 2010/13, fear is to be subjectively determined:<sup>140</sup>

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.

155. The Explanatory Notes are to the same effect.<sup>141</sup> However, it is arguably misleading for the HO Circular to state that the approach is "in common with the complete defence of self-defence". Furthermore no authoritative source is cited by the Home Office in support of the proposition that the defendant does not need to prove that his or her fear was based on reasonable grounds.

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<sup>140</sup> Paragraph 25.

<sup>141</sup> "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." See also, Carol Withey, *Loss of Control* (2010) 174 JPN 197, in which the same point is made.

156. The arguments for and against a requirement of reasonableness, are finely balanced. When presented with cases that evoke a sense of compassion for the defendant (e.g. the battered woman, or where D having been sexually abused misreads the approach and fears sexual violence<sup>142</sup>), the temptation is to resist the imposition of such a requirement. However, other cases might justify limits being placed on the availability of the defence.
157. Accordingly, notwithstanding the aforementioned paragraph of the HO Circular, the courts may be called upon to decide whether fear, albeit genuinely held, must be 'reasonable', or 'warranted'. Those two descriptors arguably involve different thresholds: D's fear might have been unwarranted (e.g. on his perception of facts had he been sober), but it was based on reasonable grounds. A person whose nerves had been frayed by years of violent abuse might have remained 'on edge' fearing further attacks notwithstanding that V's behaviour had improved in the months preceding the killing. Professor Susan Edwards has given the useful example of the woman (D) who, having been repeatedly battered by her violent spouse, hears the key turning in the latch to the front door, and becomes so fearful of V, that she kills him.<sup>143</sup> A jury might conclude that it was reasonable for D to have been in fear, but D's lethal response must be judged in accordance with the test in s.54(1)(c).<sup>144</sup>

*The argument in support of an objective element to the notion of fear*

158. Comparing the s.54 partial defence with self-defence, is not to compare like-with-like:
- a. Self-defence is complete defence because it is justificatory. By contrast, a plea of 'Loss of self-control' is a partial defence that is excusatory in nature (it is submitted).
  - b. Self-defence now has a statutory basis by virtue of s.76 of the Criminal Justice and Immigration Act 2008. D is entitled to be judged on the facts as he/she genuinely believed them to be.<sup>145</sup> But, s.76(5) CJIA 2008 provides

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<sup>142</sup> My thanks to Professor David Ormerod for that example. He is not to be taken as endorsing any of the views expressed in this handout.

<sup>143</sup> Conference at Durham Castle, 30<sup>th</sup> September 2010, "*The Coroners and Justice Act 2009: Panacea or Pandora's Box for Partial Defences?*": a collaboration of the University of Durham, and the University of Sunderland.

<sup>144</sup> Professor Edwards is not to be taken as endorsing this statement.

<sup>145</sup> The principles of self-defence under the laws of New Zealand, provide useful examples. In *R v Fairburn* [2010] NZCA 44, the Court of Appeal of New Zealand, remarked that "there must be an honest belief of a threat of the requisite danger. Thus, to take an extreme example, even an insane delusion might require the defence to be put to the jury [fn 16: see *R v Green* [1992] 9 CRNZ 523 (CA)]. As Wright has correctly observed, "[t]he cases that really concern the judges seem to be those where the defendant's view of the circumstances is wholly unreasonable" [fn 17: Fran Wright, "*The circumstances as she believed them to be: Reappraisal of s 48 of the Crimes Act 1961*" (1998) 7 Waikato L

that “*subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced*”. This is consistent with the position at common law: see *R v Hatton*.<sup>146</sup> Sections 55(3) CAJA 2009, is not expressly qualified in similar terms (that is not to say that the courts will not introduce such a qualification).

- c. Where D pleads self-defence, the degree of force used by him/her must not be disproportionate.<sup>147</sup> Nothing in ss.54-56, CAJA 2009, limits the defence of loss of self-control to cases where D’s lethal response was proportionate. Indeed, it has been a feature of many cases of provocation (at common law) that D’s lethal response was manifestly disproportionate.

159. Unless the first qualifying trigger has an objective element of some description then, even in a case where D’s fear of serious violence from V was utterly irrational, it is difficult to see how a jury can say anything other than that a person in D’s circumstances “*might have*” reacted lethally, as D did.<sup>148</sup>

160. It might also be said that the absence of an objective criterion will widen the overlap of the s.54 partial defence with the modernised version of Diminished Responsibility. For example, if D’s fear was irrational, attributable to a recognised medical condition, the appropriate plea is arguably one of Diminished Responsibility. Whether the existence of an overlap (or the extent of it) should be a source of concern, is debatable.<sup>149</sup>

### *Arguments against an objective element to the notion of fear*

161. The Law Commission agreed with the view of Professor Ashworth when he stated (albeit in relation its proposals that the partial defence encompass “grossly provocative words or conduct”):

...the reasonableness requirement is out of place when we are thinking of people who are acting out of fear or anger and are therefore likely to be in a somewhat disturbed emotional state. Moreover, we have managed without a reasonableness requirement for mistake in provocation cases for almost a

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Rev 109 particularly at 120 et seq.]. But on the present state of the law, so long as the belief is honestly held it does not matter that it was unreasonable.”

<sup>146</sup> [2006] 1 Cr.App.R. 16.

<sup>147</sup> “The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances”: s.76(6), CJA 2008.

<sup>148</sup> Applying the objective test in s.54(1)(c), CAJA 2009.

<sup>149</sup> The potential overlap between Diminished Responsibility and Provocation, was an issue in the cases of *Morgan (Smith)* [2001] 1 AC 146, and *Holley* [2005] 2 A.C. 580. However, the familiar rationale for the existence of such partial defence is the same, namely, that they are concessions to human frailty that reduce liability for the killing to manslaughter and thus enable trial judges to sentence with discretion.

hundred years and probably longer. (Law Commission, Partial Defences to Murder (HMSO, 2004), Law Com. Paper No 290 [Para.3.154])

162. Arguably it would be difficult to prove that “the fear was genuine” if it is not based on reasonable grounds.<sup>150</sup>
163. There are difficulties associated with the imposition of an objective condition to the application of the first qualifying trigger:
- a. Defendants would not be judged entirely on the facts as he/she genuinely believed them to be.
  - b. What would be the relationship between s.55(3) and s.54(1)(c)<sup>151</sup>? The fact that D had reasonable grounds for being in fear would not necessarily be sufficient for the purposes of s.54(1)(c). However, much would turn on the construction of that provision and whether it gives statutory effect to the principles declared in *Holley*.<sup>152</sup>
  - c. How is the jury to be directed in a case where D kills V1 (pleading self-defence and loss of self-control), and injures V2 (pleading self-defence)?

*Fear is not gender specific*

164. There is nothing in the 2009 Act to limit the first qualifying trigger to cases that involve battered women. Men, too, may be able to rely on that trigger. Suppose D, who is engaged in a ‘drug war’ with V, loses his self-control and (in fear of serious violence from V) kills the latter. If D’s conduct meets the test set out in s.54(1)(c), his partial defence to murder seems likely to succeed. However, s.55(6) precludes D from raising the defence where he/she incited something to be said or done for the purpose of providing an excuse to use violence. If the partial defence was left to the jury, it would need to distinguish between those two situations. The Law Commission was clearly alive to the problem, although its proposed solution is not free of difficulty.<sup>153</sup>

We would not, for example, want a partial defence to be available to criminal gangs who choose to deal with threats of violence from rival gangs by striking first. Our proposals regarding the role of the judge and jury would properly preclude such a defence from being left to the jury in those

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<sup>150</sup> My thanks to Nicola Wake for making this point.

<sup>151</sup> Section 54(1)(c) provides: “...a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.”

<sup>152</sup> [2005] 2 A.C. 580.

<sup>153</sup> Law Commission, Partial Defences to Murder (HMSO, 2004), Law Com. Consultation Paper No.290. My thanks to Nicola Wake for her comments on this issue.

circumstances (on the basis that no properly directed jury could reasonably conclude that a gangster who chose to act in such a way could satisfy the objective test).

***The first trigger and self-defence***

165. Suppose D, fearing that he is about to be stabbed by V, strikes V on the head with a rock and kills him. In answer to a charge of murder, D might wish to run both self-defence and the s.54 defence.
166. Self-defence will be a complete defence whereas s.54 will afford him a partial defence. But, D's plea of self-defence would presumably be on the basis that he was in control, not that he had lost his self-control.
167. Even if the two defences are not mutually exclusive, they do not sit comfortably together.
168. The problem is made worse by s.54(5) of the Act (the conundrum discussed below) which seems to require a jury to assume that the s.54 defence is satisfied if D adduces sufficient evidence to raise an issue with respect to that defence.

**Second trigger: things said or done; circumstances of an extremely grave character, etc.**

169. Things said and/or done (usually by V) that provoked D to lose his/her self-control, was the only basis on which D could mount a partial defence of provocation to a charge of murder.
170. Until the enactment of s.3 of the HA 1957, the House of Lords had held that words alone ("save perhaps in circumstances of a most extreme and exceptional nature"<sup>154</sup>) were incapable of constituting provocation: *Holmes*.<sup>155</sup>
171. The common law definition of provocation was influenced by cases decided under s.3 of the 1957 Act which states:

"Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation is enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall

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<sup>154</sup> *Camplin* [1978] UKHL, per Lord Diplock.

<sup>155</sup> [1946] AC 588.

take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.” [Emphasis added.]

172. A wide range of situations in which D claimed that he had been provoked by things said and/or done, were able to be left for the jury’s consideration under s.3 of the 1957 Act. Thus, in *Doughty*,<sup>156</sup> it was held that the judge had been required to leave provocation to the jury where D had lost his self control and killed a baby that had been persistently crying. The Court rejected an argument that the decision would open the floodgates to pleas of provocation, and the court put its faith in the common sense of juries to reject a defence that was devoid of merit. In any event, several ‘brakes’ have been applied to the application of the common law partial defence of provocation: see “*No statutory ‘reasonable person’ test*” (above). The government’s has deliberately raised the threshold<sup>157</sup> to exclude from the scope of (what was) provocation cases such as *Doughty*.
173. A partial explanation for the limitations imposed on the availability of the second qualifying trigger (s.55(4)) is reflected in an article by Professor J. Horder, for the Oxford Journal of Legal Studies (2005):

Reilly [states] that, ‘ [t]here seems no good reason why a defence based on loss of self-control should not also be extended to actors who kill under conditions of intense fear, or sadness, or under other emotional conditions such as compassion, depression, or jealousy’.[67]<sup>158</sup> I have defended this view, in so far as fear for one’s (or for another’s) safety is concerned. How plausible is this view, though, when applied to, say, extreme emotional disturbance produced by ‘sadness’, or by ‘jealousy’, whether or not the victim was in any plausible sense causally implicated in bringing about the violent reaction? [68]<sup>159</sup> Every stalker who feels that the object of his obsessive love should be reciprocating, even though she has never shown the slightest interest in him, would in principle be entitled to be acquitted of murder if he deliberately killed her when he was ‘overcome’ by sadness or jealousy at her continuing rejection.

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<sup>156</sup> (1986) 83 Cr. App. R 319

<sup>157</sup> “What we therefore sought to do in respect of the change to a provocation defence is to raise the threshold generally, so that those who kill in anger can succeed in having their conviction reduced to manslaughter only in exceptional circumstances. So, we are raising the bar of the availability of that defence and extending it to cover those who kill in fear of serious violence as well as those who kill in anger.”: Maria Eagle (*Parliamentary Under-Secretary of State for Justice*), Hansard, Public Bill Committee, Tuesday 3 February 2009, Q.11: and see the discussion, above, “*When the ‘loss of self-control’ defence is not available*”.

<sup>158</sup> A. Reilly, ‘*Loss of Self-Control in Provocation*’, above n 28 at 329.

<sup>159</sup> See further, J. Gardner and T. Macklem, ‘No Provocation without Responsibility: A Reply to Mackay and Mitchell’ [2004] Crim LR 213, 215.

**Third trigger: s.55(5)**

174. The effect of s.55(5) is self-evident.

**The incidence of the burden and standard of proof; and the s.54 (5) conundrum**

175. Unlike the defence of diminished responsibility (see s.52 of the 2009 Act), which D must prove on the balance of probabilities, s.54(5) requires only that sufficient evidence is adduced to raise an issue under s.54(1). Thereafter, the prosecution shoulders the legal burden of proving, to the criminal standard of proof, that the defence is not satisfied.

176. Unless the prosecution discharges that burden, s.54(5) requires the jury to assume that the defence is satisfied. This might give rise to interesting legal arguments and judicial decisions in cases where D has a good (and complete) defence of self-defence but, *the evidence also shows that D lost his/her self-control*. Would the judge be obliged to direct the jury to convict D of manslaughter in accordance with s.54(5)? Professor Jeremy Horder had posed that question in his evidence to the Public Bill Committee. In dealing with that issue before the Committee, the Parliamentary Under-Secretary of State for Justice, Maria Eagle, provided only a partial answer, namely, that the purpose of subs.(5) was to “clarify where the burden of proof lies when a partial defence of loss of control arises in a case” and that “the usual principles apply in relation to the burden of proof in the new partial defence”.<sup>160</sup>

177. In *Rossiter*,<sup>161</sup> it was held that wherever there is material, on a charge of murder, which is capable of amounting to provocation *however tenuous it may be*, the trial judge should pursuant to s. 3 of the Homicide Act 1957, leave that issue for the jury to determine. This has been criticised as being too generous to a defendant so that (as Amanda Clough points out<sup>162</sup>) if evidence is presented during the trial that there was provocative conduct and a loss of self-control, the jury should be directed that the defence is available even if it would be absurd to think that a jury would find that a reasonable person would have acted as the defendant did. However, in *Miao*,<sup>163</sup> the Court of Appeal held that the observation expressed in *Rossiter*, was not capable of surviving observations made by Lord Steyn (with whose speech all the other members of the House of Lords agreed) in *R v Acott*,<sup>164</sup>

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<sup>160</sup> Hansard, col.437, March 3, 2009; see also the speech of Baroness Scotland of Asthal, Hansard, col.585, July 7, 2009.

<sup>161</sup> (1992) 95 Cr.App.R. 326.

<sup>162</sup> Amanda Clough, Loss of Self-control as a Defence: The Key to Replacing Provocation, JoCL 74(118).

<sup>163</sup> [2003] EWCA Crim 3486.

<sup>164</sup> [1997] 2 Cr App R 94.

where the question was whether there was evidence of provocative conduct sufficient to be left to the jury.<sup>165</sup>

178. At 102E Lord Steyn said:

“If there is such evidence, the judge must leave the issue to the jury. If there is no such evidence, but merely the speculative possibility that there had been an act of provocation, it is wrong for the judge to direct the jury to consider provocation. In such a case there is simply no triable issue of provocation.”

179. The situation is clarified under the provisions of the CAJA 2009. First, s. 56(2)(a) abolishes s.3 of the 1957 Act. Secondly, s.56(6) stipulates, in effect, that the partial defence will be left to the jury if sufficient evidence is adduced to raise an issue with respect to the defence on which, *in the opinion of the trial judge*, a jury, properly directed, could reasonably conclude that the defence might apply.

180. A duty was even imposed on counsel on both sides to make the judge aware that evidence of provocation was present.

### **Rejecting the Commission’s proposal to remove the ‘loss of control’ requirement**

181. The partial defence of provocation has been the subject of detailed study by the Law Commission on more than one occasion.<sup>166</sup>

182. The Government latched onto the Law Commission’s description of the defence as a “confusing mixture of common law rules and statute”.<sup>167</sup> Whilst accepting the Law Commission’s analysis that the law on provocation needed to be reformed, the Government devised a statutory defence, the structure of which bears little resemblance to that proposed by the Commission.

183. Crucially, the Law Commission recommended abolishing the positive requirement that D lost his self-control on the grounds that the requirement was unnecessary and undesirable (see s.3 of the 1957 Act and Law Com.304 para.5.19). In rejecting this recommendation, the Government said that it remained concerned that there was a risk of the partial defence being used inappropriately, for example, where D

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<sup>165</sup> At page 100E, Lord Steyn said: “It remained the duty of the judge to decide whether there was evidence of provoking conduct, which resulted in the defendant losing his self-control. If in the opinion of the judge, even on a view most favourable to the accused, there is insufficient material for a jury to find that it is a reasonable possibility that there was specific provoking conduct resulting in a loss of self-control, there is simply no issue of provocation to be considered by the jury.”

<sup>166</sup> See Law Com.304, Law Com.290, CP 177 and CP 173.

<sup>167</sup> Law Com.304, para.5.3; CP 19/08 para.17.

killed in cold blood, or the killing was gang-related, or the killing was a so-called 'honour killing',<sup>168</sup> and "where a defendant has killed while basically in full possession of his or her senses, even if he or she is frightened, other than in a situation which is complete self-defence".<sup>169</sup>

184. The Government's reasoning is difficult to sustain (it is submitted), given that there was broad support for the Law Commission's recommendations that included putting the judge in control of the defence by empowering him/ her not to leave the defence to the jury unless there is evidence on which a jury, properly directed, could conclude that the defence might apply.<sup>170</sup> That recommendation came with the suggestion that consideration be given to the creation of an interlocutory appeal against a judge's ruling that the defence should *not* be left to the jury (Law Com.304, para.5.16).
185. The Government's decision to retain the requirement of 'loss of self-control' is surprising given the administration's efforts over the years to amend the law to ensure the equal treatment of men and women. The Commission had taken on board criticisms that the 'loss of self-control' requirement privileges men's typical reactions in the face of provocation over women's typical reactions; the latter are less likely to involve 'loss of self-control' and more likely to comprise of a blend of anger, fear, frustration, and a sense of desperation.<sup>171</sup> The Commission recognised that women's typical reactions might make it harder for them to demonstrate a loss of self-control (although, it must be noted, that the burden on the accused is evidential only).
186. The s.54 defence will therefore not benefit persons who, without losing their self-control, kill their abuser, regardless of the frequency and/or intensity of the abuse. It may be that defending advocates, and sympathetic juries, will seek to return a just verdict by applying the requirement of 'loss of self-control' in an elastic way.

### **Abolition of the label "provocation"**

187. The word "provocation" does not appear in ss.54 and 55. This is deliberate. Notwithstanding that the word "provocation" has a popular meaning and a long established legal meaning, it was "clear" to the Government (following discussions with stakeholders) that "the term 'provocation' carries negative connotations".<sup>172</sup> Precisely what these connotations are, is unclear, but in its Response to CP

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<sup>168</sup> CP 19/08

<sup>169</sup> CP 19/08 para.36

<sup>170</sup> Law Com.304 para.5.11(5); and see paras 5.25-5.32.

<sup>171</sup> Law Com.304, para.5.18; and see para.5.29.

<sup>172</sup> Government CP 19/08, para. 34.

19/08,<sup>173</sup> the Government merely said that it believed that “a partial defence on the basis of loss of self-control adequately describes it and that any references to provocation are unhelpful” (para.85).

### The elusive rationale for the defence of provocation

188. In its 2004 Report, the Law Commission noted that the major sources of dissatisfaction with the common law defence of provocation related to a lack of a clear rationale and the unsatisfactoriness in its key components.<sup>174</sup>

189. The rationale for the defence of provocation is usually said to rest in the fact that “murder carries a fixed sentence, so provocation could not otherwise be taken into account”.<sup>175</sup> However, the actual rationale arguably has more than one basis, and that provocation developed “alongside the changing understanding of the *mens rea* for murder” (CP 173, para.3.10), as well as changes in society’s moral barometer with regards to the homicidal responses of a reasonable person in the face of extenuating circumstances, and whose conduct ought not to be stigmatised and punished as an offence of “murder”.

190. In *Duffy*,<sup>176</sup> Devlin J. described provocation the following terms (emphasis added):

“Provocation is some act or series of acts done by the dead man to the accused which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, *rendering the accused so subject to passion as to make him or her for the moment not master of his mind*...Circumstances which merely predispose to a violent act are not enough...Similarly, circumstances which induce a desire for revenge, or a sudden passion of anger are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control which is the essence of provocation.”

191. Leaving aside the question whether this direction stated the common law too restrictively, the point of interest for the purposes of this handout is in the description of the defendant as “*not master of his mind*” at the moment that he killed V (or when he was a party to the killing). This implies that the rationale of provocation was that a person would not be responsible in murder where reason

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<sup>173</sup> January 14, 2009.

<sup>174</sup> *Partial Defences to Murder*, Law Com.290, paras 3.20-21 and 3.5; and see J. Horder, *Provocation and Responsibility* (1992).

<sup>175</sup> Professor Glanville Williams, *Textbook of Criminal Law*, Stevens, p.478 (1978).

<sup>176</sup> [1949] 1 All ER 932.

and self-restraint had become disconnected from other mental functions that caused D to respond fatally.

192. The above may be an imperfect explanation because, on that basis, a partial defence ought (arguably) to exist in relation to any offence (and not only murder) where proof of a specific intent is required (for example grievous bodily harm with intent, under s.18 of the Offences Against the Person Act 1861). But the principal point is that not all killings equally deserve of the mandatory imposition of life imprisonment.
193. The effect of ss.54-56 of the 2009 Act is that the juries are no longer empowered to determine for themselves whether the gravity of things said or done is sufficient to mitigate D's conduct as an offence of manslaughter rather than of murder. Parliament has set qualifying thresholds in s.55 of the Act. By reason of those thresholds alone, the upshot is likely to be that a significant number of defendants, who would have succeeded in answering a charge of murder on the grounds of provocation, will be convicted of murder.

### INFANTICIDE

194. Section 57 of the CAJA 2009, will come into force on the 4<sup>th</sup> October 2010 and provides (England and Wales):
- (1) Section 1 of the Infanticide Act 1938 (c. 36) (offence of infanticide) is amended as follows.
  - (2) In subsection (1)-
    - (a) for "notwithstanding that" substitute "if", and
    - (b) after "murder" insert "or manslaughter".
  - (3) In subsection (2)-
    - (a) for "notwithstanding that" substitute "if", and
    - (b) after "murder" insert "or manslaughter".
195. Section 1(1) and (2) of the Infanticide Act 1938 ("1938 Act") provides (words deleted by the 2009 Act, appear in square brackets; words inserted are italicised):
- (1) Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission 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, then, [notwithstanding that] *if* the circumstances were such that but for this Act the offence would have amounted to murder *or manslaughter*; she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

- (2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission 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, then the jury may, [notwithstanding that] *if* the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder *or manslaughter*; return in lieu thereof a verdict of infanticide.

### **Infanticide where D would be guilty of murder (or manslaughter)**

196. Section 57 of the 2009 Act has a two-fold purpose.
197. The first is to make it clear that infanticide, whether preferred as a discrete charge, or invoked by D as a defence, is “available only in respect of a woman who would otherwise be found guilty of murder or manslaughter”.<sup>177</sup> The amendment was considered necessary following the decision of the Court of Appeal in *Gore*,<sup>178</sup> in which it was held that the mens rea of the offence of infanticide is that D acted (or failed to act) wilfully, and that it is unnecessary for the prosecution to prove that D intended to kill or to cause grievous bodily harm. Accordingly, the decision of the Court of Appeal in *Gore* is overruled (in effect) on this point.
198. The second purpose is to preserve what the Court saw as the “fortunate consequence” of its decision, namely, that D is not forced to confront the “dreadful truth” that she had the *mens rea* for murder, and thus she need not feel inhibited from adducing psychiatric evidence relating to the balance of her mind.
199. In order to understand the thinking behind the amendments made by s.57 of the 2009 Act, it is important to note that in *Gore*, both the Criminal Cases Review Commission and G had contended that the correct construction of s.1 of the 1938 Act is, that a person is guilty of infanticide “provided that” (i.e. “if”) D killed in circumstances which, but for the 1938 Act, would have amounted to murder. Obviously, D’s conduct could only amount to murder if D had the *mens rea* for murder. Accordingly, so the argument must have run, if D did not have the *mens*

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<sup>177</sup> Explanatory Notes, para.351

<sup>178</sup> [2007] EWCA Crim 2789

*rea* for murder, then D could be guilty of neither murder nor the offence of infanticide. The Court of Appeal rejected that argument. The Court held that the words “notwithstanding that”, as they appear in s.1, are equivalent to “despite the fact” or “even if”; they did not mean “provided that”. The *mens rea* for the offence of infanticide was held to be explicitly contained in the first few words of s.1(1), namely, that the prosecution must prove that the defendant acted or omitted to act wilfully, and that the section makes no reference to any intention to kill or cause serious bodily harm (para.34).

200. The effect of the Court’s construction of s.1 was to widen the reach of infanticide when charged as an offence but, on the other hand, it also widened ‘infanticide’ when deployed as a defence to a charge of murder. The Court described its interpretation as having a “fortunate consequence” in cases where infanticide is pleaded as a defence to murder because D is not forced to accept the “dreadful truth” that she intended either to kill the child or, to cause it really serious bodily harm. This was a point well made by the Court of Appeal, but the Government was concerned that *Gore* could give rise to the consequence (probably unintended by the Court) that D might be charged with infanticide even if she could not be convicted of a homicide offence. This was because a wilful act or omission might include negligence below the level of ‘gross negligence’ that was “necessary for a manslaughter offence to be charged”.<sup>179</sup> Thus, the birth mother could be convicted of a homicide offence (albeit described as ‘infanticide’) whereas “the father or any other responsible adult in a similar position, would be charged with the lesser offence of child cruelty that carries a maximum sentence of 10 years imprisonment”.<sup>180</sup>
201. With the above in mind, s.57 of the 2009 Act addresses three questions raised in *Gore*
- i. Should D be convicted of infanticide “despite the fact” that D might, but for s.1 of the 1938 Act, have committed the offence of murder or, should D be guilty of infanticide only if D would otherwise be guilty of murder?
  - ii. If the answer is the latter, how does one deal with the problem that D might well decline to adduce psychiatric evidence relating to the balance of her mind if she has to admit the “dreadful truth” that she intended to kill her child, or to cause it really serious bodily harm to her child?
  - iii. If *Gore* were to remain the law, would it be appropriate to convict D of infanticide if she killed in circumstances that would not amount to either murder or manslaughter?

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<sup>179</sup> CP 19/08, para.122

<sup>180</sup> CP 19/08, para.123

202. Parliament's solution to these issues is as follows.

- i. Section 57(2)(a) and (3)(a) of the 2009 Act amend s.1 (1) and (2) of the 1938 Act, by substituting the word "if" for the words "notwithstanding that". To that extent, Parliament has departed from *Gore*. However, without further amendment to s.1 of the 1938 Act, the effect of this change would have been that D must be proved to have had the *mens rea* for murder. This would have meant that the "fortunate consequence" of the Court's interpretation in *Gore* would have been lost.
- ii. Accordingly, s.57(2)(b) and (3)(b) insert the words "or manslaughter" after the word "murder", with the result that D need only confront the fact that her conduct (and *mens rea*) would have amounted to at least the offence of manslaughter.
- iii. D cannot now be guilty of infanticide in cases that would not currently be homicide at all (thus dealing with the third issue mentioned above).

### Proposals for reform

203. Infanticide requires that the balance of the accused's mind was disturbed due to one of the two circumstances specified in s.1 of the 1938 Act (i.e. the effects of the birth, or the effects of lactation). Almost 20 years later, the 1957 Act created a partial defence to murder on the grounds of diminished responsibility. But, whereas the burden of proving the latter falls on the accused (to the civil standard of proof), the legal burden is on the prosecution to prove infanticide to the criminal standard of proof (or to disprove a plea of infanticide when raised as a defence).
204. The Law Commission did not recommend that infanticide should be subsumed within the partial defence of diminished responsibility,<sup>181</sup> and indeed, the Commission recommended that infanticide should be retained without amendment.<sup>182</sup>
205. To bring infanticide within the rubric of diminished responsibility would be a retrograde step; not only with regards to the incidence of the burden and standard of proof, but also because a person who would now be convicted of 'infanticide' would instead be convicted of 'manslaughter'.

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<sup>181</sup> Law Com.304, para.8.35.

<sup>182</sup> Law Com.304, para.8.23.

206. In *Kai-Whitewind*,<sup>183</sup> the Court of Appeal remarked that the law relating to infanticide is unsatisfactory and outdated (para.140). It was a case where, on its facts, there was no evidence to support a defence of diminished responsibility, or infanticide (para.132).
207. In *Kai-Whitewind*, the Court identified two issues relating to infanticide that warranted further consideration:
- i. Whether as a matter of substantive law, infanticide should be extended to include circumstances subsequent to the birth of the child, but connected with it, such as the stresses imposed on a mother by the absence of natural bonding with her baby (see para.139); and
  - ii. The problem in cases where D declines to admit that she killed the child, and therefore fails to adduce psychiatric evidence relating to the balance of her mind in order to plead infanticide as a defence to murder (para.139).
208. With regards to issue (1), s.1 of the 1938 Act has not been widened by the 2009 Act to include the mother's circumstances subsequent to the birth of the child.
209. In relation to issue (2), the Law Commission recommended that the trial judge should be empowered to order a medical examination of the defendant with a view to establishing whether the requisite elements of infanticide were present.<sup>184</sup> However, the Government has claimed that it found no evidence that such a power was needed and therefore the 2009 Act makes no such change in the law.<sup>185</sup>

## ENCOURAGING OR ASSISTING SUICIDE (E&W)

### Section 59: the statutory provisions

210. The Suicide Act 1961 is amended by s.59(1), (2), of the CAJA 2009, as follows.

In section 2 (criminal liability for complicity in another's suicide), for subsection (1) substitute

“(1) A person (“D”) commits an offence if

- (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and

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<sup>183</sup> [2005] EWCA Crim 1092.

<sup>184</sup> Law Com.304, para.8.46.

<sup>185</sup> CP 19/08, para.125.

- (b) D's act was intended to encourage or assist suicide or an attempt at suicide.
  - (1A) The person referred to in subsection (1)(a) need not be a specific person (or class of persons) known to, or identified by, D.
  - (1B) D may commit an offence under this section whether or not a suicide, or an attempt at suicide, occurs.
  - (1C) An offence under this section is triable on indictment and a person convicted of such an offence is liable to imprisonment for a term not exceeding 14 years."
211. Section 59(3) of the CAJA2009, amends s.2(2) of the Suicide Act 1960:
- (3) In subsection (2) of that section, for "it" to the end substitute "of a person it is proved that the deceased person committed suicide, and the accused committed an offence under subsection (1) in relation to that suicide, the jury may find the accused guilty of the offence under subsection (1)."
212. The amendments made to s.2(2) SA 1960, by s.59(3) CAJA 2009, are seen in their context under the subheading "discussion", below.
213. Section 59(4) of the CAJA 2009, inserts new s.2A into the Suicide Act 1960 (*acts capable of encouraging or assisting suicide*):
- (1) If D arranges for a person ("D2") to do an act that is capable of encouraging or assisting the suicide or attempted suicide of another person and D2 does that act, D is also to be treated for the purposes of this Act as having done it.
  - (2) Where the facts are such that an act is not capable of encouraging or assisting suicide or attempted suicide, for the purposes of this Act it is to be treated as so capable if the act would have been so capable had the facts been as D believed them to be at the time of the act or had subsequent events happened in the manner D believed they would happen (or both).
  - (3) A reference in this Act to a person ("P") doing an act that is capable of encouraging the suicide or attempted suicide of another person includes a reference to P doing so by threatening another person or otherwise putting pressure on another person to commit or attempt suicide.
214. Section 59(4) of the CAJA 2009, also inserts new s.2B into the Suicide Act 1960 (*acts capable of encouraging or assisting suicide course of conduct*). Criminal liability may be based on a course of conduct and not simply because of a single act.
- "A reference in this Act to an act includes a reference to a course of conduct, and a reference to doing an act is to be read accordingly."

### **Commencement and transitional provisions**

215. Section 59, and Sch.12 and Sch.23<sup>186</sup>, came into force on February 1, 2010 (see the *Coroners and Justice Act 2009 (Commencement No.3 and Transitional Provision) Order 2010* (SI 2010/145)).
216. It is important to note the transitional provisions in paras.8 to 11 of Sch.22 to the 2009 Act (see **Appendix B**). Note also that by Art.2 and para.25 of the Schedule to SI 2010/145, certain minor and consequential amendments have been made pursuant to s.177 and paragraphs 53 to 61 (suicide) of schedule 21 to the CAJA 2009.
217. Paragraph 10(3) of Sch.22 to the 2009 Act provides that, for the purpose of determining the guilt of the defendant, “it is to be conclusively presumed that the offence was committed wholly or partly before the section 59 commencement date” in the situations specified in para.10(2) of Sch.22, namely, where:
- (a) a person (“the defendant”) is charged in respect of the same conduct with both an old offence and a new offence;
  - (b) the only thing preventing the defendant from being found guilty of the new offence is the fact that it has not been proved beyond reasonable doubt that the offence was committed wholly after the s.59 commencement date; and
  - (c) the only thing preventing the defendant from being found guilty of the old offence is the fact that it has not been proved beyond reasonable doubt that the offence was committed wholly or partly before the s.59 commencement date.

### **Discussion**

218. Prior to s.59 of the 2009 Act coming into force, s.2(1) of the 1961 Act had read as follows:
- “A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.”
219. By s.59(3) of the 2009 Act, s.2(2) of the 1961 Act is amended to read as follows (words deleted by the 2009 Act appear in square brackets; words inserted are italicised):

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<sup>186</sup> Repeals to Pt 2 (criminal offences); repeals relating to the Suicide Act 1961 (“1961 Act”); and repeals to the Criminal Justice Act (Northern Ireland) 1966.

“If on the trial of an indictment for murder or manslaughter [it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of that offence] *of a person it is proved that the deceased person committed suicide, and the accused committed an offence under subsection (1) in relation to that suicide, the jury may find the accused guilty of the offence under subsection (1).*”

220. According to the Explanatory Notes (para.356), s.59 of the 2009 Act, when read together with s.1 of the Criminal Attempts Act 1981, is not intended to change the scope of s.2 (as originally worded). In fact, the scope of criminal liability has been extended (for the reasons set out below).
221. The original s.2(1) of the 1957 Act was a substantive offence with regards to conduct described by the words “aiding, abetting, counselling and procuring” suicide, etc. That offence has now been replaced with a single inchoate offence expressed in language that is consonant with the language of Pt 2 of the Serious Crime Act 2007. By dispensing with the words “aid, abet, counsel (etc.)” practitioners cannot be lulled into thinking that the new offence (any more than the original offence) is a species of derivative liability (for an explanation of this expression, see Smith and Hogan, *The Criminal Law*,<sup>187</sup> and see the speech of Lord Hope in *Purdy*<sup>188</sup>).
222. In the 12th edn of Smith and Hogan, *Criminal Law*, it is stated that the words “aids, abets, counsels or procures” are “used to define secondary participation in crime but here they are used to define the principal offence. The interpretation of the words should be the same”.<sup>189</sup> Lord Phillips expressed agreement with that statement of principle.<sup>190</sup> Accordingly, the author continues, “advising another to commit suicide does not amount to abetting or counselling unless and until that other does commit suicide”, or (it is submitted) that he/she actually attempted to commit suicide.
223. The aforementioned passage of Lord Phillips must not be misunderstood. It is merely stating that the words ‘aids, abets, etc’ are well defined in law. It is not stating that old s.2 gave rise to derivative liability or that the ordinary principles of secondary liability applied; the original provision plainly did not have that effect because the offence of suicide was abrogated by the 1961 Act. However, where neither the act of suicide nor attempted suicide actually occurs, D’s attempt to aid, abet, etc (by, for example, giving unsuccessful advice) was punishable as a criminal

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<sup>187</sup> 12th edn, OUP, p.180.

<sup>188</sup> [2009] UKHL 45, paras 18 and 24.

<sup>189</sup> Para.16.2.2.1.

<sup>190</sup> *Purdy* [2009] UKHL 45, para.4.

attempt under the Criminal Attempts Act 1981. It is important to note that such conduct now falls within new s.2(1) of the 1961 Act, regardless of whether a suicide or an attempt at suicide occurs (s.2(1 B)).

224. It is submitted that it is immaterial that an act of encouragement or assistance was ineffective, or that D's words of encouragement had not been communicated to the intended recipient. Thus, a letter posted by D urging V to "top himself" would be caught by new s.2(1)(a), even if the letter was intercepted by a police officer before it had been read by V.
225. Literature that is published on a website, or devices or substances offered for sale to facilitate suicide, would also come within new s.2(1).<sup>191</sup> Presumably, *Att-Gen v Able*<sup>192</sup> would now be decided differently.
226. Even in cases where the act in question would not be capable of assisting suicide, that act might nonetheless constitute an act of encouragement (but note s.2A(2) and (3), inserted into the 1961 Act by s.59(4) of the 2009 Act).
227. Given the inchoate nature of the offence, there is no need to charge under the Criminal Attempts Act 1981 a statutory attempt to assist or to encourage a person to commit suicide or an attempt at suicide. The only basis for charging a statutory attempt under the 1981 Act, in relation to the new s.2(1) offence, is where D attempts to do an act that is capable of encouraging or assisting etc., but such cases are likely to be very rare.

### **Extraterritorial effect**

228. The defendant's acts will come within new s.2 of the 1961 Act if he, in England or Wales, does an act to which s.2(1)(a) applies even if the suicide, or attempted suicide occurs elsewhere. In *Purdy*, Lord Hope gave the example of a person who helped another person "to make a journey to another country, in the knowledge that its purpose is to enable the person to end [his/her] own life there" (para.18). Such conduct would (it is submitted) be within the reach of s.2 (as amended).
229. Whether the same holds true under the original provision of the 1961 Act depends on whether the argument advanced by Professor Michael Hirst is correct, namely, that D cannot be complicit in the suicide or attempted suicide of another (i.e. by aiding, abetting, etc.) unless, and until, the latter commits suicide or attempted to do so and, where this occurs abroad, D's act of complicity is also deemed to be

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<sup>191</sup> See Safer Children in a Digital World: the Report of the Byron Review (2008)

<sup>192</sup> [1984] QB 795.

located abroad (applying the terminatory principle): see “*Suicide in Switzerland: Complicity in England?*”.<sup>193</sup> The argument runs that because old s.2 is not framed to give that provision extraterritorial reach, then D’s conduct is not caught by the section. Although, in *R. (on the application of Purdy) v DPP*,<sup>194</sup> the House of Lords left the issue “unresolved”, Lord Hope expressed his disagreement with it (but see Professor Hirst’s response: “*Assisted Suicide after Purdy: the unresolved issue*”<sup>195</sup>).

### **Mens rea of the new s.2(1) offence**

230. The *mens rea* element of new s.2(1) is spelt out in s.2(1)(b), namely, that D intends to encourage or to assist suicide, or an attempt at suicide. This is consistent with the *mens rea* requirement of s.44 of the Serious Crime Act 2007.
231. Arguably, it would have been preferable had s.59 of the 2009 Act made it clear (as Parliament has done for the purposes of s.44 of the Serious Crime Act 2007) that by “intention” is meant that it was D’s purpose to encourage, etc. and that it is not enough that D foresaw, as a virtually certain consequence that his acts would encourage or assist another to commit suicide, etc.<sup>196</sup>

### **Section 59 (4)**

232. As stated above, s.59(4) inserts new s.2A into the 1961 Act, which clarifies the meaning of the expression “capable of encouraging or assisting” as that expression appears in s.2(1)(a) of the 1961 Act.
233. New s.2A(1) makes it clear that both D1 and D2 will come within the reach of new s.2(1) if D1 arranges for D2 to do an act that is forbidden by s.2(1), and D2 does that act.
234. Note that in the event that D2 was unable to carry out an act of assistance or encouragement (for example, he was arrested before he could do so, or D2 changed his/her mind), D1 and D2 might have done enough to be charged with a conspiracy to contravene new s.2 of the 1961 Act, or that each had attempted to contravene the section (i.e. charged in this instance as a statutory attempt, under the Criminal Attempts Act 1981).

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<sup>193</sup> [2009] Crim LR 335.

<sup>194</sup> [2009] UKHL 45.

<sup>195</sup> [2009] Crim LR 870.

<sup>196</sup> See R. Fortson, *Serious Crime Act 2007*, Blackstone’s Guide, OUP, paras 6.61, 6.119

235. The reach of s.2 is extended by s.2A(2), which provides that even if D's act was in fact incapable of encouraging or assisting suicide, etc. D will nevertheless come within s.2(1)(a) if:
- i on the facts as D believed them to be, the act in question would have been capable of encouraging or assisting suicide. For example, it would be sufficient if D supplied a noose which he mistakenly believed would be strong enough to assist another to commit suicide; or
  - ii the acts would have been capable of encouraging or assisting suicide if events had happened as D believed that they would. For example, D encourages V to throw himself onto the 'live' rail at a particular railway station but, on the occasion that V proceeded to act as advised, the power had been disconnected.
236. Section 2A(3) makes it clear that encouragement by threats or other forms of pressure come within s.2(1) of the 1961 Act.

### General matters

237. Section 59 of the 2009 Act was extensively debated in both Houses of Parliament. Much has been written and said not just about assisted suicide but also about euthanasia, mercy killings, honour killings, and other related topics. See, for example:
- Research Paper 09/06;
  - *Inchoate Liability for Encouraging and Assisting Crime* (Law Com.300);
  - *Save the Children in a Digital World*: the Report of the Byron Review;
  - the Assisted Dying for the Terminally Ill Bill;
  - Select Committee on the Assisted Dying for the Terminally Ill Bill, First Report (March 2005);
  - M. Hirst, "*Assisted Suicide after Purdy: the unresolved issue*";<sup>197</sup>
  - R. Huxtable, "*A Right to Die or is it the Right to Die?*";<sup>198</sup>
  - *R (Pretty) v DPP*;<sup>199</sup>
  - *R (Purdy) v DPP*;<sup>200</sup>
  - *Re B (Refusal of Treatment) (Mrs B v NHS Trust)*,<sup>201</sup> a case that raises complex issues where B wished to have her artificial ventilation withdrawn).

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<sup>197</sup> [2009] Crim. LR 870.

<sup>198</sup> [2002] CFLQ 341

<sup>199</sup> [2002] 1 All ER 1 (HL).

<sup>200</sup> [2009] UKHL 45

238. Although the issues and the debates concerning them are wide ranging, there is little value in even attempting to summarise them as part of this handout. When all is said and done, s.59 does little more than to modify existing law without radically altering its reach into areas such as euthanasia or mercy killing.
239. It is important to note that the Director of Public Prosecutions has issued a “policy” statement in connection with decisions taken to prosecute cases of alleged assisted suicide.<sup>202</sup> Note that the End of Life Assistance (Scotland) Bill was introduced in the Scottish Parliament on January 20, 2010.

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The author annotated Parts 2-9 of the CAJA 2009 (c.25), *Current Law Statutes (Annotated)* Sweet & Maxwell, 2010.

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<sup>201</sup> [2002] 2 All ER 449

<sup>202</sup> And see D. Powell, “Assisting suicide and the discretion to prosecute revisited”, J. Crim. L. 2009,73(6),475-479

**APPENDIX A: Transitional and saving provisions (SI 2010 No.816)**

**Article 7**

- (1) Existing guidelines which have effect immediately before the coming into force, by virtue of article 2 and paragraph 8 of the Schedule, of section 125(1) of the 2009 Act (sentencing guidelines: duty of court) are to be treated as guidelines issued by the Sentencing Council for England and Wales under section 120 of the 2009 Act (sentencing guidelines).
- (2) The repeal of section 172 of the Criminal Justice Act 2003 (duty of court to have regard to sentencing guidelines), which takes effect by virtue of article 2 and paragraph 22(b)(iv) of the Schedule, shall have no effect where a court is sentencing an offender for, or exercising any other function relating to the sentencing of offenders in respect of, an offence committed before 6th April 2010.
- (3) The amendments to section 174 of the Criminal Justice Act 2003 (duty to give reasons for, and explain effect of, sentence), which take effect by virtue of article 2 and paragraph 20(b) of the Schedule, shall have no effect in relation to the sentencing of any offender for an offence committed before 6th April 2010.
- (4) The amendments to Schedule 21 to the Criminal Justice Act 2003 (determination of minimum term in relation to mandatory life sentence), which take effect by virtue of article 5(f) and (g)(ii), shall have no effect in relation to the sentencing of any offender for an offence of murder committed before 4th October 2010.
- (5) In this article, “existing guidelines” has the meaning given in paragraph 28(2) of Schedule 22 to the 2009 Act.

**APPENDIX B: Schedule 22; paras 8 to 11 (transitional provisions): CAJA 2009**

8. The reference to “aiding, abetting, counselling or procuring suicide” in the following enactments is to be read as including a reference to “an offence under section 2(1) of the Suicide Act 1961 (encouraging or assisting suicide) in connection with the death of a person”-

- (a) section 70(4) of the Army Act 1955 (3 & 4 Eliz. 2 c.18);
- (b) section 70(4) of the Air Force Act 1955 (3 & 4 Eliz. 2 c.19);
- (c) section 48(2) of the Naval Discipline Act 1957 (c. 53).

9. Until such time as the following provisions of the Coroners Act 1988 (c. 13) are repealed by this Act, they have effect with the following amendments-

- (a) in section 16(1)(a)(iii) for “consisting of aiding, abetting, counselling or procuring the suicide of the deceased” substitute “(encouraging or assisting suicide) in connection with the death of the deceased”,
- (b) in section 17(1)(c) for “consisting of aiding, abetting, counselling or procuring the suicide of another” substitute “(encouraging or assisting suicide) in connection with a death”, and
- (c) in section 17(2)(c) for “consisting of aiding, abetting, counselling or procuring the suicide of another” substitute “(encouraging or assisting suicide) in connection with a death”.

10.

(1) In this paragraph-

“old offence” means an offence under section 2(1) of the Suicide Act 1961 as that section had effect before the section 59 commencement date, or an attempt to commit such an offence;

“new offence” means an offence under section 2(1) of that Act as that Act is amended by section 59 of this Act.

(2) Sub-paragraph (3) applies where-

(a) a person (“the defendant”) is charged in respect of the same conduct with both an old offence and a new offence,

(b) the only thing preventing the defendant from being found guilty of the new offence is the fact that it has not been proved beyond reasonable doubt that the offence was committed wholly after the section 59 commencement date, and

(c) the only thing preventing the defendant from being found guilty of the old offence is the fact that it has not been proved beyond reasonable doubt that the offence was committed wholly or partly before the section 59 commencement date.

(3) For the purpose of determining the guilt of the defendant it is to be conclusively presumed that the offence was committed wholly or partly before the section 59 commencement date.

(4) For this purpose “the section 59 commencement date” means the day appointed under section 182 for the coming into force of section 59.

11.

(1) In this paragraph-

“old offence” means an offence under section 13(1) of the Criminal Justice Act (Northern Ireland) 1966 (c. 20) as that section had effect before the section 60 commencement date, or an attempt to commit such an offence;

“new offence” means an offence under section 13(1) of that Act as that Act is amended by section 60 of this Act.

(2) Sub-paragraph (3) applies where-

(a) a person (“the defendant”) is charged in respect of the same conduct with both an old offence and a new offence,

(b) the only thing preventing the defendant from being found guilty of the new offence is the fact that it has not been proved beyond reasonable doubt that the offence was committed wholly after the section 60 commencement date, and

(c) the only thing preventing the defendant from being found guilty of the old offence is the fact that it has not been proved beyond reasonable doubt that the offence was committed wholly or partly before the section 60 commencement date.

(3) For the purpose of determining the guilt of the defendant it is to be conclusively presumed that the offence was committed wholly or partly before the section 60 commencement date.

(4) For this purpose “the section 60 commencement date” means the day appointed under section 182 for the coming into force of section 60.

**APPENDIX C: Commencement Dates: not for court use**

Section	Schedule	Subject-matter	Commencement Date	Statutory Provision
1-34		[not yet in force]		
35		Chief Coroner and Deputy Chief Coroners	1.2.10	2010/145
47		“Interested person”	Royal Assent	s.182
48		Interpretation: general	Royal Assent	s.182
52		persons suffering from diminished responsibility (England and Wales)	4.10.10	2010/816
54		partial defence to murder: loss of control (England and Wales)	4.10.10	2010/816
55		partial defence to murder: loss of control (England and Wales)	4.10.10	2010/816
56(1)		abolition of common law defence of provocation (England and Wales)	4.10.10	2010/816
56(2)(a)		repeal relating to abolition of common law defence of provocation	4.10.10	2010/816
57		infanticide (England and Wales)	4.10.10	2010/816
59		Encouraging or assisting suicide (England and Wales).	1.2.10	2010/145
60		Encouraging or assisting suicide (Northern Ireland).	1.2.10	2010/145
61		Encouraging or assisting suicide: information society services.	1.2.10	2010/145
62		prohibited images of children	6.4.10	2010/816
63		prohibited images of children	6.4.10	2010/816
64		prohibited images of children	6.4.10	2010/816
65		prohibited images of children	6.4.10	2010/816
66		prohibited images of children	6.4.10	2010/816
67		prohibited images of children	6.4.10	2010/816
68		prohibited images of children	6.4.10	2010/816
69		indecent pseudo-photographs of children: marriage etc	6.4.10	2010/816
70		genocide, crimes against humanity and war crimes	6.4.10	2010/816
71		slavery, servitude and forced or compulsory labour	6.4.10	2010/816
72		Conspiracy.	1.2.10	2010/145
73		Abolition of common law libel offences etc	2 months after RA	s.182
74		anonymity in investigations	6.4.10	2010/816
75		anonymity in investigations	6.4.10	2010/816
76		anonymity in investigations	6.4.10	2010/816
77		anonymity in investigations	6.4.10	2010/816
78		anonymity in investigations	6.4.10	2010/816
79		anonymity in investigations	6.4.10	2010/816
80		anonymity in investigations	6.4.10	2010/816
81		anonymity in investigations	6.4.10	2010/816
82		anonymity in investigations	6.4.10	2010/816
83		anonymity in investigations	6.4.10	2010/816

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Section	Schedule	Subject-matter	Commencement Date	Statutory Provision
84		anonymity in investigations: application to armed forces	6.4.10	2010/816
85		anonymity in investigations	6.4.10	2010/816
86		Witness anonymity orders	1.1.10	s.182(3)
87		Applications	1.1.10	s.182(3)
88		Conditions for making order	1.1.10	s.182(3)
89		Relevant considerations	1.1.10	s.182(3)
90		Warning to jury	1.1.10	s.182(3)
91		Discharge or variation of order	1.1.10	s.182(3)
92		Discharge or variation after proceedings	1.1.10	s.182(3)
93		Discharge or variation by appeal court	1.1.10	s.182(3)
94		Special provisions for service courts	1.1.10	s.182(3)
95		Public interest immunity	1.1.10	s.182(3)
96		Power to make orders under the 2008 Act	1.1.10	s.182(3)
97		Interpretation of this Chapter	1.1.10	s.182(3)
106		(partially) Directions to attend through live link	14.12.2009	2009/3253
107		(partially) Answering to live link bail	14.12.2009	2009/3253
108		(partially) Searches of persons answering to live link bail	14.12.2009	2009/3253
109		Use of live link in certain enforcement hearings	14.12.2009	2009/3253
110		Direction of registrar for appeal hearing by live link	14.12.2009	2009/3253
112		Admissibility of evidence of previous complaints.	1.2.10	2010/145
113		powers in respect of offenders who assist investigations and prosecutions	6.4.10	2010/816
114		Bail: risk of committing an offence causing injury.	1.2.10	2010/145
115		Bail decisions in murder cases to be made by Crown Court judge.	1.2.10	2010/145
116		Indictment of offenders	Royal Assent	s.182
118(2)		Provision about the Sentencing Council for England and Wales), so far as it relates to the provisions specified in paragraph 23.	1.2.10	2010/145
118		Sentencing Council for England and Wales), so far as it is not already in force	6.4.10	2010/816
119		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
120		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
121		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
123		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
124		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
125		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816

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Section	Schedule	Subject-matter	Commencement Date	Statutory Provision
126		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
127		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
128		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
129		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
130		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
131		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
132		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
133		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
134		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
135		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
136		provisions regarding Sentencing Council for England and Wales	6.4.10	2010/816
137				
138		Dangerous offenders: terrorism offences (England and Wales)	2 months after RA	s.182
139		Dangerous offenders: terrorism offences (Northern Ireland)	12.1.2010	2010/28
140		Appeals against certain confiscation orders (England and Wales)	1.2.10	2010/145
141		Appeals against certain confiscation orders (Northern Ireland)	1.2.10	2010/145
142		Commissioner for Victims	Before 1.2.10	2010/145
143		Implementation of E-Commerce and Services directives: penalties	Royal Assent	s.182
146		retention of knives surrendered or seized (England and Wales)	6.4.10	2010/816
147		retention of knives surrendered or seized (Northern Ireland)	6.4.10	2010/816
148				
149		Community Legal Service: pilot schemes	1.2.10	2010/145
150		Excluded services: help in connection with business matters	1.2.10	2010/145
151		Criminal Defence Service: information requests	Royal Assent	s.182
152		Criminal Defence Service: enforcement of order to pay cost of representation	Royal Assent	s.182
153		Statutory instruments relating to the Legal Services Commission	1.2.10	2010/145
154		Damages-based agreements relating to employment matters	Royal Assent	s.182
155		criminal memoirs etc	6.4.10	2010/816
156		criminal memoirs etc	6.4.10	2010/816
157		criminal memoirs etc	6.4.10	2010/816

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Section	Schedule	Subject-matter	Commencement Date	Statutory Provision
158		criminal memoirs etc	6.4.10	2010/816
159		criminal memoirs etc	6.4.10	2010/816
160		criminal memoirs etc	6.4.10	2010/816
161		criminal memoirs etc	6.4.10	2010/816
162		criminal memoirs etc	6.4.10	2010/816
163		criminal memoirs etc	6.4.10	2010/816
164		criminal memoirs etc	6.4.10	2010/816
165		criminal memoirs etc	6.4.10	2010/816
166		criminal memoirs etc	6.4.10	2010/816
167		criminal memoirs etc	6.4.10	2010/816
168		criminal memoirs etc	6.4.10	2010/816
169		criminal memoirs etc	6.4.10	2010/816
170		criminal memoirs etc	6.4.10	2010/816
171		criminal memoirs etc	6.4.10	2010/816
172		criminal memoirs etc	6.4.10	2010/816
173		(Assessment notices), so far as it inserts s.41C (code of practice about assessment notices) of the Data Protection Act 1998	1.2.10	2010/145
173		Assessment notices, so far as it is not already in force	6.4.10	2010/816
174		Data-sharing code of practice	1.2.10	2010/145
175		Further amendments of the Data Protection Act 1998, so far as it relates to the provisions specified in <b>Schedule 20</b> (amendments of the Data Protection Act 1998), paragraphs 1 to 3 (data controllers' registration).	1.2.10	2010/145
175		In Schedule 20 (amendments of the Data Protection Act 1998), paragraphs 5 to 14 (amendments other than those relating to data controllers' registration).	6.4.10	2010/816
176		Orders, regulations and rules	Royal Assent	s.182
177		(partially) Consequential etc amendments and transitional and saving provisions	12.01.2010	2010/28
177(1)		Re Part 4 of schedule 21	Royal Assent	s.182

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Section	Schedule	Subject-matter	Commencement Date	Statutory Provision
177(1), (2)		Consequential etc amendments and transitional etc provisions) - <b>subsection (1)</b> (minor and consequential amendments), so far as it relates to the provisions specified in <b>Schedule 21</b> (minor and consequential amendments) - paragraphs 53 to 61 (suicide); and paragraphs 74 to 78 (bail); and <b>subsection (2)</b> (transitional, transitory and saving provisions), so far as it relates to the provisions specified in <b>Schedule 22</b> (transitional, transitory and saving provisions) - paragraph 7 (Chapter 1 of Part 2 transitional provision); paragraphs 8 to 11 (suicide); paragraph 25 (evidence of previous complaint); paragraph 28 (provision in respect of the Sentencing Council for England and Wales); and paragraph 39 (confiscation orders).	1.2.10	2010/145
177(1)		in Schedule 21 (minor and consequential amendments), paragraph 52;	4.10.10	2010/816
177(1)		In Schedule 21 (minor and consequential amendments): (a) paragraph 62 (so far as it is not already in force) and paragraphs 63 and 64 (prohibited images of children); and (b) paragraphs 79 to 89 (Sentencing Council for England and Wales).	6.4.10	2010/816
177(2)		In Schedule 22 (transitional, transitory and saving provisions): (a) paragraph 12 (prohibited images of children); (b) paragraph 13 (slavery, servitude and forced or compulsory labour); (c) paragraphs 14 and 15 (anonymity in investigations); (d) paragraph 27 (provision in respect of the Sentencing Council for England and Wales); (e) paragraph 44 (knives in court buildings etc); (f) paragraph 45 (criminal memoirs etc); and (g) paragraph 46 (assessment notices).	6.4.10	2010/816
177(2)		See paragraph 37 of Schedule 22; and <b>Part 1</b> and paragraphs 26 and 47 of Schedule 22.	Royal Assent	s.182
177(3)-(10)		Consequential etc amendments and transitional and saving provisions	Royal Assent	s.182
178		Schedule 23 ( <b>Parts 3, 4, 5, 6 and 9</b> ).	Royal Assent	s.182(1)
178		<b>Part 2</b> to schedule 23.	2 months after RA	s.182(2)

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Section	Schedule	Subject-matter	Commencement Date	Statutory Provision
178		<b>Part 3</b> of Schedule 23, the repeals relating to the Criminal Evidence (Witness Anonymity) Act 2008	1.1.10	s.182(3)
178		Repeals (so far as it relates to the repeals specified in sub-paragraph (c))	Before 1.2.10	2010/145
178		(repeals), so far as it relates to the provisions specified in <b>schedule 23</b> (repeals) - in <b>Part 2</b> (criminal offences), the repeals relating to the Suicide Act 1961, and to the Criminal Justice Act (Northern Ireland) 1966; and <b>Part 6</b> (legal aid), so far as it is not already in force.	1.2.10	2010/145
178		So far as it relates to Part 3 of Schedule 23 (criminal evidence and procedure), the repeals relating to PACE 1984, and s. 57C of the Crime and Disorder Act 1998.	6.4.10	2010/816
179		Financial provision	Royal Assent	s.182
180		Effect of amendments to provisions applied for purposes of service law.	1.2.10	2010/145
181		Extent	Royal Assent	s.182
182		Commencement	Royal Assent	s.182
183		Short title	Royal Assent	s.182
	8	Chief Coroner and Deputy Chief Coroners	1.2.10	2010/145
	12	Encouraging or assisting suicide: providers of information society services	1.2.10	2010/145
	13	prohibited images: providers of information society services	6.4.10	2010/816
	15	The Sentencing Council for England and Wales, so far as it is not already in force.	6.4.10	2010/816
	15	The Sentencing Council for England and Wales - paragraphs 1 to 4, 6 and 9; and paragraphs 5, 7 and 10, for the purposes of making appointments	1.2.10	2010/145
	18	Motor vehicle orders	Royal Assent	s.182
	19	exploitation proceeds investigations	6.4.10	2010/816
	20	Amendments of the Data Protection Act 1998, paragraphs 5 to 14 (amendments other than those relating to data controllers' registration).	6.4.10	2010/816
	20	Amendments of the Data Protection Act 1998, paragraphs 1 to 3 (data controllers' registration)	1.2.10	2010/145
	21	(Minor and consequential amendments) - paragraphs 53 to 61 (suicide); and paragraphs 74 to 78 (bail)	1.2.10	2010/145
	21	<b>Part 4</b> of Schedule 21	2 months after RA	s.182
	21	(in part)	Royal Assent	s.182
	21	Paragraphs 69 to 71 of Schedule 21 (and s.177(1) so far as relating to Chp 2 to Part 3)	1.1.10	s.182(3)

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Section	Schedule	Subject-matter	Commencement Date	Statutory Provision
	21	in Schedule 21 (minor and consequential amendments), paragraph 52;	4.10.10	2010/816
	21	Minor and consequential amendments: (a) paragraph 62 (so far as it is not already in force) and paragraphs 63 and 64 (prohibited images of children); and (b) paragraphs 79 to 89 (Sentencing Council for England and Wales).	6.4.10	2010/816
	22	(Transitional, transitory and saving provisions) - (a) paragraph 7 (Chapter 1 of <b>Part 2</b> transitional provision); paragraphs 8 to 11 (suicide); paragraph 25 (evidence of previous complaint); paragraph 28 (provision in respect of the Sentencing Council for England and Wales); and paragraph 39 (confiscation orders)	1.2.10	2010/145
	22	(partially)	12.1.2010	2010/28
	22	<b>Part 1</b> and paragraphs 26 and 47	Royal Assent	s.182
	22	Paragraph 37 of Schedule 22	2 months after RA	s.182
	22	Paragraphs 16 to 22 of Schedule 22 (and section 177(2)) so far as relating to chp.2 to Part 3)	1.1.10	s.182(3)
	22	Transitional, transitory and saving provisions: (a) paragraph 12 (prohibited images of children); (b) paragraph 13 (slavery, servitude and forced or compulsory labour); (c) paragraphs 14 and 15 (anonymity in investigations); (d) paragraph 27 (provision in respect of the Sentencing Council for England and Wales); (e) paragraph 44 (knives in court buildings etc); (f) paragraph 45 (criminal memoirs etc); and (g) paragraph 46 (assessment notices).	6.4.10	2010/816
	23	Repeals: (a) in <b>Part 3</b> (criminal evidence and procedure), the repeals relating to: (i) sections 57D and 57E of the Crime and Disorder Act 1998; and (ii) section 120(7)(d) of the Criminal Justice Act 2003.	6.4.10	2010/816

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Section	Schedule	Subject-matter	Commencement Date	Statutory Provision
	23	<b>Part 3</b> , the repeals relating to the Administration of Justice (Miscellaneous Provisions) Act 1933, and the Supreme Court Act 1981; <b>Part 4</b> , the repeals in the Criminal Justice and Immigration Act 2008. <b>Part 5</b> , the repeal of s.8(6) of the Animal Welfare Act 2006. <b>Part 6</b> , the repeals in ss.17 and 17A of, and Schedule 3 to, the Access to Justice Act 1999, and <b>Part 9</b> , and section 178 so far as relating to those repeals.	Royal Assent	s.182
	23	<b>Part 4</b> (sentencing), the repeals relating to— (i) the Parliamentary Commissioner Act 1967; (ii) the Race Relations Act 1976; (iii) the Freedom of Information Act 2000; (iv) the Criminal Justice Act 2003; and (v) the Constitutional Reform Act 2005.	6.4.10	2010/816
	23	<b>Part 5</b> of Schedule 23 (miscellaneous criminal justice provisions), regarding: (i) the Superannuation Act 1972, (ii) the House of Commons Disqualification Act 1975, (iii) the Northern Ireland Assembly Disqualification Act 1975, and (iv) the Domestic Violence, Crime and Victims Act 2004.	Before 1.2.10	2010/145
	23	<b>Part 2</b> (criminal offences), the repeals relating to the Suicide Act 1961 and to the Criminal Justice Act (Northern Ireland) 1966. <b>Part 6</b> (legal aid), so far as it is not already in force.	1.2.10	2010/145
	23	<b>Part 2</b> of Schedule 23; The repeals relating to the following Acts, (i) Libel Act 1792, (ii) Criminal Libel Act 1819, (iii) Libel Act 1843, (iv) Newspaper Libel and Registration Act 1881, (v) Law of Libel Amendment Act 1888, (vi) Defamation Act 1952, (vii) Theatres Act 1968, (viii) Broadcasting Act 1990, (ix) Criminal Procedure and Investigations Act 1996, (x) Defamation Act 1996, and (xi) Legal Deposit Libraries Act 2003.	2 months after RA	s.182
	23	<b>Part 2</b> the repeals relating to (i) the Homicide Act 1957; and (ii) the Criminal Justice Act 2003.	4.10.10	2010/816
	23	In <b>Part 3</b> of Schedule 23, the repeals relating to the Criminal Evidence (Witness Anonymity) Act 2008.	1.1.10	s.182(3)
	23	In <b>Part 7</b> , criminal memoirs	6.4.10	2010/816

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<b>Section</b>	<b>Schedule</b>	<b>Subject-matter</b>	<b>Commencement Date</b>	<b>Statutory Provision</b>
	23	in <b>Part 8</b> (Data Protection Act 1998), the repeals relating to section 16(1) of and Schedule 9 to the Data Protection Act 1998.	6.4.10	2010/816

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