

EXECUTIVE NOTE

THE CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010 (COMMENCEMENT NO. 10 AND SAVING PROVISIONS) ORDER 2012

SSI 2012/160 (C.15)

1. The above instrument will be made in exercise of the powers conferred by virtue of sections 201(1), (2) and 206(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”).

Policy Objectives

2. The purpose of this instrument is to commence provisions contained in the 2010 Act which implement the Scottish Law Commission’s Report on Insanity and Diminished Responsibility, published in 2004 (*a link to which is attached at the end of this note*). The provisions directly reflect the policy of the draft Bill contained in the Commission’s Report, with only any changes having been made to reflect the incorporation of the provisions within the larger 2010 Act, to deal with changes to the law since the Commission’s 2004 Report, and to correct some minor errors and omissions. The explanatory notes for the mental disorder and unfitness for trial provisions under the 2010 Act may be accessed at: <http://www.legislation.gov.uk/asp/2010/13/notes/division/2/7>

Section 168 – Criminal responsibility of persons with mental disorder

3. Section 168 provides for a special defence in respect of persons who lack criminal responsibility by reason of their mental disorder at the time of the committal of the offence with which they are charged. There are two elements, (both of which must be met), for it to be available:
 - The presence of a mental disorder at the time the conduct was undertaken which constitutes the offence, and
 - The disorder had a specific effect on the accused in so much that the person was unable to appreciate the nature or wrongfulness of the conduct.
4. The special defence will not apply to a person who had a mental disorder which consisted of a psychopathic disorder alone. However, it will be available for all other mental disorders and if the psychopathic disorder co-existed with another mental disorder, including other (non-psychopathic) personality disorders. The special defence can only be raised by the person charged with the offence and not the Crown or the court of its own accord.
5. Section 168 also introduces a statutory version of the plea of diminished responsibility. There are two significant changes to the common law on the plea of diminished responsibility as follows:

- While the common law plea was only available when the accused's state of mind fell short of the insanity special defence, there is no corresponding restriction on the statutory plea. An accused charged with murder whose condition at the time of the offence satisfies the test for the mental disorder special defence will therefore have the option of advancing either the special defence or the statutory plea.
 - The statutory plea no longer excludes the possibility of reliance on a psychopathic disorder to establish the required abnormality of mind.
6. This section also clarifies the effect which the state of intoxication has on the availability of diminished responsibility. It also deals with the burden of proof in relation to a plea of diminished responsibility and is in substance the same as the common law rule, (i.e. the accused has to prove diminished responsibility on the balance of probabilities).

Section 169 – Acquittal involving mental disorder

7. Section 169 provides that where the defence of insanity is raised in a solemn case, a jury will now not be empanelled and directed to return a verdict even when the Crown accepts the plea of insanity. Therefore, the court will have to declare that the accused has been acquitted by reason of the special defence. This provision assimilates the procedure for solemn and summary cases. The remaining subsections provide for the situation where the Crown has not accepted a plea.

Section 170 – Unfitness for trial

8. Section 170 replaces the existing common law rule on insanity as a plea in bar of trial, with a new statutory plea of unfitness based on the mental or physical condition of the accused. It also repeals the part of section 54(1) of the Criminal Procedure (Scotland) Act 1995, ("the 1995 Act") that contains a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in mental health. The effect of this is that this requirement will not apply to a finding by a court that a person is unfit for trial. The requirement for evidence from such medical practitioners is however retained if the court makes a temporary compulsion order.
9. Section 170 also amends section 54 of the 1995 Act to reflect the new names for the new defence and plea in bar of trial and makes various consequential repeals. The effect of the repeals is to make clear the provisions for recording an acquittal based on the defence apply to proceedings in the justice of the peace courts and that the procedure in summary cases for the giving of notice of a plea of unfitness for trial is governed by the general rules for intimation of pleas in bar.

Section 171 – Abolition of common law rules

10. Section 171 abolishes all common law rules regarding the special defence of insanity, the plea of diminished responsibility and the plea of insanity in bar of trial.

Schedule 7 – Modifications of Enactments

11. Various paragraphs of Schedule 7 of the 2010 Act are also being commenced which make a number of consequential amendments to other legislation necessary as a result of the effect of sections 168 to 171 of the 2010 Act.

Manner of commencement

12. The provisions will apply in all criminal proceedings commenced on or after 25 June.
13. There is one exception to this general approach where there is a question of diminished responsibility and where the conduct in question occurred before 25 June. In such cases the common law plea of diminished responsibility will continue to have effect.
14. The reason for this exception is that the statutory plea can only be invoked in relation to a charge of murder. However, in the case *HMA v Kerr* in February 2011 the High Court appears to have accepted that the common law plea of diminished responsibility could also be invoked in relation to a charge of attempted murder. In the circumstances, we are commencing in such a manner as to ensure there is no unfairness to an accused by potentially restricting the law for conduct undertaken prior to commencement of the provisions.

<http://www.bailii.org/scot/other/SLC/Report/2004/195.html>

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