

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Schedule 7 – Modification of enactments

Paragraphs 1, 2, 6, 19, 64, 72 – The Libel Act 1792 (para 1), The Criminal Libel Act 1819 (para 2), The Defamation Act 1952 (para 6), The Trade Union and Labour Relations (Consolidation) Act 1992 (para 19), The Defamation Act 1996 (para 64) and The Legal Deposit Libraries Act 2003 (para 72)

874. See section 51 above.

Paragraph 3 – The False Oaths (Scotland) Act 1933

875. Sections 44 to 46 of the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”) re-enact most of the False Oaths (Scotland) Act 1933 (“the 1933 Act”). Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 which lists the repeals undertaken in the consolidation exercise does not include a reference to the 1933 Act. This is an error and should have been included at the time of the consolidation exercise was carried out. This paragraph repeals the 1933 Act in full. Consequential amendments are required where reference is made to the 1933 Act, or a provision of that Act, in other pieces of legislation, substituting a reference to the new provisions in the 1995 Act. Paragraphs 11, 69 and 77 of Schedule 7 make the necessary consequential amendments.

Paragraph 4 – The Public Records (Scotland) Act 1937

876. Paragraph 4 amends section 14 of the Public Records (Scotland) Act 1937. Paragraph 4(a) puts beyond any doubt that references to “court records” in that Act include the Scottish Land Court as well as all the ordinary courts. Paragraph 4(b) provides that any question as to whether or not a document is part of the records of a particular court is to be determined by either the Lord President or the Lord Justice General.

Paragraph 5 – The Law Officers Act 1944

877. Paragraph 5 updates a cross-reference in section 2 of the Law Officers Act 1944. Following the passage of the Criminal Procedure (Scotland) Act 1995 the correct provision dealing with demission of office by the Law Officers is section 287 of the 1995 Act rather than the provisions currently mentioned in the 1944 Act which previously did so.

Paragraphs 7 to 10 – The Rehabilitation of Offenders Act 1974

878. Paragraph 8 amends section 1(4)(b) of the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) to change the reference of “insanity” in that Act to refer to the new defence

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created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act.

879. **Paragraph 9** substitutes “Schedule 1” for “the Schedule” in section 6(6)(bb) of the 1974 Act. This change is necessary because section 109 of this Act inserts a Schedule 3 into the 1974 Act. In addition, the Criminal Justice and Immigration Act 2008 which made similar amendments to the 1974 Act for cautions in England and Wales inserted a Schedule 2 into the 1974 Act.
880. **Paragraph 10** renumbers the Schedule after section 11 of the 1974 Act to “Schedule 1” to reflect the introduction of further Schedules to that Act, as referred to in the previous sub-paragraph.

Paragraph 11 – The Evidence (Proceedings in Other Jurisdictions) Act 1975

881. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 3.

Paragraphs 12–14 - The 1982 Act

882. Section 52(7) of the Civic Government (Scotland) Act 1982 (“the 1982 Act”) provided that offences of taking, permitting to be taken, or making of any indecent photograph or pseudo-photograph (section 52(1)(a) of the 1982 Act) were to be included in the list of offences contained in Schedule 1 to the Criminal Procedure (Scotland) Act 1975 (“the 1975 Act”). Schedule 1 to the 1975 Act listed offences against children under the age of 17 years, to which special provisions applied. Section 52(7) of the 1982 Act also provided that section 52(1)(a) offences were included in Schedule 1 to the 1975 Act for the purposes of Part III of the Social Work (Scotland) Act 1968, which has since been repealed.
883. Schedule 1 to the 1975 Act has since become Schedule 1 to the Criminal Procedure (Scotland) Act 1995, and was later amended by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 to insert the offences under sections 52 and 52A of the 1982 Act in relation to an indecent photograph of a child under the age of 17 years. As section 52(7) has been overtaken by subsequent legislation, this subsection is repealed.
884. **Paragraph 13** repeals a minor amendment made to section 52(7) of the Civic Government (Scotland) Act 1982 by the Criminal Justice Act 1988, consequential on the repeal of section 52 (7) by paragraph 6 of this schedule.
885. **Paragraph 14** corrects a minor error in section 64 of the 1982 Act, which provides for appeals against orders in relation to public processions.

Paragraph 16 – The Legal Aid (Scotland) Act 1986

886. **Paragraph 16** amends section 22 of the Legal Aid (Scotland) Act 1986 which deals with the availability of criminal legal aid so as to substitute reference to the new defence and plea of unfit for trial (as provided for in sections 168 to 171 of this Act) in place of the references to cases involving “insanity”.

Paragraph 17 – The Criminal Justice (Scotland) Act 1987

Paragraph 18 – The Criminal Justice Act 1988

Paragraph 20 – The Criminal Justice and Public Order Act 1994

887. Sections 27 to 30 of the Criminal Law (Consolidation)(Scotland) Act 1995 provide for special investigating powers to be exercised by a nominee of the Lord Advocate in the event of a direction being given when a suspected offence may involve serious or complex fraud. They re-enact sections 51 to 54 of the Criminal Justice (Scotland)

Act 1987 (“the 1987 Act”). Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 lists the provisions which were repealed as part of the consolidation exercise. However, the schedule does not include sections 51 to 54 of the 1987 Act. This is an error and should have been included at the time of the consolidation exercise. Paragraph 17 repeals sections 51 to 54 of the 1987 Act, and paragraphs 18 and 20 repeal amendments made to those sections by the Criminal Justice Act 1988 and the Criminal Justice and Public Order Act 1994.

Paragraphs 21, 22 and 23 – The Criminal Law (Consolidation) (Scotland) Act 1995

888. Section 16 of the Criminal Law (Consolidation) (Scotland) Act 1995 allows any parent, relative, guardian or person acting in the best interests of a woman or girl to ask for a warrant authorising a named constable to enter a specified place and search for that woman or girl where they believe she is unlawfully being held for immoral purposes. If the woman or girl is found she will be delivered to her parents or guardians.
889. There is also a right afforded to the person requesting the warrant to accompany the constable when the warrant is executed. This is an outmoded provision and in practical terms the police already have the common law power to request warrants for circumstances such as this. Paragraph 22 repeals section 16. The power has not been used for many years, and is repealed as it is considered to be redundant.
890. Part II of the Criminal Law (Consolidation) (Scotland) Act 1995 makes provision for sporting events and specifically makes provision regarding the control of alcohol, fireworks and flares at sporting grounds and sporting events. Paragraph 23 substitutes “it” for “in” section 23 (interpretation of part 2) to correct a typographical error. The relevant provision was originally section 77 of the Criminal Justice (Scotland) Act 1980 where the text was correct.

Paragraph 24 – The Criminal Procedure(Consequential Provisions) (Scotland) Act 1995

891. Paragraph 24 repeals a provision in the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 that is made redundant by the provisions on extreme pornography in section 42 of this Act.

Paragraphs 25-62 – The 1995 Act

892. Paragraph 26 inserts new section 5A into the 1995 Act providing that it is competent for a sheriff to sign certain documents at any place in Scotland. As this is currently provided for under section 9A of the 1995 Act, this amendment has no effect on existing practice. However, new section 5A will become necessary upon the full repeal of section 9A (by paragraph 9(7) of the Schedule to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007). Separate provision as to the signing of documents by justices of the peace and stipendiary magistrates is made in section 62 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.
893. Paragraph 27 amends section 10A of the 1995 Act and is consequential upon section 61 of the Act. It confers jurisdiction upon both the JP court and the procurator fiscal of the relevant court where proceedings have been initiated in or transferred to another JP court.
894. Paragraph 28 amends subsections (3) and (4) of section 11 of the 1995 Act to provide that where applicable the offences referred to within the 1995 provisions may be triable by either solemn or summary procedure. Section 11 gives jurisdiction to the Scottish courts to try certain specified offences which are committed outside Scotland by certain specified individuals. Subsection (3) makes provision concerning the jurisdiction of the sheriff court in the taking of proceedings in relation to these offences. Subsection (4) makes provision concerning the taking of proceedings in Scotland in relation to certain

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specified criminal behaviour taking place in Scotland concerning property which has been stolen outwith Scotland but within the United Kingdom.

895. Paragraphs 29, 36, 44, 45, 54, 55 and 56 substitute references to specific types of hearings (such as trials and victim statement proofs) with “any relevant hearing” in sections 17A, 35, 66, 71, 140, 144 and 146 of the 1995 Act. These are consequential upon section 69, which extends the prohibitions on an accused conducting his own defence contained in sections 288C, 288E and 288F of the 1995 Act to any relevant hearings.
896. Paragraph 30 amends section 18(8)(c) of the 1995 Act. The amendment to section 18(8)(c) removes the reference to “impressions” and replaces the reference to “prints” with “relevant physical data”. Since the meaning of “prints” is limited to fingerprints, its replacement with “relevant physical data” ensures there is no doubt that palm prints and other kinds of relevant physical data, as defined in section 18(7A) of the 1995 Act, are included for the purpose of section 18(8)(c). The power to take samples, information derived from samples and relevant physical data under authority of a warrant remains.
897. Paragraph 31 removes the obsolete reference to “impressions” in section 19(1)(b) of the 1995 Act.
898. Paragraphs 32, 37, 38, 39, 40, 42, 43, 51 and 57-58 all concern the change in references to “insanity” and “insanity as a plea in bar” in the 1995 Act. References in the 1995 Act to “insanity” as a defence are changed to refer to the defence created by the new section 51A of the 1995 Act, as inserted by section 168 of this Act. References to “insanity as a plea in bar” are changed to refer to unfitness for trial.
899. Paragraph 33 repeals section 20 of the 1995 Act in consequence of new section 19C (inserted by section 82).
900. Paragraph 34 repeals parts of section 22 of the 1995 Act, in consequence of the amendments made by section 55 of this Act.
901. Paragraph 35 amends section 23A of the 1995 Act, which provides that bail can be granted notwithstanding that an accused is in custody for another offence. The amendment inserts a reference to bail granted pending a Crown appeal under new section 107A (2)(b), which is being inserted into the 1995 Act by section 74 of this Act.
902. Paragraph 41 amends section 61 of the 1995 Act. Section 61 of the 1995 Act 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 these amendments is that this requirement does not apply to a finding by a court that a person is unfit for trial.
903. Paragraph 46 amends section 78(2) of the 1995 Act so as to provide that diminished responsibility is treated as if it were a special defence for the purpose of giving advance notice (see 1995 Act, section 78(1)). The plea is not treated as if it were a special defence for any other purpose (eg disclosure to the jury under section 89(1)).
904. Paragraph 49 removes a superfluous word from section 90D of the 1995 Act.
905. Paragraph 50 substitutes a new subsection (4) into section 102A of the 1995 Act. The effect of this is to remove from that subsection a reference to section 27(1)(a) of the 1995 Act which has no application in the context of the section 102A provision.
906. Paragraph 52 is consequential upon section 61 of this Act. The effect is to ensure time limits for transferred and related cases apply also to relevant cases in JP courts.
907. Paragraph 53 makes an amendment to section 137B of the 1995 Act. Where a sheriff has made an order allowing the transfer of, or initiation of proceedings in, another sheriff court paragraph 53 provides that any other sheriff of the same sheriffdom may revoke or vary that order.

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908. Paragraph 60 amends section 254 to make clear that the term “article” includes animal. A consequential rearrangement of section 254 is made.
909. Paragraph 61 inserts new subsection (4AA) into section 258. This clarifies that where an objection to a notice of uncontroversial evidence has been lodged in summary proceedings, this may be challenged at any time prior to an intermediate diet.
910. Paragraph 62 amends section 307 of the 1995 Act (which defines certain terms for the purposes of the 1995 Act) so as to provide that the meaning of "unfit for trial" is given in the new section 53F (as provided for by section 170 of this Act).

Paragraph 63 – The Offensive Weapons Act 1996

911. Paragraph 63 is consequential on the amendment of section 47(4) of the Criminal Law (Consolidation) (Scotland) Act 1995 made by section 37 of this Act.

Paragraphs 65 to 68 – The Crime and Punishment (Scotland) Act 1997

912. Paragraph 66 amends section 9 the Crime and Punishment (Scotland) Act 1997. Section 9 of the 1997 Act refers to "section 57(2)(a) of the 1995 Act (disposal where accused insane)." The effect is to substitute references to “insane” with a reference to the new statutory defence and plea in bar of trial which is contained in section 168 of this Act.
913. Paragraphs 67 and 68 repeal provisions in the Crime and Punishment (Scotland) Act 1997 that are made redundant by the changes to summary court sentencing powers contained in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 and by the provisions on remand and committal of children and young persons (contained in section 64 of this Act).

Paragraph 69 – The Terrorism Act 2000

914. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 3.

Paragraph 70 – The Protection of Children (Scotland) Act 2003

915. Paragraph 70 amends section 10 of the Protection of Children (Scotland) Act 2003 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act, in place of the reference to acquittal on the ground of “insanity”.

Paragraph 71 – The Criminal Justice (Scotland) Act 2003

916. Paragraph 71 amends the Criminal Justice (Scotland) Act 2003 to adjust a reference in section 3 of that Act to section 57 of the 1995 Act to take account of the change of the title of section 57 by paragraph 38 of this Schedule.

Paragraph 73 – The Sexual Offences Act 2003

917. Paragraph 73 amends section 135 of the Sexual Offences Act 2003 so that references in Part 2 of that Act (notification and orders) to a person being found not guilty of an offence by reason of insanity include reference to a person acquitted by reason of the defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act.

Paragraph 74 – The Criminal Procedure (Amendment) (Scotland) Act 2004

918. Paragraph 74 is consequential to sections 59 and 69 of this Act. Subsection (4) of section 4, section 17 and paragraph 55 of the schedule to the Criminal Procedure (Amendment) (Scotland) Act 2004 are repealed.

Paragraph 75 – The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005

919. **Paragraph 75** amends section 8 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, which deals with persons who breach Risk of Sexual Harm Orders. It adds reference to a person acquitted of an offence of breaching an risk of sexual harm order by reason of the defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act alongside references to a person being found not guilty of such an offence by reason of insanity.

Paragraph 76 – The Management of Offenders etc. (Scotland) Act 2005

920. **Paragraph 76** amends section 10 of the Management of Offenders etc. (Scotland) Act 2005 so that references to persons acquitted on the ground of insanity and persons found to be insane in bar of trial are updated to reflect the new equivalents established by sections 168 to 171 of this Act.

Paragraph 77 – Serious Organised Crime and Police Act 2005

921. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 3.

Paragraphs 78-83 - The Criminal Proceedings etc (Reform) (Scotland) Act 2007

922. **Paragraphs 79** and **83** remove unnecessary references from section 7 of, and the Schedule to, the 2007 Act, in consequence of the amendments made by section 55 of this Act.
923. Section 74(6) of the 2007 Act states that a Stipendiary Magistrate may exercise judicial and signing functions in the same manner as a Justice of the Peace (JP). Section 76(2) of that Act states that a member of a local authority may also exercise signing functions in the same manner as a JP.
924. **Paragraphs 80-82** clarify the position by replacing the reference to Stipendiary Magistrates acting “in the same manner” as a JP with a new section 74A which states that a Stipendiary Magistrate may exercise the same judicial and signing functions as a JP as if the magistrate was a JP. It also clarifies that a member of a local authority may exercise the same signing functions as a JP.

Paragraph 84 – The Protection of Vulnerable Groups (Scotland) Act 2007

925. **Paragraph 84** amends section 32 of the Protection of Vulnerable Groups (Scotland) Act 2007 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act, in place of the reference to acquittal on the ground of “insanity”.

Paragraph 85 – The Counter-Terrorism Act 2008

926. **Paragraph 85** amends section 45 of the Counter-Terrorism Act 2008 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this act, in place of the reference to acquittal on the ground of “insanity” and to update a reference to section 55 of the Criminal Procedure (Scotland) Act 1995.

Paragraph 86 – The Sexual Offences (Scotland) Act 2009

927. **Paragraph 86** amends section 55(7) of the Sexual Offences (Scotland) Act 2009 to provide greater certainty in statute to clarify that these offences may be triable by either solemn or summary procedure. Section 55(7) of the 2009 Act gives the sheriff court

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jurisdiction to try certain specified offences committed outwith the United Kingdom by persons to whom section 55 of the 2009 Act applies.

Paragraph 87 – The Coroners and Justice Act 2009

928. **Paragraph 87** amends section 156 of the Coroners and Justice Act so as to substitute references to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act, in place of the references to acquittal on the ground of “insanity”.