

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 7 - Mental Disorder and Unfitness for Trial

Section 168 - Criminal responsibility of persons with mental disorder

704. [Sections 168 to 171](#) and associated minor amendments in Schedule 7 implement the Scottish Law Commission's Report on Insanity and Diminished Responsibility, published in 2004. The provisions directly reflect the draft Bill contained in the Commission's Report, with changes only to reflect the incorporation of the provisions within the larger Criminal Justice and Licensing (Scotland) Act, to deal with changes to the law since the Commission's Report, and to correct some minor errors and omissions.
705. [Section 168](#) introduces a new statutory defence to replace the common law defence of insanity. It does so by inserting a new section 51A into the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). It provides for a special defence in respect of persons who lack criminal responsibility by reason of their mental disorder at the time of the offence with which they are charged.
706. Subsection (1) sets out the test for the new statutory defence. It provides that there are two elements to the test. The first is the presence of a mental disorder suffered by the accused at the time of the conduct constituting the offence. Secondly, the mental disorder must have a specific effect on the accused for the defence to be available. This effect is the inability of the accused to appreciate either the nature or wrongfulness of the conduct constituting the offence. 'Nature' and 'wrongfulness' are alternative concepts and the defence may be established by proving lack of appreciation in respect of only one of them. The concept of appreciation is wider than that of mere knowledge. Failure to appreciate the nature of conduct would not therefore be precluded by knowledge of the physical attributes of the conduct. Similarly the defence may be available to an accused who knew that his conduct was in breach of legal or moral norms but who had reasons for believing that he was nonetheless right to do what he did.
707. Subsection (2) provides that the special defence does not apply to a person who at the time of the conduct constituting the offence had a mental disorder which consisted of a psychopathic personality disorder alone. The exclusion in this subsection applies only to psychopathic personality disorder. Other forms of personality disorder may give rise to the defence provided that the effect on the accused satisfies the test in subsection (1) above. The defence would also be available where psychopathic personality disorder co-existed with another mental disorder (including other personality disorders) provided that the effect of the other mental disorder falls within the test in subsection (1).
708. Under the common law insanity is classified as a special defence. Subsection (3) provides for a similar rule in relation to the new statutory defence based on mental disorder. The main effect of the characterisation of a defence as a special defence is

in relation to various procedural requirements under the 1995 Act (e.g. section 78(1) (giving of notice), section 89 (reading of the defence to the jury)).

709. Subsection (4) deals with who can raise the defence and with the relevant standard of proof. It provides that the special defence can be raised only by the person charged with the offence. It cannot be raised by the Crown or by the court of its own accord. This provision is in contrast to the common law defence, which can be raised by the Crown. The subsection also provides that the standard of proof on an accused person who states the defence is the balance of probabilities. This rule corresponds with that for the common law defence of insanity (*HM Advocate v Mitchell* 1951 JC 53).
710. **Section 168** introduces a statutory version of the plea of diminished responsibility in place of the common law plea. It does so by inserting a new section 51B into the 1995 Act. The test for the statutory plea is modelled on the common law as set out in *Galbraith v HM Advocate* 2002 JC 1, subject to some variations noted below.
711. Subsection (1) provides that a plea of diminished responsibility is applicable in cases of murder but not in respect of any other crime or offence. The effect of the plea, if proved, is that a person who would otherwise be convicted of murder is to be convicted instead of culpable homicide. The main difference between the two outcomes is that the court has a discretion in sentencing a person convicted of culpable homicide which it lacks in a murder case (a person convicted of murder must be given a sentence of life imprisonment as required by section 205(1) of the 1995 Act). The test for the plea is based on that laid down in *Galbraith v HM Advocate*, namely at the time of the killing the accused must have been suffering from an abnormality of mind which substantially impaired his ability to determine or control his conduct. Comments by the Court in the *Galbraith* case on this part of the common law test will be of use in interpreting the statutory test.
712. Subsection (2) makes two significant changes to the law on the plea of diminished responsibility. At common law the plea is not available where the relevant abnormality of mind falls within the scope of the insanity defence. The position is different under this Act where the accused's condition at the time of an unlawful killing falls within the definitions of both the defence based on mental disorder and diminished responsibility. In this situation, the accused has the option of advancing either the defence or the plea. Secondly the subsection allows for diminished responsibility to be based on the condition of psychopathic personality disorder. At common law this condition cannot be used as a basis for the plea (*Carraher v HM Advocate* 1946 JC 108). The subsection makes clear that this exclusion does not apply to the statutory test for diminished responsibility.
713. Subsection (3) clarifies the effect which a state of intoxication has on the availability of diminished responsibility. In the first place, the provision re-states the rule laid down in *Brennan v HM Advocate* 1977 JC 38 that a person who kills whilst in state of intoxication cannot found a plea of diminished responsibility on that condition. Secondly, it states that the presence of intoxication does not preclude diminished responsibility provided that there is a basis for the plea independently of the intoxication.
714. Subsection (4) deals with the burden and standard of proof in relation to a plea of diminished responsibility. The subsection follows the same approach as that for the defence based on mental disorder. Only the accused can raise the plea, and if raised the accused has to prove diminished responsibility on the balance of probabilities. The rule is in substance the same as the common law rule (*HM Advocate v Braithwaite* 1945 JC 55).