

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 7 - Mental Disorder and Unfitness for Trial

Section 170 - Unfitness for trial

718. Subsection (1) inserts a new section 53F into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The new section 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.
719. Subsection (1) of the new section 53F sets out a general test for the new statutory plea of unfitness for trial. The effect of the provision is that a person is unfit for trial if he cannot effectively participate in the proceedings because of his mental or physical condition.
720. This Act does not change the common law rule that the issue of an accused’s fitness for trial may be raised by the accused, the Crown, or by the court. However, this subsection makes clear that the appropriate standard of proof for a finding of unfitness for trial is on the balance of probabilities.
721. Subsection (2) of the new section 53F lists various incapacities which if proved in respect of the accused indicate his unfitness for trial. The list in paragraph (a) is illustrative, and not exhaustive, of the types of incapacities which constitute lack of ability to participate effectively in proceedings. Paragraph (b) provides that other factors may be relevant to making a determination.
722. Subsection (3) of the new section 53F applies to the statutory plea a common rule laid down in *Russell v HM Advocate* 1946 JC 37. It makes clear that a person is not unfit for trial simply because he cannot remember what happened at the time of the offence with which he is charged. However the rule does not apply where the accused is suffering from problems affecting memory of events at the time of the trial itself.
723. Subsection (4) of the new section 53F explains the meaning of “the court” when used in the new section 53F.
724. Subsection (2) of section 170 amends the title of section 54 of the 1995 Act and introduces some amendments to that section.
725. Subsection (2)(a)(i) repeals part of section 54(1) of the 1995 Act. Section 54(1) of the 1995 Act contained 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 subsection 2(a)(i) is that this requirement does not apply to a finding by a court that a person is unfit for trial.

*These notes relate to the Criminal Justice and Licensing (Scotland)
Act 2010 (asp 13) which received Royal Assent on 6 August 2010*

726. Subsections (2)(b) and (c) amend section 54 to reflect the names for the new defence and plea in bar of trial. References to insanity as a plea in bar are changed to refer to unfitness for trial.
727. Subsection (3) of section 170 repeals subsection (6) of section 54 of the 1995 Act. That provision dealt with procedure on insanity as a defence. The repeal follows on from the introduction by section 169 of this Act of the new statutory defence based on the accused's mental disorder. By placing the defence in provisions separate from section 54, the definition of "court" in section 54(8) no longer applies to the procedure relating to the defence. The effect is to make clear that the provisions for recording an acquittal based on the defence apply to proceedings in the district/justice of the peace courts.
728. Subsection (3) of section 170 also repeals subsection (7) of section 54 of the 1995 Act. The effect is 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 (see section 144 of the 1995 Act).