



# Scottish Law Commission

*promoting law reform*

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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION

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## Report on Insanity and Diminished Responsibility

Today the Scottish Law Commission publishes its Report on Insanity and Diminished Responsibility (Scot Law Com No. 195) recommending much needed reforms to modernise the criminal law in relation to mentally disordered offenders in Scotland.

The report recommends that outmoded terminology, including references in the legislation to 'insanity', should be replaced by terms which are acceptable in modern society. The recommended reforms seek to ensure that the criminal law on mentally disordered offenders meets the needs of the 21<sup>st</sup> century.

Describing the recommendations in the report, Professor Gerry Maher, one of the Scottish Law Commissioners, said that reform of the tests for insanity and diminished responsibility was long overdue. It was now unacceptable for mentally disordered offenders to be described as 'insane'. The criminal law in this area needed to be modernised and brought into line with recent mental health legislation introduced by the Scottish Parliament.

## **Background – the Millan Committee's recommendations**

1. In October 2001 the Scottish Law Commission was asked by the Scottish Ministers to consider whether the existing definitions of insanity and diminished responsibility in the criminal law required reform. This reference followed the publication of a report by an expert Committee (the Millan Committee) which made recommendations for reform of the civil law on mental health. The bulk of the Committee's recommendations were made law in the Mental Health (Care and Treatment) (Scotland) Act 2003, a measure described in the Scottish Parliament as revolutionising mental health law in Scotland.

2 The Millan Committee reviewed the civil law, but not the criminal law, relating to mental health. However it received representations that the tests for insanity and diminished responsibility in the criminal law often posed problems for mental health practitioners. These concerns led to the Scottish Executive referring the criminal law relating to mental disorder defences to the Scottish Law Commission. Implementation of the Scottish Law Commission's recommendations would be an important step in completing the reform of mental health law started by the Millan Committee.

## **Meaning of insanity and diminished responsibility in the criminal law**

3. The word 'insanity' is used in two quite different contexts in the criminal law. First, insanity at the time of the alleged offence is a defence to the criminal charge. An accused person invoking this defence claims that because of his or her mental state at the time of the offence he or she should not be subject to criminal punishment. Secondly, insanity can act as a plea in bar of trial. An accused cannot be tried if his or her condition at the time of the trial is such that he or she cannot understand the proceedings.

4. Diminished responsibility arises only in murder cases. Where at the time of the offence the accused was suffering from a condition which constitutes an extenuating circumstance, instead of being convicted of murder the accused is convicted of culpable homicide. The effect is to allow the court a discretion as to sentence, which it has in respect of culpable homicide but not murder. Previously the courts applied a very narrow definition of diminished responsibility, insisting that it must be a condition very near to insanity. However the recent decision of the High Court of Justiciary in *HM Advocate v Galbraith* (2002 JC 1) has widened the range of conditions which can form the basis for diminished responsibility.

## **The Commission's recommendations for reform**

5. The Commission's report recommends a number of reforms of the law of insanity and diminished responsibility, as follows.

### **(1) Insanity as a defence**

- The present law derives from a work written in 1797. The current test uses out-of-date language (the accused has to be suffering from 'a complete alienation of reason'). This terminology cannot be easily understood by persons who have to apply it, such as psychiatric experts or jurors. The test should be re-stated to reflect modern terminology and thinking on mental health.
- The old-fashioned, and stigmatising, term 'insanity' is out of place in a modern legal system. The Commission therefore recommends that the common law defence should be replaced by a statutory defence that the accused lacked criminal responsibility by reason of mental disorder.

- The reformed defence should require the presence of a mental disorder suffered by the accused at the time of the alleged offence. The existence (or non-existence) of a mental disorder in a particular case would normally be a matter for expert, psychiatric evidence.
- The core element of the defence should be that, by reason of a mental disorder at the relevant time, the accused was unable to appreciate the nature or wrongfulness of his or her conduct.
- The condition of psychopathic personality disorder should be excluded from the definition of the new defence.

## **(2) Diminished responsibility**

- The definition of the plea should be set out in statute on substantially the same basis as formulated in the decision of *Galbraith v HM Advocate* (2002 JC 1), namely the accused's ability to determine or control his or her conduct at the time of the killing was substantially impaired by reason of mental abnormality.
- The plea should continue to apply in cases of murder only and, if successful, the effect should be that the accused is convicted of culpable homicide instead of murder.
- Unlike the common law, the statutory test for the plea should include a mental abnormality based on a personality disorder.

## **(3) Insanity as a plea in bar of trial**

- The common law plea should be replaced by a statutory plea called 'unfitness for trial'.
- The test for the plea should be that an accused person is unfit for trial where as a consequence of his or her mental or physical condition at the time of the trial he or she cannot participate effectively in the proceedings against him or her.
- This formulation of the plea reflects the language of the European Convention on Human Rights.

## **(4) Procedural issues in cases involving mental disorder**

- Various recommendations on procedural issues are made in the report. These recommendations are aimed at making criminal cases involving mental disorder easier to deal with.

## **NOTES TO EDITORS**

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is Lord Eassie, a senior Scottish judge. The other Commissioners are Professor Gerry Maher QC, Professor Kenneth G C Reid, Professor Joseph M Thomson and Mr Colin J Tyre QC.

2. A News Conference will be held on 1 July 2004 at 11.00 hours at the Commission's offices at 140 Causewayside, Edinburgh EH9 1PR (Tel 0131 668 2131, Fax: 0131 662 4900, e-mail: [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk)). You are invited to be represented. Media copies of the report will be available at the News Conference or can be collected from the Commission's offices. The report may also be viewed on the Commission's website at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk) or purchased from TSO Scotland Bookshop.

3. Further information can be obtained by contacting Professor Gerry Maher, at the above address.