

SCOTTISH LAW COMMISSION
Discussion Paper No 122



Discussion Paper on Insanity and Diminished Responsibility

January 2003

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EDINBURGH: The Stationery Office
£16.00 net

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¹ Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I. 1999/1820).

Abbreviations

1984 Act

Mental Health (Scotland) Act 1984 (c 36)

1995 Act

Criminal Procedure (Scotland) Act 1995 (c 46)

Burman and Connelly

Michele Burman and Clare Connelly, *Mentally Disordered Offenders and Criminal Proceedings* (The Scottish Office Central Research Unit, 1999)

Butler Report

Report of the Committee on Mentally Abnormal Offenders, chaired by the Rt Hon Lord Butler (Cmnd 6244, 1975)

Gordon

Sir Gerald H Gordon QC, *The Criminal Law of Scotland* (3rd edn ed Michael G A Christie) (Edinburgh, 2000)

Hume

Baron Hume, *Commentaries on the Law of Scotland Respecting Crimes* (4th edn) (Edinburgh, 1844; reprinted, 1986)

Mackay

R D Mackay, *Mental Condition Defences in the Criminal Law* (Oxford, 1995)

MacLean Report

Report of the Committee on Serious Violent and Sexual Offenders, chaired by the Hon Lord MacLean (SE/2000/68)

McAuley

Finbarr McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Dublin, 1993)

Millan Report

New Directions: Report on the Review of the Mental Health (Scotland) Act 1984 by a Committee chaired by the Rt Hon Bruce Millan (SE/2001/56)

Renton & Brown

Renton & Brown's *Criminal Procedure* (6th edn ed Sir Gerald H Gordon QC) (Edinburgh)

Stair Memorial Encyclopaedia

The Laws of Scotland – Stair Memorial Encyclopaedia 25 vols (Edinburgh, 1986-1995)

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Part 1 Introduction

Terms of reference

1.1 In October 2001 we received the following reference¹ from the Scottish Ministers:

- "(1) To consider -
- (a) the tests to establish insanity (either as a defence or as a plea in bar of trial) and the plea of diminished responsibility; and
 - (b) issues of the law of evidence and procedure involved in raising and establishing insanity and diminished responsibility;
- (2) To make recommendations for reform, if so advised; and
- (3) Consequent upon any such recommendations for reform, to consider what changes, if any, should be made to the powers of the courts to deal with persons in respect of whom insanity (either as a defence or a plea in bar of trial) or diminished responsibility has been established."

1.2 The immediate background to our receiving these terms of reference is a report of a committee chaired by the Rt Hon Bruce Millan which conducted a comprehensive review of the Mental Health (Scotland) Act 1984.² During the course of its inquiry the Millan Committee received representations about difficulties encountered in practice arising from the tests in Scots law for insanity, both as a defence and as a plea in bar of trial, and for diminished responsibility.³ The Committee recommended that the Scottish Law Commission should review these topics, and these recommendations led in turn to our involvement in this reference.

1.3 We have undertaken to work on this project as a medium-term one and to submit a report by the end of 2003.

Seminar

1.4 The law on the topics included in the terms of our reference, especially insanity as a defence, has been the source of considerable discussion and controversy. Moreover in many jurisdictions, especially over the last thirty years or so, there have been proposals for reform of the law, as well as changes as a result of statutory or constitutional provision and case law. In order to discover the possible implications of these developments for our own project, in April 2002 we held a seminar, jointly with the Law Faculty of the University of Edinburgh. The purpose of the seminar was to consider the strengths and weaknesses of existing Scots law and what could be learned from the law, and attempts at law reform, in other jurisdictions. The seminar was of great assistance in helping us identify and develop

¹ Under section 3(1)(e) of the Law Commissions Act 1965 (c 22).

² Millan Report. A Bill to give effect to the bulk of the Millan Committee's recommendations was introduced in the Scottish Parliament on 16 September 2002: Mental Health (Scotland) Bill.

³ Millan Report ch 29, esp paras 43-61.

the principles which are at the basis of the proposals in this Discussion Paper. We wish to express our gratitude to the speakers and other participants at the seminar.⁴

Outline of our approach

1.5 As already mentioned, the topics covered by our terms of reference have given rise to an enormous literature, reflecting the interests of (among others) lawyers, psychiatrists, philosophers, sociologists and historians. Accordingly at the outset it is important to set out how we have interpreted our task. The points raised by the Millan Committee, which are reflected in our terms of reference, are concerned chiefly with the definitions of, or the tests for establishing, insanity and diminished responsibility. Two consequences follow. First our remit is not extended to any wide-ranging review of the powers of the courts when dealing with persons in respect of whom any of these conditions has been established. Secondly we are not conducting a review on the general topic of defences in criminal law or on mental conditions and criminal responsibility. Rather our concern is with three discrete areas of criminal law: insanity as a defence, the plea of diminished responsibility, and insanity as a plea in bar of trial.

1.6 **Disposals.** Our terms of reference limit our interest in disposals to consideration of any changes to the powers of the court which may arise as a consequence of our proposals for reform of the tests for establishing insanity and diminished responsibility. At the same time we accept that questions of disposal form part of the general context of the issues which are our concern in this project. Indeed much of the concern with insanity and diminished responsibility has been what happens to persons who use these conditions as a defence or a plea. Take a famous historical example. In 1800 when James Hadfield was found to be insane on a charge of the attempted murder of George III, he received an outright acquittal. Public and political reaction to this case led in turn to the enactment of the Criminal Lunatics Act 1800 which required the courts in England to order anyone who had been acquitted by reason of insanity of various serious offences to be detained until His Majesty's pleasure be known. In modern times virtually every legal system regards a verdict of insanity as something less than a complete acquittal; for despite the acquittal, the accused is still subject to the powers of the court. Indeed, until recently in Scotland (in common with other legal systems in the United Kingdom) a verdict of insanity required the courts to order the detention of the accused for an indefinite period in a mental hospital.⁵ A similar approach was used in respect of persons found insane in bar of trial.

1.7 Before we consider the current arrangements for disposal, we wish to emphasise the significant role which questions of disposal have played in the development of the law of insanity. When insanity acted to provide an acquittal simpliciter, there was an obvious public interest in restricting its scope, for the effect of the defence was to place persons who had already committed criminal, including violent, acts beyond any form of social control. By contrast when the consequence of a verdict of insanity was that the accused had to be committed to a mental hospital, the concern was that the defence might be over-inclusive

⁴ The seminar was held at the University of Edinburgh on 25 and 26 April 2002. The speakers were Professor R A McCall Smith, University of Edinburgh; Professor R D Mackay, De Montfort University; Professor Richard J Bonnie, School of Law and Director, Institute of Law Psychiatry and Public Policy at the University of Virginia; Professor Warren Brookbanks, University of Auckland; and Professor Finbarr McAuley, University College Dublin and Commissioner, Law Reform Commission of Ireland.

⁵ Criminal Procedure (Scotland) Act 1975 (c 21) ss 174; 375 (replaced as of 1 April 1996 by provisions of the 1995 Act).

and cover persons who, though in some way mentally abnormal, did not require such drastic treatment.

1.8 The position on disposals has now been changed.⁶ Where a person is acquitted on the ground of insanity, the court must consider the appropriate means of disposal. Under section 57 of the Criminal Procedure (Scotland) Act 1995, the court has the power to make the following orders:

- (a) a hospital order;
- (b) a hospital order with a restriction order;
- (c) a guardianship order;
- (d) a supervision and treatment order; and
- (e) a discharge with no further order made.

Accordingly the present law gives the court considerable flexibility in dealing with persons who fall within the definition of insanity. Furthermore the 1995 Act provisions require the court to make a disposal appropriate to the circumstances of each individual accused person, reflecting his condition at the time of the disposal.

1.9 A similar situation exists in respect of the plea in bar. Prior to the 1995 Act, the effect of a finding of insanity in bar of trial was that the accused was subject to compulsory committal to a mental hospital. This outcome necessarily arose whether or not the accused's condition (which might be a physical one, such as being a deaf-mute) merited it. Furthermore this disposal could apply even where it had never been shown that the accused committed the act which was the subject of the charge against him. Under the 1995 Act, however, a three-staged approach is now taken in cases of insanity in bar of trial. The first stage is a preliminary hearing to investigate whether the accused's condition meets the criteria of the plea in bar of trial. If it is found that it does, then the court must order a further hearing, known as an examination of facts. The third stage, that of disposal, arises if the examination of facts shows that the accused committed the act he was charged with and that he had no defence to that charge.⁷ The court's powers of disposal at this final stage are the same as those for cases of insanity as a defence.

1.10 There is an exception to these provisions on disposal of insanity cases, namely where the charge is murder. Where an accused is acquitted of a murder charge on grounds of insanity at the time or where he proceeds to the disposal stage for insanity in bar of trial in a murder case, the court must make a hospital order coupled with a restriction order.⁸ However under the Criminal Justice (Scotland) Bill,⁹ the mandatory disposal consequences

⁶ See 1995 Act Part VI, especially s 57. The provisions of s 57 first appeared in the Criminal Justice (Scotland) Act 1995 (c 20), which was consolidated into the 1995 Act. The 'new' law on disposals in insanity cases came into effect on 1 April 1996. The provisions relating to disposals involving insanity under Part VI of the 1995 Act are reproduced at Appendix A.

⁷ The disposal stage also arises where the examination of facts shows that the accused committed the act in question but was within the scope of the insanity defence.

⁸ 1995 Act s 57(3).

⁹ This Bill was introduced in the Scottish Parliament on 26 March 2002. The proposed changes on the disposal of murder cases which involve insanity were introduced by Executive amendments to the Bill. See further Appendix B.

of cases involving murder and insanity are to be replaced by provisions allowing the courts the same range of disposal options as those which exist under the present law in non-murder cases.

1.11 Matters are to some extent different in respect of diminished responsibility. This plea arises only in cases of murder and its effect is that the accused is liable to a conviction for the lesser charge of culpable homicide.¹⁰ But here again the powers of the court are at the core of diminished responsibility, for its rationale is to give courts a sentencing discretion in cases of unlawful killing which they possess if an accused is guilty of culpable homicide but not if guilty of murder.¹¹

1.12 Accordingly a crucial characteristic of the current law (apart from murder cases, until the proposed amendments are enacted) is that a finding that the accused is insane (either as a defence or a plea in bar) has no necessary consequences in respect of the ultimate disposal of the case against the accused. The question of what constitutes insanity and the question of what follows from a finding of insanity have been separated into different legal compartments. As a result, our own project can leave matters relating to disposal to one side and concentrate on the substantive issues involved in the topics mentioned in our terms of reference. We identify three separate issues.

(1) First, as regards insanity as a defence, the issue is one of criminal responsibility, that is under what circumstances is it fair and just to hold a person accountable for his *prima facie* criminal actions, or stated negatively when do justice and fairness require that a person is not held accountable. The defence of insanity seeks to provide one answer to these broad questions by indicating the types of mental condition or state of the accused's mental health at the time of the alleged offence which relieve the accused of responsibility for his conduct. A person who suffers from a serious mental illness or mental disorder is not a fit person to be held answerable for his conduct and does not deserve to be convicted of a criminal charge. The question for us to consider is what forms of mental disorder, if any, should the law recognise as exempting an accused person from criminal responsibility.

(2) Secondly, diminished responsibility gives rise to a related but different point. An accused person's conduct may take place against a whole range of personal and background circumstances which do not relieve him from criminal liability but mitigate the severity of the punishment he is to receive for his criminal actings. This is a question of the level of appropriate punishment of a convicted offender. Various types of mitigating circumstance may lead a court to impose on a convicted person a lesser sentence than would be the case in the absence of such circumstance. Where a sentence is fixed (as is the case with a conviction for murder) some legal mechanism is required to allow the court to give effect to mitigating circumstances relating to the accused. In Scots law the plea of diminished responsibility is the primary such mechanism.¹²

(3) Thirdly, insanity as a plea in bar of trial involves yet further types of issue. Here the question is not one of fitness of an accused person for criminal punishment (or for the level of appropriate punishment) but of that person's fitness to stand trial. Scots law recognises a

¹⁰ We later consider whether a plea of diminished responsibility should extend to crimes other than murder. See paras 3.31-3.35.

¹¹ 1995 Act s 205(1). We discuss the mandatory life sentence for murder at para 3.13.

¹² The defence of provocation also operates to 'reduce' a conviction for murder to one for culpable homicide. We consider the differences between diminished responsibility and provocation at para 1.15.

number of pleas in bar of trial,¹³ but the plea of insanity deals with the issue whether the accused's mental (or physical) condition is such that he cannot participate in any meaningful way in the process used against him to establish his guilt. The underlying idea is that it is unfair to use the criminal process, especially a trial, against such a person. The question for us is that of identifying what is involved in meaningful participation in a trial and the types of condition which might prevent or hinder such participation.

1.13 Mental conditions and defences to criminal charges. Just as our present project is not concerned with questions of disposal, neither does it involve a wide-ranging review of criminal defences. Many discussions of insanity (as a defence) and diminished responsibility group them along with other so-called 'mental condition' defences, especially intoxication and automatism.¹⁴ We must make clear that our interest in these defences is only incidental. We recognise that there is a degree of intersection between the defence of insanity, and those of intoxication and automatism. However there is one significant difference in the consequences which follow from establishing insanity and diminished responsibility on the one hand and intoxication and automatism on the other. Where a defence of intoxication or automatism applies, the accused receives an outright acquittal.¹⁵ This is not the case with insanity (and even more so with diminished responsibility which presupposes that an accused person is convicted of culpable homicide). Although an insanity verdict is one of acquittal, the accused must face further proceedings in respect of the ultimate disposal of the case against him.¹⁶

1.14 The problem facing the courts with the defences of intoxication and automatism is that of reconciling the basic principle of mens rea (namely that at the time of committing the offence the accused had the appropriate 'mental element') with conditions in which persons can hardly be said to have any mental capacity at all. At the same time the social consequences of recognising automatism and intoxication as complete defences in all circumstances would be extremely serious. It is primarily for these reasons that the courts have traditionally been wary of widening the scope of these total defences. Prior to the decision in *Ross v HM Advocate*¹⁷ Scots law in effect did not recognise a defence of automatism at all, and in the law since that case the defence still does not apply where the cause of the accused's dissociated state of mind is an 'internal' mental or pathological condition (for example, diabetic hyperglycaemia). Similarly an accused who has brought about a malfunctioning of the mind of transitory effect as a result of the voluntary consumption of alcohol or other drugs cannot plead intoxication.¹⁸ However, these particular policy issues do not arise with insanity (where the question is the appropriateness of attributing criminal responsibility to a person with a non-transitory mental condition) or with diminished responsibility (which is concerned with conditions of an accused which should be recognised as mitigating factors in cases of murder).

¹³ In addition to insanity the pleas are non-age, *res judicata*, *socii criminis*, personal bar, prejudicial publicity, and oppression (Renton & Brown paras 9.05-9.25).

¹⁴ For example, R D Mackay, *Mental Condition Defences in the Criminal Law* (Oxford, 1995). The article on Criminal Law in *Stair Memorial Encyclopaedia*, vol 7, deals with all four topics (along with non-age) under the general heading of Criminal Capacity (paras 113-159).

¹⁵ The courts have strictly defined the scope of the defences of intoxication and automatism. The leading cases are *Brennan v HM Advocate* 1977 JC 38 (intoxication) and *Ross v HM Advocate* 1991 JC 210 (automatism).

¹⁶ 1995 Act s 57(1)(a). Unlike an ordinary form of acquittal, a verdict for the insanity defence must expressly state that the acquittal was on account of the accused's insanity at the time of the offence (1995 Act s 54(6)).

¹⁷ 1991 JC 210 overruling, but only in part, the much-criticised case of *HM Advocate v Cunningham* 1963 JC 80.

¹⁸ *Brennan v HM Advocate* 1977 JC 38. It should also be noted that the defence of automatism does not apply where the accused's condition was self-induced: *Ross v HM Advocate* at 214.

1.15 A similar point arises in relation to diminished responsibility and provocation. Provocation is also a partial defence which has the effect of reducing what would otherwise be a conviction of murder to one of culpable homicide. Commentators have long noticed the similarities between the two doctrines,¹⁹ but there are still important differences. Prior to the decision in *HM Advocate v Galbraith*²⁰ diminished responsibility was understood to require a degree of mental abnormality on the part of the accused which bordered on insanity. Even since that decision the plea calls for some 'condition' of the accused which is not one of a normal person. By contrast provocation deals with the normal or ordinary reaction by the accused to the provoking words or event, though it is not entirely clear whether the reaction is that of an objective reasonable person or that of the particular accused judged in terms of his own sensitivities. There is no doubt that the two defences can overlap. Indeed one of the key issues in the *Galbraith* case was whether medical conditions brought about by repeated acts of provocation could constitute diminished responsibility. However there are special issues in the defence of provocation which do not involve mental 'abnormality'²¹ and we do not deal with the defence of provocation in this Discussion Paper.

Definitions

1.16 Our terms of reference call for us to consider the tests for establishing insanity and diminished responsibility. This requirement has important implications for our approach to the project. Our normal method of preliminary consultation in a discussion paper is to present provisional proposals but not drafts of the proposals in statutory form. However, a key issue in the present context is deciding how well the proposed constituent elements of insanity as a defence and the pleas of diminished responsibility and insanity in bar of trial lend themselves to definitions which can be understood and used across the various disciplines which have to apply them. In this context we are mindful that the points made to the Millan Committee about the problems encountered in the current tests came not only from the legal profession but also from psychiatrists and psychologists. We therefore include draft definitions of the proposed tests.²² We would stress that the definitions which are set out in this Discussion Paper have not been prepared by Parliamentary draftsmen and therefore do not necessarily reflect the form which they may take in any statute which gives effect to our ultimate recommendations. However we consider that it would be worthwhile for us to ask for the views of consultees not only on the elements of the tests but also on the draft definitions which express them.²³ The comments which we receive will be of value when we reach the stage of instructing Parliamentary draftsmen as part of our work on the final report.

¹⁹ For example T B Smith, "Diminished Responsibility" in *Studies Critical and Comparative* (Edinburgh, 1962) (at p 251) who argued for a more general defence of attenuating circumstances which would combine the two defences. For discussion of the interaction of provocation and diminished responsibility in English law see Mackay at pp 198-202.

²⁰ 2002 JC 1.

²¹ For discussion see *Stair Memorial Encyclopaedia*, vol 7, paras 272-277.

²² See paras 2.58 (insanity as a defence); 3.38 (diminished responsibility); 4.34 (insanity as a plea in bar).

²³ We have set out in Appendix E a list of definitions of insanity and diminished responsibility which are, or have been, used in various legal systems. Consultees may wish to bear in mind the definitions in Appendix E when considering our own draft definitions, though it is important to remember that different tests may reflect different underlying principles.

Statistical data

1.17 It may be useful in understanding the context of this project to consider statistical data on the use made of the defence and the pleas and the outcome of cases where they are involved.²⁴ Special problems attend data on the plea of diminished responsibility, which we consider later.²⁵ As regards cases involving insanity (either as a defence or as a plea in bar), perhaps the main point to bear in mind is their statistical rarity. The Annual Statistical Bulletin on Criminal Proceedings in the Scottish Courts sets out statistics on the number of persons proceeded against in the criminal courts. The Bulletin also provides figures for the main disposal used against all persons in respect of whom a criminal charge has been proved. These figures include a general category of 'insanity, hospital, guardianship order' but the basis on which these disposals were made is not explained.²⁶ However the figures do provide a general insight into the overall scale of use of mental disorder issues in criminal proceedings. The number of persons proceeded against for each of the 5 years 1996-2000 was 175,457, 172,556, 159,232, 146,841, and 137,026. The number of persons with an 'insanity, hospital, guardianship order' disposal for the same years was 159, 162, 129, 135, and 108.²⁷

1.18 A more useful source of information on the use of the insanity defence and plea in bar is the report of a research project on the operation of Part VI of the 1995 Act.²⁸ The aim of this project was to assess the workings of the provisions of the 1995 Act relating to insanity as a plea in bar (including the new procedure of examination of facts) and the insanity defence over a 2-year period. The researchers requested that clerks of court notify them of any case involving the plea in bar and the defence, and detailed scrutiny and analysis were made of all the notified cases. For the period from September 1996 to August 1998, the researchers were notified of 52 cases.²⁹ 37 of these cases involved the plea in bar, 12 the insanity defence and in a further 3 the plea in bar and the defence were both raised.

1.19 Of the 37 cases involving only the plea in bar the accused was found insane in bar in 29, and after the resulting examinations of facts, the facts were established in 22 of these cases. The disposals made in this last group of cases were 16 hospital orders, 4 treatment and supervision orders, 1 guardianship order, and in 1 case no order was made.³⁰ Of the 12 cases involving the insanity defence only, in 2 cases the accused was found to be sane.³¹ Of the remaining 10 cases, hospital orders were made in 7 cases, a supervision and treatment order in 1, and no order made in 2. Of the 3 cases involving both the plea and the defence, the accused in all cases was found to be both insane in bar of trial and at the time of the offence. Hospital orders were made in all 3 cases.

²⁴ The data referred to in this part of the Paper are set out in full in Appendix C.

²⁵ Para 1.20.

²⁶ See further Appendix C, Table 1.

²⁷ See Appendix C, Table 1.

²⁸ Burman and Connelly. Data derived from this study are reproduced in Appendix C. See also Appendix D which contains a summary of the findings of the project.

²⁹ Three of the cases had been heard in the period between April 1996 (when the 1995 Act provisions came into effect) and the starting date of the project in September 1996.

³⁰ It may also be noted that in one of the cases in which the facts were not established, a disposal was made under the 1984 Act.

³¹ In both cases the accused was convicted. In one case a hospital order was made; in the other the accused was sentenced to a period of community service.

1.20 Data on the use of diminished responsibility are not readily available. The plea arises only in connection with charges of murder. Although figures exist for the number of murder cases,³² it is not possible to identify all the cases in which diminished responsibility may have been involved. Diminished responsibility is not a special defence and accordingly there is no need for the accused to give advance notice that he intends to raise the issue.³³ As a result, even examination of the relevant court papers would not necessarily disclose all cases concerning diminished responsibility. However we conducted an informal survey of members of the Faculty of Advocates with experience in criminal cases with a view to forming a general impression of the use made of the plea, and in particular what had been the impact of the decision of the court in *HM Advocate v Galbraith*.³⁴

1.21 The majority of those who responded were of the view that there had been an increase in the use of the plea as a result of that case. One advocate told us that even before *Galbraith* the Crown would often be prepared to accept a plea of guilty to culpable homicide even if the accused's condition did not fall strictly within the scope of the plea as then defined. Another perceived consequence is in relation to the effect of disposal of cases where a plea of diminished responsibility was successful. Prior to *Galbraith*, most cases resulted in a hospital order, whereas now the courts were thought to impose sentences of imprisonment (including life sentences) more frequently than before.

Terminology

1.22 We later suggest that the word 'insanity' is inappropriate in referring to the defence and the plea in bar currently indicated by that term.³⁵ We also question whether the expression 'diminished responsibility' should continue to be used.³⁶ However for the purposes of this Discussion Paper we use the current terminology of 'insanity' and 'diminished responsibility.' Our reasons for doing so are solely pragmatic in nature. These words reflect the existing law and are also those used in our terms of reference. Furthermore we wish to avoid any possible confusion which might result if we were to deploy new terminology in the body of our discussion. However, our use of the existing terms should not be understood as indicating that we support their continued use as legal terms of art.

Structure of the Discussion Paper and outline of our proposals

1.23 In Parts 2, 3 and 4 we deal respectively with the topics of insanity as a defence, diminished responsibility, and insanity as a plea in bar. In each Part we outline the existing law and then, having considered criticisms and possible weaknesses of that law, we make proposals for reform.

1.24 In relation to the insanity defence our main proposal is that there should be a new statutory defence of 'not guilty by reason of mental disorder.' This defence would apply where the accused was suffering from a mental disorder which had the effect that he lacked

³² See Scottish Executive Statistical Bulletin CrJ/2001/9, *Homicide in Scotland 2000*, Table 8. The number of persons accused of homicide for the years 1996-2000 are 171, 126, 140, 172, 128. The number of these cases classified as murder are 100, 66, 86, 126, and 75. See further Appendix C.

³³ We consider the issue whether advance notice should be required in respect of diminished responsibility at paras 5.38-5.39.

³⁴ 2002 JC 1, considered in Part 3 of this Discussion Paper.

³⁵ Paras 2.19-2.21.

³⁶ Para 3.15-3.17.

a full or correct appreciation of his conduct at the time of the offence. Our provisional view is that anti-social personality disorder should be excluded from the defence. We ask consultees whether the defence should extend to those lacking substantial capacity to control their actions (the so-called 'volitional prong' of the defence). We seek views on a possible statutory definition for the defence, which brings together the various elements of the test discussed in Part 2. Finally, we propose a change in procedure to enable the court to return a verdict of not guilty by reason of mental disorder, if the Crown and the defence agree on the relevant evidence.

1.25 In Part 3 we propose that the plea of diminished responsibility should be retained, but not extended beyond cases of murder. In the light of the decision in *HM Advocate v Galbraith*,³⁷ we seek the views of consultees on whether there is a need for statutory reformulation of the plea. We ask consultees whether the relationship between diminished responsibility and intoxication requires statutory clarification. We also ask whether there are any good reasons for maintaining the exclusion of anti-social personality disorder from the scope of the plea. We question whether the term 'diminished responsibility' should be changed and if so, what the name of the plea should be. Finally we invite comments on a possible statutory definition of the plea.

1.26 In Part 4 we propose that the test for the plea in bar of trial should be formulated in statute. The basis of the test would be in terms of the accused's capacity to participate effectively in the trial process. We suggest renaming the plea 'disability in bar of trial' to indicate that it extends to physical incapacity as well as mental disorders. However, we take the view that loss of memory by itself should not be sufficient to constitute the plea. We invite comments on a draft definition of the new plea which includes a non-exhaustive list of activities which would constitute capacity to participate effectively. Finally, we propose the repeal of the statutory requirement for evidence from two medical practitioners before a plea in bar can be established.

1.27 Part 5 addresses the complicated issues of burdens and standards of proof. We propose that the burden of proof on an accused person raising a defence of mental disorder should be an evidential, rather than a legal, burden. Once sufficient evidence has been adduced to put the question of the accused's mental disorder in issue, it should be for the Crown to show beyond reasonable doubt that the defence is not applicable. We make similar proposals on burden of proof where the accused raises a plea of diminished responsibility or a plea of disability in bar of trial. We further propose that the accused should be required to provide the Crown with advance notice of the intention to plead diminished responsibility, as in the case of special defences. We also ask for the views of consultees on whether the Crown should have the right to raise the issue of the accused's mental disorder at the time of the offence, and what the standard of proof should be if the Crown were to have such a right. We further take the view that no provision is required to deal with the situation where the Crown wish to raise the question of the accused's diminished responsibility at the time of an unlawful killing. Finally we propose that where the accused's ability to participate in a trial is raised by the Crown or by the court, the standard of proof should be the balance of probabilities.

³⁷ 2002 JC 1.

1.28 Part 6 contains a summary of the proposals and questions on which we invite comments. Appendix A sets out the powers of disposal available to the courts under the Criminal Procedure (Scotland) Act 1995 when dealing with cases involving insanity. Appendix B contains copies of notes prepared by the Scottish Executive on changes in relation to powers of disposal in cases of mental disorder which are to be introduced by the Criminal Justice (Scotland) Bill and the Mental Health (Scotland) Bill. Appendix C contains statistical information on the use of the insanity defence and the plea of insanity in bar of trial, and on the resulting disposals. Appendix D contains the executive summary of the report of a research project on the operation of the provisions of Part VI of the 1995 Act.³⁸ Appendix E lists the definitions of insanity and diminished responsibility derived from historical and comparative research.

Legislative competence

1.29 The proposals in this Discussion Paper relate to criminal law and procedure and mental health. With a few exceptions which do not concern the matters in this Discussion Paper these areas of law are not reserved to the Westminster Parliament.³⁹ We are of the view that our proposals would therefore be capable of being implemented by legislation of the Scottish Parliament.

1.30 A further aspect of the legislative competence of the Scottish Parliament is that an Act of the Parliament must be compatible with the rights set out in the European Convention on Human Rights.⁴⁰ In our view enactment of the proposals made in this Discussion Paper would not breach Convention rights.⁴¹

³⁸ See para 1.18.

³⁹ Scotland Act 1998 (c 46), Sch 5.

⁴⁰ Scotland Act 1998, s 29(2)(d); Human Rights Act 1998 (c 42), s 1(1).

⁴¹ See paras 2.59-2.65; 3.36; 4.27-4.33; 5.11-5.19; 5.35.

Part 2 Insanity as a defence

Introduction

2.1 We turn now to consider what changes, if any, should be made to the existing law in relation to the tests used to establish the defence of insanity, the plea of diminished responsibility, and insanity as a plea in bar of trial. In this Part we deal with insanity as a defence. Diminished responsibility is considered in Part 3, and the plea in bar of trial in Part 4.

Existing test for insanity as a defence

2.2 The starting-point for consideration of the existing test for the defence of insanity in Scots law is a passage in Hume's Commentaries:¹

"We may next attend to the case of those unfortunate persons, who have plead the miserable defence of idiocy or insanity. Which condition, if it is not an assumed or imperfect, but a genuine and thorough insanity, and is proved by the testimony of intelligent witnesses, makes the act like that of an infant, and equally bestows the privilege of an entire exemption from any manner of pain; '*Cum alterum innocentia concilii tuetur, alterum fati infelicitas excusat.*' I say, where the insanity is absolute, and is duly proved: For if reason and humanity enforce the plea in these circumstances, it is no less necessary to observe a caution and reserve in applying the law, as shall hinder it from being understood, that there is any privilege in a case of mere weakness of intellect, or a strange and moody humour, or a crazy and capricious or irritable temper. In none of these situations does or can the law excuse the offender. Because such constitutions are not exclusive of a competent understanding of the true state of the circumstances in which the deed is done, nor of the subsistence of some steady and evil passion, grounded in those circumstances, and directed to a certain object. To serve the purpose of a defence in law, the disorder must therefore amount to an absolute alienation of reason, '*ut continua mentis alienatione, omni intellectu careat*' - such a disease as deprives the patient of the knowledge of the true aspect and position of things about him - hinders him from distinguishing friend from foe - and gives him up to the impulse of his own distempered fancy."

2.3 To a large extent Scots law has moved little from Hume's definition, and the phrase 'absolute alienation of reason' is still regarded as at the core of the defence in the modern law. In *Brennan v HM Advocate*,² the Court rejected an argument that a transitory malfunctioning of the mind brought about by self-induced intoxication could amount to insanity saying that "...insanity in our law requires proof of total alienation of reason in relation to the act charged as the result of mental illness, mental disease or defect or unsoundness of mind... ." The most modern direct authority on the defence is the direction to the jury on the topic by Lord Strachan in the case of *HM Advocate v Kidd*:³

¹ Hume I, 37.

² 1977 JC 38 at 45.

³ 1960 JC 61 at 70-71. A broadly similar approach was adopted in the Inner House case *Breen v Breen* 1961 SC 158 (a case involving insanity as a ground for divorce).

"The question really is this, whether at the time of the offences charged the accused was of unsound mind. I do not think you should resolve this matter by inquiring into all the technical terms and ideas that the medical witnesses have put before you. Treat it broadly, and treat the question as being whether the accused was of sound or unsound mind. That question is primarily one of fact to be decided by you, but I have to give you these directions. First, in order to excuse a person from responsibility for his acts on the ground of insanity, there must have been an alienation of the reason in relation to the act committed. There must have been some mental defect, to use a broad neutral word, a mental defect, by which his reason was overpowered, and he was thereby rendered incapable of exerting his reason to control his conduct and reactions. If his reason was alienated in relation to the act committed, he was not responsible for that act, even although otherwise he may have been apparently quite rational. What is required is some alienation of the reason in relation to the act committed.

...

At one time, following English law, it was held in Scotland that if an accused did not know the nature and quality of the act committed, or if he did know it but did not know he was doing wrong, it was held that he was insane. That was the test, but that test has not been followed in Scotland in the most recent cases. Knowledge of the nature and quality of the act, and knowledge that he is doing wrong, may no doubt be an element, indeed are an element, in deciding whether a man is sane or insane, but they do not, in my view, afford a complete or perfect test of sanity. A man may know very well what he is doing, and may know that it is wrong, and he may none the less be insane. It may be that some lunatics do an act just because they know it is wrong. I direct you therefore that you should dispose of this question in accordance with the directions which I have given, which briefly are, that there must be alienation of reason in regard to the act committed, otherwise the question is one for you to decide whether the accused was at the time of sound or unsound mind."

2.4 The remaining modern authority to consider is *Cardle v Mulrainey*⁴ which dealt with the test laid down in *Ross v HM Advocate*⁵ for the defence of automatism, especially the requirement that there must be a total alienation of reason leading to a loss of self-control. In this case the accused claimed that he had involuntarily consumed a drug which had the effect that he knew what he was doing but was unable to refrain from acting. The Court held that the defence of automatism was not available in this situation. The Court stated that:⁶

"Where, as in the present case, the accused knew what he was doing and was aware of the nature and quality of his acts and that what he was doing was wrong, he cannot be said to be suffering from the total alienation of reason in regard to the crime with which he is charged which the defence requires. The sheriff found in finding 16 that the respondent's ability to reason the consequences of his actions to himself was affected by his ingestion of the drug. The finding narrates that he was unable to take account in his actions of the fact that they were criminal in character and to refrain for them. But this inability to exert self-control, which the sheriff has described as an inability to complete the reasoning process, must be distinguished from the essential requirement that there should be total alienation of the accused's mental faculties of reasoning and of understanding what he is doing."

⁴ 1992 SCCR 658.

⁵ 1991 JC 210 where the court laid down three requirements for a defence of automatism (at 218): "that the external factor must not be self-induced, that it must be one which the accused was not bound to foresee, and that it must have resulted in a total alienation of reason amounting to a complete absence of self-control."

⁶ 1992 SCCR at 668.

2.5 The Court considered the expression 'total alienation of reason' used in previous definitions of the insanity defence, referring to Hume, *HM Advocate v Kidd* and *Brennan v HM Advocate*. The court then stated: "It is clear therefore that not every weakness or aberration of the mind will amount to insanity. So it is in the case of the defence with which the decision in *Ross* was concerned. Not every weakness or aberration induced by the external factor will provide the defence."

2.6 Before moving on to proposals for reform of the Scots law on insanity it is necessary to consider briefly English law on this topic. The English law on the defence of insanity is contained in the Rules laid down in the case of Daniel M'Naghten in 1843. M'Naghten suffered from a form of mental disorder as a result of which he believed that he was being persecuted by various bodies in authority, including the Tory Party. He sought to kill the Tory Prime Minister Sir Robert Peel, but shot and killed instead Peel's private secretary whom he had mistaken for the Prime Minister. At his trial for murder M'Naghten was given a special verdict of insanity. Although M'Naghten was committed to a mental hospital as a result of this verdict, his acquittal gave rise to considerable public and Parliamentary debate which in turn led to the House of Lords, in its legislative capacity, inviting the judges to attend the House to answer questions clarifying the law on insanity. The responses of the judges to these questions became known as the M'Naghten Rules and continue to constitute the law on insanity not only for English law but also for many other legal systems in the Anglo-American tradition.⁷ The key part of the Rules lies in the following passage:⁸

"[T]he jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

2.7 Ever since the M'Naghten Rules were first promulgated they have been subject to considerable criticism. The general weakness of the Rules is that they deal solely with cognitive aspects of the accused's mind, that is with questions of the accused's knowledge of what he was doing at the time of the offence. Even in the early 19th century medical science had been stressing that mental disorder might be manifested in ways in which the sufferer lacks the ability to control his conduct. The Rules do not seem to allow for any such volitional disorder. For this reason many legal systems (but not England) which use the M'Naghten Rules as the basis for the insanity defence have supplemented the Rules by adding on a volitional element.⁹ A further point of criticism of the M'Naghten Rules in English law is the way in which the courts have placed narrow interpretations on some of the main elements of the test, especially in relation to the meaning of 'nature and quality' of the accused's act and of 'doing what is wrong'.¹⁰

⁷ For discussion of the extent to which the M'Naghten Rules have been an influence on the Scots law of insanity, see Gordon pp 434-448.

⁸ (1843) 10 Cl & F 200 at 210 per Lord Chief Justice Tindal.

⁹ For example the test proposed by the American Law Institute: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." (The American Law Institute, Model Penal Code, Official Draft (Philadelphia, 1985), s 4.01(1).)

¹⁰ The leading cases are *R v Codère* (1916) 12 Cr App Rep 21 and *R v Windle* [1952] 2 QB 826.

Option of no change to the current law

2.8 The first option for consideration is whether there is any need to change the existing law on insanity as a defence. There are several strands of argument in favour of this option. First, unlike many other jurisdictions, Scots law has avoided any deep-rooted controversy about the definition of the defence of insanity. As noted earlier, in legal systems which base their insanity defence on the M'Naghten Rules (or their equivalent) there has been a long-standing debate about the exact meaning of the Rules (what does it mean to 'know' the nature and quality of an act? What sort of wrongfulness is required in respect of not knowing that one was doing what is wrong?) Even greater controversy has arisen about the scope of the Rules, especially in respect of their seemingly narrow focus on cognitive aspects of the mind and the total exclusion of any volitional element. Secondly, and related to this point, in its practical operation the definition in Scots law has not presented any major problems. The test is a broad one, almost a jury question, which can be easily adapted to the facts and circumstances of each individual case.¹¹ Thirdly, there has never been any perceived need to put the definition into statutory form and any required flexibility can be achieved by case law development.

2.9 However we do not consider that the option of leaving the law as it is to be desirable. Indeed in our view there are good reasons for reforming the law on the defence of insanity.

2.10 (1) Whatever the substantive merits of the current test, it is expressed in old-fashioned language.¹² The key phrase, 'absolute (or total) alienation of reason', derives from Hume's Commentaries, first published in 1797. One consequence is that the language of the test does not reflect the concepts and principles at the core of medical thinking or psychiatric practice. The issue here is not to be confused with the separate point that insanity as a legal device serves a different function from medical approaches to mental disorder. In *Brennan v HM Advocate*¹³ Lord Justice General Emslie stated:

"We ask ourselves first of all the fundamental question: what is insanity, according to the law of Scotland, for the purpose of a special defence of insanity at the time? The question has nothing to do with any popular view of the meaning of the word 'insanity', nor indeed is it a question to be resolved upon medical opinion for the time being. It is, on the contrary, a question which has been resolved by the law itself as a matter of legal policy in order to set, in the public interest, acceptable limits upon the circumstances in which any person may be able to relieve himself of criminal responsibility."

2.11 We accept the general point made by Lord Emslie in this passage that the approaches towards the insanity defence taken by the disciplines of law and medicine are not identical. But it is also the case that they are not in conflict with each other. For the law to determine acceptable boundaries of criminal responsibility it must refer to medical concepts. The effect of the present law is to create difficulties for expert witnesses in providing the courts with

¹¹ Consider in this regard Lord Cooper's well-known remarks in evidence to the Royal Commission on Capital Punishment: "However much you charge a jury as to the McNaghten Rules or any other test, the question they would put to themselves when they retired is – 'Is the man mad or is he not?'" (Report of the Royal Commission on Capital Punishment: Minutes of Evidence, 1949-1951, Evidence of Lord Cooper, Q 5479.) See also Lord Strachan's charge to the jury in *HM Advocate v Kidd* 1960 JC 61 at 70: "I do not think you should resolve this matter by inquiring into all the technical terms and ideas that the medical witnesses have put before you. Treat it broadly, and treat the question as being whether the accused was of sound or unsound mind."

¹² We consider at para 2.19-2.21 the desirability of continuing to use the term 'insanity' itself.

¹³ 1977 JC 38 at 43.

the medical information needed to give effect to the legal test in individual cases. The Millan Committee expressed this point as follows:¹⁴ "It seems wrong to us that such an important issue as determining the responsibility of an individual for a serious criminal charge should depend on terms and definitions which are largely meaningless to those with the responsibility of giving expert evidence to the court." We agree with this observation. Furthermore in many cases where insanity is an issue the other key participants are members of the jury and it is difficult to see how their task is helped by the use of language from the 18th century.¹⁵ A further point is that in the civil law terminology has been changed to reflect more up-to-date medical ideas,¹⁶ and we are unable to identify any good reason why the criminal law should not do the same. Accordingly we take the view that even if no other change is required, then at the very least the test for the insanity defence should be re-stated in a more modern idiom.

2.12 (2) Secondly, the substance of the existing test has not been without criticism. It is not entirely easy to say what the test includes and what it excludes. Cases such as *HM Advocate v Kidd* suggest that the test is wider than that in the M'Naghten Rules but are not clear as to what the further elements are. Does the test include conditions of irresistible impulse, or all volitional incapacities? Does it include any type of personality disorder, and if so which (for example psychopathy)? What is the required causal connection between the accused's mental state and his criminal conduct? In addition, more recent decisions, such as *Brennan v HM Advocate* and *Cardle v Mulrainey*, contain dicta (strictly speaking in this context obiter) that the test is confined to something very like that of the M'Naghten Rules. In addition the existing law can be criticised as being too vague. The charge to the jury in *HM Advocate v Kidd* lays stress on the fact that the decision is broadly a 'jury question' but juries directed in this way will have difficulty in determining exactly what factors are or are not relevant to their decision-making.

2.13 (3) Finally we are not convinced that the development and reform of the defence of insanity should be left solely to courts. As noted in our discussion on the statistical data,¹⁷ there are relatively few cases where the defence is raised, and compared with other similar areas of criminal law (for example intoxication and automatism) there is marked paucity of case law. Nor are we persuaded that this area is unsuitable for statutory intervention. Indeed (virtually) the entire civil law on mental health is governed by statute, as is the law on disposals of mentally disordered offenders.¹⁸ It may also be noted that in many jurisdictions the definition of insanity has been a matter of statutory (or constitutional) provision.¹⁹

¹⁴ Millan Report para 29.43.

¹⁵ The Butler Committee when recommending reform of the insanity defence identified as two of its guiding principles that the defence must "avoid the use of words and expressions which may confuse the jury" and must also "be capable of being the subject of a clear direction by the judge." (Butler Report para 18.17.)

¹⁶ The older common law referred to persons as 'furious' and 'idiots'. An important series of statutes in the 19th and early 20th centuries referred to 'lunatics' and 'mental defectives' (see eg the Lunacy (Scotland) Acts 1857 and 1862 and the Mental Deficiency and Lunacy (Scotland) Act 1913). A radical change to the civil law on mental health was brought about by the Mental Health (Scotland) Act 1960 (c 61), which used contemporary language to describe forms of mental disorder. The 1960 Act along with subsequent legislation was consolidated in the 1984 Act which was the subject of the review by the Millan Committee.

¹⁷ Paras 1.17-1.21.

¹⁸ One of the reasons why the language of the criminal law has remained old-fashioned, discussed above, may have been the lack of statutory intervention.

¹⁹ See Appendix E.

2.14 Accordingly we propose that:

1. **The current test of insanity as a defence should not be left solely to further development by the courts but should be reformulated in statute.**

Option of abolition of insanity as a defence

2.15 A quite different option is that the defence of insanity should be abolished. Abolition of the defence has been considered in academic literature for some time.²⁰ Furthermore as a reaction to the Hinckley case in 1982 some states in the USA enacted measures to abolish the insanity defence.²¹ The underlying principle of an abolitionist approach is that a defence of insanity is unnecessary. If an accused lacks the mens rea for an offence he is entitled to an acquittal, no matter if the lack of the guilty mind is caused by insanity. If the accused suffers from a mental disorder which did not affect his mens rea for the offence charged against him, then the mental disorder may have relevance for the question of disposal but not that of his guilt.²² A further point in support of abolition is that criminal courts now have very wide powers of disposal in respect of mentally abnormal offenders. A person who is suffering from a mental disorder should receive appropriate treatment, even if he is convicted of an offence. However, the practice in those states which have implemented abolitionist measures suggests a number of undesirable consequences. One effect of abolition of the insanity defence has been to distort the concept of mens rea to accommodate cases where the accused suffers from a mental disorder but can still 'form' a mental element for specific offences. A similar effect exists in respect of the impact of the abolition of the defence on insanity as a plea in bar of trial. The type of mental disorder relevant to the question of a plea in bar is not the same as that in respect of a condition which excuses a person from criminal responsibility. However, where there is no defence of insanity the tendency has been to widen the scope of the plea in bar.²³

2.16 In addition to these practical problems, there is an objection in principle. The defence of insanity gives effect to a fundamental principle of the criminal law, namely that where a person suffers from a severe mental disorder it is unfair to hold that person criminally responsible. That is so whether or not that person could have the mens rea for the offence charged and whether or not that person could understand and participate in his trial. Abolition of the defence fails to give effect to this basic principle.²⁴ The Royal Commission on Capital Punishment which reported in 1953 noted that it "has for centuries been recognised that, if a person was, at the time of his unlawful act, mentally so disordered that it would be unreasonable to impute guilt to him, he ought not to be held liable to conviction and punishment under the criminal law."²⁵ The Royal Commission concluded

²⁰ J Goldstein & J Katz, "Abolish the 'Insanity Defence' – Why Not?" (1963) 72 Yale LJ 853; Norval Morris, *Madness and the Criminal Law* (1982), pp 53-76.

²¹ *US v Hinckley* 672 F 2d 115 (DC Cir 1982). Hinckley shot President Ronald Reagan in an attempted assassination. He was subsequently found not guilty by reason of insanity. For discussion of the effect of this decision on reform of the insanity defence in the USA, see Mackay pp 111-131. Mackay considers the abolitionist response at pp 123-130.

²² Mackay refers to this approach as 'partial' abolition to distinguish it from 'total' abolition (under which questions of mental disorder are irrelevant even in respect of proof of mens rea). However the US courts have tended to treat total abolition of the insanity defence as unconstitutional and there has been little support for this approach (Mackay at pp 124-125).

²³ Paul S Appelbaum, "The Insanity Defense: Moral Blameworthiness and Criminal Punishment" in Appelbaum, *Almost a Revolution: Mental Health Law and the Limits of Change* (Oxford, 1994) 163, esp pp 181-183.

²⁴ Mackay notes that in England there has not been any significant support for the abolition of the defence (p 123).

²⁵ Royal Commission on Capital Punishment (Cmnd 8932, 1953) para 278.

that support should continue for this "ancient and humane principle," a view with which we are in total agreement.

2.17 We propose that:

2. The defence of insanity should be retained as part of Scots criminal law.

Reform of the defence of insanity

2.18 For the reasons which we have set out our general view is that the defence of insanity should be retained but reformed to deal with the weaknesses of the existing test.

2.19 **Name of the defence.** We do not believe that the reformed defence should continue to use the term 'insanity.' This word was once used in both law and medicine,²⁶ but has long passed out of use in medical disciplines. It has also been replaced in the civil law by terms which reflect or cohere with current medical concepts.²⁷ There is evidence which suggests that stigma may attach to persons found by the criminal law to be 'insane.'²⁸ This stigma could well have the effect that some accused persons do not wish a defence of insanity to be raised where it might otherwise be thought to be appropriate.

2.20 In the civil law the general term used is 'mental disorder' and we believe that the criminal law should use the same terminology. We discuss next the central questions of whether and how far the phrase 'mental disorder' should be defined.

2.21 We propose that:

3. The defence of 'insanity' should be known as 'mental disorder' and where successfully raised should result in a verdict of 'not guilty by reason of mental disorder'.

2.22 **The nature of mental disorder and the role of medical evidence.** At the very core of the defence is the requirement that at the time of the offence the accused suffered from a mental disorder (variously described in the present law as a mental defect or disease, or a 'disease of the mind' in terms of the M'Naghten Rules). In short if there is no evidence of mental disorder, then there will be no basis for the defence.²⁹ Further, for the defence to be established it will be necessary to show that the accused's mental disorder had certain effects, which we deal with in more detail later.³⁰ The point for immediate consideration is what is to be understood by mental disorder. The Mental Health (Scotland) Act 1984 states that its provisions apply to persons suffering from mental disorder which is defined as 'mental illness (including personality disorder) or mental handicap however caused or

²⁶ As in the title of a book by the American doctor, Isaac Ray: *A Treatise on the Medical Jurisprudence of Insanity* (Boston, 1838), a book which had considerable influence on the development of the insanity defence in the USA.

²⁷ The Butler Committee argued that "the continued use of the words 'insanity' and 'insane' in the criminal law long after their disappearance from psychiatry and mental health law has been a substantial source of difficulty, and we attach importance to the discontinuance of the use of these words in the criminal law." (Butler Report para 18.18.)

²⁸ Mackay pp 137-138; Law Commission: *Criminal Law: Codification of the Criminal Law. Report to the Law Commission* (Law Com No 143) (1985) para 12.14: "...the offensive label of 'insanity' will no longer be used."

²⁹ We discuss questions of burden and standard of proof of the defence at paras 5.4-5.33.

³⁰ See paras 2.37-2.46. In the present law the effect of mental disease or defect must be the total (or complete) alienation of the accused's reason in respect of his conduct.

manifested.³¹ To fall within the provisions of the 1984 Act on detention in a hospital, the mental disorder must come within the scope of section 17 of the Act which is to be treated as covering (i) mental illness; (ii) mental impairment likely to be alleviated by treatment; (iii) severe mental impairment; and (iv) a persistent mental disorder manifested only by abnormally aggressive or seriously irresponsible conduct.

2.23 In its review of the 1984 Act the Millan Committee recommended that the term 'mental disorder' should be retained as a general term to delineate those persons to whom the mental health legislation should apply.³² It also recommended that the new Act should specify three categories of mental disorder: mental illness, learning disability and personality disorder, though it thought that these terms should not be defined further in the legislation. This recommendation has been given effect in the Bill introduced to implement the bulk of the Millan Committee recommendations.³³

2.24 It is important to realise that the chief purpose of the definition in the civil law is to identify those persons who are to fall within the range of its provisions, especially in relation to compulsory treatment and care and to whom local authorities and the Mental Welfare Commission for Scotland would owe duties under the statute. The purpose of the insanity defence is different, namely that of identifying persons who should be exempt from criminal responsibility on account of mental disorder. We accept that the defence should require the presence of a mental disorder but we do not believe that this term should be defined in the same way as in the civil law. Instead our approach is to propose a definition of the defence which concentrates on particular effects which arise from the presence of a mental disorder. We also consider whether there are specific conditions which are to be excluded from the range of the defence. The condition which calls for particular consideration for exclusion is anti-social personality disorder, which we discuss later.³⁴

2.25 We propose that:

4. **The defence of mental disorder should require the presence of a mental disorder suffered by the accused at the time of the alleged offence. The term 'mental disorder' should not be defined by statute except to specify any condition which is to be excluded from the range of the defence.**

³¹ 1984 Act s 1 (as amended by the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 (asp 1) s 3(1)). Section 1(3) of the 1984 Act states that "No person shall be treated under this Act as suffering from mental disorder by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs."

³² Millan Report para 4.18. The Committee noted advantages in continuing to use this broad term: "It makes no assumptions as to the cause or permanency of the disability. Because it is not bound strictly by any particular diagnostic classification system, it is flexible enough to encompass changes in diagnostic practice." (para 4.13.)

³³ Mental Health (Scotland) Bill s 227: "In this Act 'mental disorder' means any (a) mental illness; (b) personality disorder; or (c) learning disability, however caused or manifested; and cognate expressions shall be construed accordingly." The Bill in its original form did not follow the Millan Committee's further recommendation that the specific exclusions (substance misuse, sexual orientation or behaviour, and anti-social or imprudent behaviour) should be added to the definition in the new Act (Millan Report recommendation 4.13). The Health and Community Care Committee recommended in its report of Stage 1 of the Bill that specific exclusions should be added (sexual orientation or behaviour; gender dysphoria; alcohol or substance misuse; anti-social behaviour; religious or spiritual beliefs; political beliefs; acting as no prudent person would act; and personality change owing to neurological damage). We understand that the Executive is considering whether to bring forward an amendment at Stage 2.

³⁴ See paras 2.52-2.57.

2.26 In addition to the presence of a mental disorder, for the defence to be established two further preconditions would require to be met. First, that there is a connecting (or causal) link between the accused's mental disorder and his criminal conduct; and, secondly, that the mental disorder had a particular effect on the accused at the time of his criminal actings.

2.27 **Connecting link (causation).** A controversial issue in debates on the insanity defence is the link between the accused's mental condition and his criminal act. This link is usually referred to as involving causation, but this term is not completely appropriate. The concept of causation suggests some sort of physical or behavioural link between mind and body. For example, a person suffering from an epileptic seizure or a hypoglycaemic episode might strike out and hit someone else. In this sort of case it makes sense to say that the epilepsy or the diabetes *caused* the person's conduct. But most instances of mental disorder do not involve this sort of causal effect on action. This point is well put by Professor Finbarr McAuley:³⁵

"But diseases do not always affect behaviour in this way. Much more frequently, they do so through the medium of psychological states, such as thoughts, beliefs and desires. For example, Huntington's chorea and Pick's disease – both forms of genetically transmitted arteriosclerosis – typically affect the cerebral blood supply in a way that may lead to mental confusion and, consequently, to grossly anti-social behaviour on the part of those suffering from them. Similarly, victims of a functional disorder like paranoia sometimes have extremely violent reactions as a direct result of their condition.

But notice that a completely different type of causation is at work in these examples. Here the disease causes the defendant to *do* something by influencing the content and direction of his thoughts and feelings (paranoia) or by generally interfering with his thought processes (Huntington's chorea or Pick's disease). Thus what follows are actions, not mere movements of the defendant's body such as might occur in the course of an epileptic seizure or during an attack of St Vitus' dance. In the result, the question of the defendant's responsibility for what happened arises in such cases in a way that it does not arise in cases where the effects of the disease are not mediated by psychological states."

2.28 Accordingly we prefer to describe the issue as one of a *connecting link* between a mental disorder and criminal conduct, even though we accept that most commentators use causal terminology. The problem arises in the type of situation where a person suffering from a disorder (eg conspiracy delusions) commits an offence (road traffic offence, breach of the peace) which appears to be unrelated to his condition. In other words there is no connecting link between the disorder and the criminal act. In these circumstances should that person be held to be lacking in criminal responsibility in respect of that offence? There are a variety of approaches to this issue. We consider, but reject, two such approaches, which we refer to as the 'presumption' test and the 'product' test. Instead we favour an approach which requires that a mental disorder has specific effects on the workings of the accused's mind at the time of the offence.

2.29 *The presumption test.* One solution is to argue that in the vast majority of cases, especially where the mental disorder is severe, it can be assumed that there is a link between

³⁵ McAuley pp 12-13.

the disorder and the criminal conduct. This was the approach adopted by the Butler Committee who argued that:³⁶

"It is true that it is theoretically possible for a person to be suffering from a severe mental disorder which has in a causal sense nothing to do with the act or omission for which he is being tried: but in practice it is very difficult to imagine a case in which one could be sure of the absence of any such connection."

2.30 However, this approach has been strongly criticised by various commentators who point out that the lack of a connecting link is more than merely theoretical. For example, the committee of expert lawyers who reported to the Law Commission on codification of the criminal law put the matter as follows:³⁷

"The [Butler] Committee proposed, in effect, an irrebuttable presumption that there was a sufficient connection between the severe disorder and the offence. This certainly simplifies the tasks of psychiatric witnesses and the court. Some people, however, take the view that it would be wrong in principle that a person should escape conviction if, although severely mentally ill, he has committed a rational crime which was uninfluenced by his illness and for which he ought to be liable to be punished. They believe that the prosecution should be allowed to persuade the jury (if it can) that the offence and the disorder were unconnected."

2.31 We agree with the conclusion set out in the above passage. In our view to deny criminal responsibility in all circumstances to a person suffering from a mental disorder is in effect to treat insanity as a form of status defence.³⁸ We believe that a person has a right to be treated as responsible where any disorder, mental or physical, has no bearing on his criminal actings. In any case we envisage all sorts of practical problems which might arise if proof of a mental disorder was all that was required to excuse a person from responsibility for any type of criminal conduct. What advice should a practitioner give to a client with a mental disorder who is charged with a speeding offence unrelated to his condition? This is not a question of what is the appropriate treatment for such a person, for a conviction on a minor criminal charge would not rule out a mental health disposal if the appropriate criteria were met in the circumstances of the case.

2.32 *The product test.* An alternative approach to the problem of the connecting link between insanity disorder and criminal conduct is to require that the conduct was the product of the accused's mental disorder. This approach was first adopted in the USA in the 19th century in the so-called New Hampshire doctrine,³⁹ and more famously in the later *Durham* formula:⁴⁰

³⁶ Butler Report para 18.29.

³⁷ Law Commission: *Criminal Law: Codification of the Criminal Law. Report to the Law Commission* (Law Com No 143) (1985) para 12.6.

³⁸ For a detailed account and criticism of insanity as a status defence, see Mackay pp 81-90. See also V Tadros, "Insanity and the Capacity for Criminal Responsibility" (2001) 5 *Edin LR* 325 for an argument that the Scots law of insanity should be understood in terms of the accused person as someone who is not an appropriate subject for criminal responsibility.

³⁹ *State of New Hampshire v Jones* 50 NH 369 (1871) at 394: "...no man shall be held accountable, criminally, for an act which was the offspring and product of mental disease. Of the soundness of this proposition there can be no doubt. Thus far all are agreed; and the doctrine rests upon principles of reason, humanity, and justice, too firm and too deeply rooted to be shaken by any narrow rule that might be adopted on the subject. No argument is needed to show that to hold that a man may be punished for what is the offspring of disease would be to hold that he may be punished for disease. Any rule which makes that possible cannot be law."

⁴⁰ *Durham v US* 214 F 2d 862, 874-5 (DC Cir 1954).

"It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

2.33 However the *Durham* approach was subject to severe criticism and was later abandoned by the court which had initially adopted it.⁴¹ Two particular weaknesses were associated with the *Durham* formula. First, the practical experience of applying the formula was that the issue at a criminal trial simply became that of psychiatric evidence and nothing else. Psychiatric witnesses would testify first that the accused was (or was not) suffering from a mental disease or defect and secondly that his criminal conduct was (or was not) a result.⁴² On this approach unless there was a conflict of expert evidence there was little for the court or a jury to decide.

2.34 A second and more fundamental weakness in the *Durham* formula is that it presupposed a mechanical, and direct, connection between mental disorder and criminal conduct. Earlier we made the point that mental disorders do not typically deprive persons of all control over their behaviour. More usually their effect is to lead to such persons having unusual or distorted motivations and reasons for acting. In our view it is this particular effect of mental disorder which is at the core of the definition of the defence of insanity. The *Durham* test was correct in stressing that there has to be a link between the mental disorder and the criminal act but it did not go far enough and specify the manner in which the disorder had affected the accused's reasoning at the time of the acting. Yet unless the test for insanity spells out the ways in which the accused's reasons for acting as he did are in some way disordered, it becomes impossible to see the accused's mental state as giving rise to a question of his criminal responsibility.

2.35 *The 'particular effect' approach.* Accordingly we prefer an approach to the connecting link issue as one which requires the insanity defence to be defined in terms of specific and particular effects which the accused's mental disorder had on his reasons and motivations for engaging in criminal conduct. In general terms these particular effects must be such as to justify holding the accused not responsible for that conduct. Under the present law of Scotland these effects are defined in terms of a total alienation of reason but the effects can be defined in all sorts of way. For example, under the M'Naghten Rules the mental disorder ('disease of the mind') must lead to the accused person failing to have various types of knowledge about his criminal conduct.⁴³ The crucial issue then is how to specify the effects of the mental disorder which explains the accused's lack of responsibility. That is a matter which we consider next.⁴⁴

⁴¹ *US v Brawner* 471 F 2d 969 (DC Cir 1972).

⁴² In *Brawner* the court itself referred to one notorious example of this sort of trial by psychiatric labelling: "The problem was dramatically highlighted by the weekend flip flop case, *In re Rosenfield*, 157 F Supp 18 (DDC 1957). The petitioner was described as a sociopath. A St Elizabeths psychiatrist testified that a person with a sociopathic personality was not suffering from a mental disease. That was Friday afternoon. On Monday morning, through a policy change at St Elizabeths Hospital, it was determined as an administrative matter that the state of a psychopathic or sociopathic personality did constitute a mental disease." (*US v Brawner* at 978.)

⁴³ Viz, that he did not know the nature and quality of his act or, if he knew that, he did not know he was doing what was wrong.

⁴⁴ Paras 2.37-2.46.

2.36 Meanwhile to sum up our views on the present issue, we propose that:

5. **The defence of mental disorder should be defined in terms of a specific effect, or specific effects, on the accused's mental state (at the time of the offence with which he or she is charged) which has been brought about by the accused's disorder.**

2.37 **Effect of mental disorder.** Traditionally definitions of the insanity defence have focussed on two basic elements as the effect of the mental disorder suffered by the accused. One is cognitive, that is, concerned with the nature of the accused's knowledge about his actings. The second is volitional, relating to the nature of the accused's control over his conduct. One of the criticisms of the current definition in Scots law is that it is difficult to be sure to what extent it covers either of these elements. The exclusion of the M'Naghten Rules (if that is the current law) does not necessarily lead to the conclusion that our law involves any volitional element, for it could instead be adopting an alternative approach to purely cognitive effects. We consider volitional aspects of the defence later.⁴⁵

2.38 In contrast to the position in Scots law the meaning of insanity in English law is more certain. Indeed the standard criticism of the M'Naghten Rules has been that the Rules focus solely, and narrowly, on cognitive aspects and exclude all volitional aspects. However it is important to be clear as to the reasons for the criticisms of the M'Naghten Rules. Leaving aside volitional elements (which we consider later), the defect in the Rules is not that they refer to cognitive concepts but that as the Rules have been interpreted by the courts they use an inappropriate conception of cognitive aspects of the mind. This point is significant. If anything is to be learned from the weaknesses of the Rules it is not that the law on insanity has nothing to do with cognitive questions at all.⁴⁶ Instead it is that the law should deploy a concept of cognitive failing more in tune with psychiatric knowledge and with conceptions of fairness and justice about the proper scope of criminal responsibility. On this view cognitive failing is at the core of our understanding of the effect of mental disorder on a person's criminal responsibility.

2.39 Consider in this regard the standard criticisms of the requirement under the Rules that the accused did not know the nature and quality of his act. Take the case where a woman kills her children by smothering them with a pillow. She does this in the belief that in doing so she will drive out demons from their souls or because she thinks that her failings as a parent means that death is the only suitable option for them. Can such a woman be said to know the nature and quality of her act? In one, narrow, sense which accords with the M'Naghten Rules in many legal systems,⁴⁷ she has this knowledge for she correctly understands the physical attributes of her actings in putting a pillow over her children with a view to stopping them breathing. But in a wider sense the woman cannot be said to have 'true' or 'complete' knowledge of her actings. Her mental disorder (schizophrenia; depression) has had the effect of distorting her understanding of the exact nature of her acts. Her children's souls are not possessed by demons; nor is death the appropriate response to perceptions of one's self as a bad parent. This is the sort of case where the intuitive response

⁴⁵ Paras 2.47-2.51.

⁴⁶ As McAuley notes: "If the [M'Naghten] Rules did not exist, it would be necessary to invent something very like them" (p 25).

⁴⁷ See *R v Codère* (1916) 12 Cr App Rep 21 for this interpretation in English law.

is to say that such a woman should be relieved of criminal responsibility for her actions. McAuley generalises this point as follows:⁴⁸

"...if the Rules are construed from the point of view of their implicit logical form, the first limb of the knowledge test can be seen to be much wider than has traditionally been supposed. Contrary to the interpretation that comes down from *Codère*, it goes to *the accused's ability to evaluate his actions, including his reasons or motives for committing them and the consequences normally associated with them, in the way that a sane person can*. An accused who cannot do this may know what he is doing in a literal sense, but he does not know why he is doing it and cannot assess its true effects. He may be quite clear about the 'physical character' of his actions, ... or even about their immediate physical consequences, But since he cannot break out of the circle described by his insane delusions, he does not know what he is doing in any epistemologically significant sense. Unlike the sane person, he cannot measure the effects of his actions or assess the validity or propriety of his motives against the criteria by which they are ordinarily judged."

2.40 A similar point can be made about the other limb of the knowledge test of the M'Naghten Rules, that the accused did not know he was doing what was wrong. In English law the phrase 'what was wrong' has been interpreted as referring to wrong in the sense of contrary to law as opposed to wrong in a moral sense.⁴⁹ This approach has been criticised,⁵⁰ but even a wider interpretation, namely lack of knowledge of doing what is morally wrong, excludes from the insanity defence some cases where it seems inappropriate to ascribe criminal responsibility. Consider the example of the depressive woman who kills her children as the only way to prevent them suffering from her own bad parenting. Such a woman knows that what she is doing is at one level morally (and legally) wrong; she may feel considerable regret about carrying out her actions. But she considers that she has an overriding reason for doing what is otherwise wrong, viz the need to save her children from future misery. This situation can be analysed in terms of the ways in which the woman's mental disorder (depression) distorts her reasoning about what is right (and wrong) for her to do. She believes that she has a purpose in doing something which in the absence of that purpose would be wrong but this purpose derives from her mentally disordered state. This point has been recognised by courts in some jurisdictions which give a wide interpretation of the M'Naghten Rules. In *R v Porter*,⁵¹ the High Court of Australia stated:

"The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong."

2.41 One danger about adopting such a wide approach to cognitive failings about the wrongness of actions is that it would include within the scope of the defence the condition of psychopathy (on the assumption that this condition would be classified as a mental disorder). A person suffering from psychopathy could be said to know that what he was

⁴⁸ McAuley p 30 (emphasis added).

⁴⁹ *R v Windle* [1952] 2 QB 826.

⁵⁰ Criticisms of the narrowness of the approach in *Windle* can be found in *Stapleton v R* (1952) 86 CLR 358 per Dixon CJ at 368, (High Court of Australia).

⁵¹ (1936) 55 CLR 182 per Dixon J at 189-190.

doing was wrong but to lack the ordinary moral constraints from doing wrong. But the solution to this problem is not to adopt a narrow concept of knowledge in the definition of the insanity defence but instead to refuse to allow psychopathy as a relevant type of mental disorder for that purpose.⁵²

2.42 We take the view that at the core of the insanity defence there should be a test in terms of cognitive failings on the part of the accused. We describe this test in terms of an accused person not having 'appreciation' of his conduct by reason of a mental disorder. The attraction of this concept is that it connotes something wider than simple knowledge and includes a level of (rational) understanding. It avoids the narrowness of the M'Naghten Rules, as they have been traditionally interpreted. In discussing definitions of insanity which use this idea Gordon notes that "[a]ppreciation' is a wide enough term to cover all aspects of the conduct – its nature, its consequences, its moral value, and its legal effect."⁵³ The concept of appreciation has been used in other definitions of the insanity defence. For example, the American Law Institute Model Penal Code states the test as follows:⁵⁴

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity ... to appreciate the criminality [wrongfulness] of his conduct."

2.43 Similarly the Criminal Code of Canada contains a provision on the defence of mental disorder:⁵⁵

"No person is criminally responsible for an act committed or an omission made while suffering from mental disorder that rendered the person incapable of appreciating the nature and the quality of an act or omission or of knowing that it was wrong."

2.44 We wish to make clear that we are not proposing that Scots law should adopt the M'Naghten Rules, as those Rules exist in English law (or indeed in any other legal system). Instead our argument is that the M'Naghten Rules correctly identify cognitive failing as a central element of the insanity defence, albeit the Rules as currently interpreted take too narrow a view of what is involved in the idea of cognitive failing. Indeed the test we propose can be understood as making explicit, and in modern language, what is implicit in the classic definition to be found in Hume⁵⁶ that there must be such a disorder or disease "as deprives the patient of the knowledge of the true aspect and position of things about him – hinders him from distinguishing friend from foe."

⁵² McAuley pp 32-33. We consider this point at paras 2.52-2.57.

⁵³ Gordon p 433.

⁵⁴ (The American Law Institute, Model Penal Code, Official Draft (Philadelphia, 1985), s 4.01(1).) The definition also contains a volitional element in terms of the accused lacking substantial capacity "to conform his conduct to the requirements of the law."

⁵⁵ RS 1985 c. C-46, s 16(1). In *R v Barnier* 109 DLR (3d) 257 (1980), the Supreme Court of Canada in interpreting a previous version of this rule stressed that 'appreciating' was a wider concept than that of 'knowing'.

⁵⁶ Hume I, 37. See also Alison, *Principles of the Criminal Law of Scotland* (Edinburgh, 1832) pp 645-646 for the view that the defence of insanity is concerned with an insane understanding of the situation rather than with knowledge in a narrow sense: "For example, a mad person may be perfectly aware that murder is a crime, and will admit that, if pressed on the subject; but still he may conceive that a homicide he had committed, was nowise blameable, because the deceased had engaged in a conspiracy with others against his own life; or was his mortal enemy, who had wounded him in his dearest interests, or was the devil incarnate, whom it was the duty of every good Christian to meet with the weapons of carnal warfare. If, therefore, the accused is in such a situation that, though possessing a sense of the distinction between right and wrong, he cannot apply it correctly in his own case, and labours under an illusion which completely misleads his judgment, as mistaking one person for another, or fastening a dreadful charge, entirely groundless, on a friend, he is entitled to the benefit of the plea of insanity in defence against a criminal charge."

2.45 What is not entirely clear is whether, once the idea of appreciation of conduct is placed at the heart of the definition of insanity, there is any need to specify further what the failure to appreciate involves. The M'Naghten Rules link the accused's cognitive failings to the 'nature and quality' of his acts and to doing 'what was wrong.' We consider that using similar expressions in a new definition in Scots law may have the advantage of bringing out the underlying meaning of the failure to appreciate test. At the same time we are hesitant in using such phrases in the proposed definition. This is so for two reasons. First, there is a danger that the use of expressions similar to those of the M'Naghten Rules might attract the restrictive interpretations which the courts in England have given to those parts of the Rules. This danger would especially arise if the definition of an appreciation-based test were to use M'Naghten-like terms such as 'nature and quality' of an act or 'wrongfulness'. Secondly, if we are correct in our argument that the concept of appreciation is wider than that of knowledge as used in the M'Naghten Rules, then any further embellishment of the test would be unnecessary. However the issue involved is essentially one of drafting rather than the substance of the test, and we revert to this matter in our presentation of the proposed definition of an insanity test which is based on the core idea of failure by the accused to appreciate his conduct.⁵⁷

2.46 Accordingly we propose that:

6. **The defence of mental disorder should be defined in terms of the accused's appreciation of his or her conduct at the time of the offence.**

2.47 **The volitional prong.** Many legal systems include a volitional component as part of the definition of the insanity defence. Part of the test in the American Law Institute's Model Penal Code is that as a result of mental disease the accused lacks substantial capacity "to conform his conduct to the requirements of the law." It may well be that Scots law contains a volitional element. For example the passage from Hume just quoted continues with the phrase "and gives him up to the impulse of his own distempered fancy." In *HM Advocate v Kidd*, Lord Strachan stated that:⁵⁸

"...in order to excuse a person from responsibility for his acts on the grounds of insanity, there must have been an alienation of the reason in relation to the act committed. There must have been some mental defect, to use a broad neutral word, a mental defect, by which his reason was overpowered, and he was thereby rendered incapable of exerting his reason to control his conduct and reactions. If his reason was alienated in relation to the act committed, he was not responsible for that act, even although otherwise he may have been apparently quite rational. What is required is some alienation of the reason in relation to the act committed."

2.48 Yet it is not entirely clear that a volitional prong is part of our law, and even if it is, whether it needs to be part of the definition of insanity. Volitional issues pose major practical questions. How can the law distinguish between someone who could have desisted from criminal conduct but chose not to desist, and someone who could do no other than commit the act? As this question is often put, what is the difference between an irresistible impulse and resistible, but not-resisted, impulse? This issue can only be resolved by looking to the reasons for the person's acting as he did, but this approach leads back to considerations of what are essentially cognitive matters. Legal systems which follow the

⁵⁷ See further para 2.58 for proposed definitions of the defence on mental disorder.

⁵⁸ 1960 JC 61 at 70.

M'Naghten Rules in their traditional sense have often added a volitional element to avoid the narrowness of the Rules.⁵⁹ However the question arises whether such a tactic is required where a wider concept of cognitive failing (the 'appreciation' test) is adopted. The use of an expanded cognitive base for the test could cover all the cases where a person should not be found criminally responsible. Consider the example of a woman who feels she is 'driven' to killing her children to save them from her own bad parenting. This case essentially involves a cognitive failing (based on the depression which gives rise to her perception of inadequacy as a parent) rather than a purely volitional one. The question becomes one of pointing to any case where a person who committed criminal conduct would be found 'sane' on the appreciation test but would be treated as 'insane' in respect of a volitional incapacity. McAuley answers this question by saying that this outcome cannot arise if the insanity defence uses a wide cognitive test:⁶⁰

"...the hypothesis of non-cognitive insanity holds up if and only if knowledge is defined in purely perceptual terms, since it is true that some psychotics know what they are doing in a physical sense. But it is patently false once knowledge is defined in the standard epistemological sense understood by psychiatrists: as the ability to formulate justified beliefs and desires and to test them against what is commonly known about the world. On that definition of knowledge, there is no such thing as non-cognitive or purely volitional insanity: all forms of serious mental illness are cases of cognitive insanity given that they are marked by an inability to test or justify beliefs and desires against the publicly available evidence – the existence of control tests and the legal fiction of volitional insanity to which they refer, notwithstanding."

2.49 However, this view does depend upon a specific interpretation of psychiatric medicine. The question whether volitional incapacities are types of mental disorder is in the first place a medical one and it could be argued that a reformed defence should not exclude them unless there are good policy reasons for doing so.

2.50 We are inclined to adopt the position that the definition of the defence should not contain a volitional element but we have not reached a concluded view on this issue. We have already set out an argument for the use of a wide cognitive test of appreciation of conduct, which we think might be sufficient to cover all the types of case appropriate for the insanity defence. As against this view it might be thought inconsistent to exclude any volitional element and at the same time require that the general test for the insanity defence coheres with current medical thinking. This is a matter on which we would welcome the views of consultees, especially those with expertise in psychiatry.

2.51 Accordingly we ask consultees for their views on the following question:

7. Should the definition of the defence of mental disorder contain any reference to volitional incapacities or disabilities of the accused?

2.52 **Psychopathy (anti-social personality disorder).** One problem associated with a volitional element of the insanity defence is that it might extend the defence to include cases of psychopathy (or anti-social personality disorder (ASPD)). This is a condition associated with forms of anti-social (including criminal) behaviour by a person who cannot apply, or is indifferent about applying, normal moral standards and feelings to his actions.

⁵⁹ This point is explored by McAuley pp 52-61.

⁶⁰ McAuley p 61.

2.53 There is considerable debate in both the medical and legal literature about the condition of ASPD. Under the civil law personality disorder is specifically mentioned as part of the definition of mental disorder.⁶¹ The Millan Committee recommended that the definition of mental disorder in the new Mental Health Act should continue to specify personality disorders as a separate category of mental disorder.⁶² Part of its reasoning was that persons with these types of disorder should not be excluded from the ambit of powers and duties of the Mental Welfare Commission and local authorities, but the Committee also recommended that the provisions of a new statute on compulsory measures of care should also apply to persons with a personality disorder.⁶³ However the concern of the civil law on mental health is quite different from that of our own project. The Millan Committee was considering personality disorders in general, whereas our present concern is with one type of such disorder.⁶⁴ The civil law is also not concerned with the criminal responsibility which is a key consideration in the insanity defence. Indeed the Millan Committee stated that it did not wish the civil law mental health legislation to be used "for the social control of undesirable or criminal behaviour in the absence of mental disorder."⁶⁵

2.54 We are also conscious of the fact that psychopathy or ASPD is excluded from the scope of the insanity defence in many legal systems. For example the American Law Institute Model Penal Code contains a provision that the "terms 'mental disease or mental defect' do not include an abnormality of mind manifested only by repeated criminal or otherwise antisocial conduct."⁶⁶ In some systems the exclusion of personality disorders from the insanity defence has been brought about by common law development.⁶⁷ The Butler Committee in its proposals for the reform of the insanity defence recommended a similar approach in English law.⁶⁸

2.55 We take the view that there are formidable problems in allowing ASPD to be included as part of the insanity defence. It may well be that a person with ASPD would not in any case come within the scope of the new test we have proposed above because the condition would not be diagnosed as a mental disorder. But there is a more fundamental objection to allowing an insanity defence to cover a person with ASPD, namely that this condition does not impact on the person's appreciation of his criminal conduct. ASPD does not have the effect that the person's reasons for acting as he did are in any way 'abnormal' or 'crazy' or 'disordered'. Rather ASPD has the effect that because of the psychological make-up of the accused he has difficulties, which are not shared by the ordinary person, in complying with the requirements of the law. But such difficulties do not remove the person in question completely from responsibility for his actions. He fully appreciates what he is doing. Earlier we presented our approach to the insanity defence as involving (i) the

⁶¹ 1984 Act s 1 (as amended).

⁶² Millan Report paras 4.75-4.93.

⁶³ Millan Report paras 4.94-4.113. The Committee did recognise that the compulsory care provisions would not in practice apply to many cases of persons with personality disorder either because they would not be diagnosed as suffering from a mental disorder or would not meet the specific criteria for compulsory measures.

⁶⁴ The range of different conditions which fall under the general label of personality disorder was recognised by the Millan Committee: "There are various sub-categories of personality disorder. Some, such as borderline personality disorder, are close to accepted forms of mental illness. These may involve bizarre and self-destructive behaviour and significant distress to the sufferer. Others, particularly anti-social personality disorder, have been criticised as being diagnosed largely through anti-social behaviour, and so could be seen as simply describing violent or dangerous people, rather than mental disorder." (Millan Report para 4.77.)

⁶⁵ Millan Report para 4.121.

⁶⁶ Section 4.01(2).

⁶⁷ See the decision of the High Court of Australia in *Willgoss v The Queen* (1960) 105 CLR 295.

⁶⁸ Butler Report para 18.30.

presence of a mental disorder which (ii) has a particular type of connecting link with the accused criminal conduct, namely the accused's appreciation of his conduct. (iii) Accordingly if there is no volitional element in the definition of insanity it is unlikely that the condition of ASPD would be understood as falling within its terms. However we take the view that even if there were to be a volitional 'prong' to the defence, ASPD should still be expressly excluded. To justify the inclusion of a volitional element as part of the insanity defence, there must be a mental disorder which has the effect that the accused *completely* lacked capacity to control his conduct. If the accused could have controlled his conduct at the time but did not do so, he is hardly relieved from responsibility, even if he was suffering from a condition which made it difficult for him to refrain from acting as he did. Any such condition might be an extenuating circumstance but not an excusing one. But ASPD does not have the effect that a person cannot control his conduct. Rather its effect is to make it more difficult, but not impossible, for the person concerned to behave in a way that he knows is correct.⁶⁹

2.56 Accordingly we believe that it is unlikely that ASPD would fall within the scope of the proposed new test for insanity, even if that test incorporated a volitional element. However to put the matter beyond all doubt it would be preferable for ASPD to be excluded specifically from the scope of the defence.

2.57 We propose that:

8. **The condition of anti-social personality disorder should be excluded from the definition of the defence of mental disorder.**

Definition of the defence of mental disorder

2.58 We present now drafts of a definition of the defence which would replace the existing one of insanity. We would remind consultees that these drafts have not been prepared by Parliamentary Counsel. Rather their purpose is to give a broad indication of how the various elements of a new test, as discussed in the preceding paragraphs, might appear. We are not at this point concerned with the acceptability (or otherwise) of the constituent elements of the defence but with the question whether these elements can be stated in a form which would be of assistance to the various 'users' of the test (such as expert witnesses or jurors). We present the definitions in different versions some of which contain only the 'cognitive' aspects of the defence,⁷⁰ and some of which contain a volitional element. We would welcome the views of consultees of the following proposed definition:

9. **The definition of mental disorder as a defence should be:**

Test with cognitive element only

- A. **"No person shall be convicted of an offence if at the time of acting or omitting to act he or she was, by reason of mental disorder, unable to appreciate the nature of the conduct forming the basis of the charge."**

⁶⁹ We consider whether the condition of anti-social personality disorder should come within the scope of the plea of diminished responsibility at paras 3.22-3.30.

⁷⁰ At para 2.45 we pointed out that our aim was to avoid the test being read in the narrow sense in which the M'Naghten Rules have been interpreted in some legal systems. This point should be borne in mind when considering the use of M'Naghten-like terms in the definition.

- B. "No person shall be convicted of an offence if at the time of acting or omitting to act he or she was, by reason of mental disorder, unable to appreciate the wrongfulness of the conduct forming the basis of the charge."
- C. "No person shall be convicted of an offence if at the time of acting or omitting to act he or she was, by reason of mental disorder, unable to appreciate that he or she ought not so to act or omit to act."
- D. "No person shall be convicted of an offence if at the time of acting or omitting to act he or she was, by reason of mental disorder, unable to appreciate the nature of the conduct forming the basis of the charge or the wrongfulness of that conduct."
- E. "No person shall be convicted of an offence if at the time of acting or omitting to act he or she was, by reason of mental disorder, unable to appreciate the nature of the conduct forming the basis of the charge or that he or she ought not so to act or omit to act."

Test with volitional element

- F. "No person shall be convicted of an offence if at the time of acting or omitting to act he or she, by reason of mental disorder, was unable to appreciate [*cognitive elements as above...*] or was unable to conform his or her actions to the requirements of the law."

Exclusion of anti-social personality disorder

- G. "(1) [*Tests as above*]
 (2) The term 'mental disorder' referred to in (1) above does not include a personality disorder which is characterised solely by criminal or anti-social conduct."

ECHR implications

2.59 We now consider whether our proposals for the reform of the definition of the defence of mental disorder are compatible with the requirements of the European Convention on Human Rights. Article 5(1) provides for a general right to liberty and security of a person and states that no one "shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law." One of the specified cases is in paragraph (e) of that article which provides for "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants." The leading decision of the European Court of Human Rights on this provision is *Winterwerp v The Netherlands*,⁷¹ where the Court in discussing the expression 'person of unsound mind' said:⁷²

⁷¹ (1979) 2 EHRR 387.

⁷² Para 37.

"This term is not one that can be given a definitive interpretation: as was pointed out by the Commission, the Government and the applicant, it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitudes to mental illness change, in particular so that a greater understanding of the problems of mental patients is becoming more widespread."

2.60 The Court also noted that the 'lawful detention' of such persons required that "no one may be confined as 'a person of unsound mind' in the absence of medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation."⁷³

2.61 In the present context these provisions are significant for it has been suggested that their effect in English law is to render the M'Naghten Rules, which provide the test for the insanity defence, incompatible with the Convention.⁷⁴ This approach is based on the premise that a finding of insanity as a defence does not act as a complete acquittal but allows the court or (in the case of murder) compels the court to order the detention of the accused under mental health legislation. However such a disposal is inconsistent with the provisions of article 5 of the Convention and in particular with the *Winterwerp* criteria (that there must be (i) a mental condition *at the time of the disposal*, (ii) established by medical evidence, which (iii) requires compulsory detention). The M'Naghten Rules do not necessarily fulfil these criteria, as they are concerned with insanity at the time of the offence rather than at the time of disposal, and use a specialised definition of disease of the mind which does not coincide with the approach of medical science. Thus, it is argued, there can be no guarantee that the Convention requirements are met by the application of the M'Naghten Rules in any particular case. A similar argument could be made in respect of Scots law. Where a person is acquitted on grounds of insanity at the time of his act, his disposal is governed by section 57 of the 1995 Act. Where the offence charged against him was murder the court must make a hospital order with restriction without limit of time. In the case of other charges the court has the power to make such an order as well as various other orders which involve the detention of the accused.⁷⁵

2.62 However it is far from obvious that a breach of the Convention is the result of the test used to establish insanity. If anything any breach is brought about by the provisions which deal with the disposal consequences of the defence. Article 5(1)(e) and the *Winterwerp* decision are not concerned with insanity as an issue of criminal responsibility but about limits on the power of the state to detain people on the basis of their mental disorder. But the part of the law which deals with the possible detention of persons who are insane in the sense of the criminal law is the 1995 Act, not the test for what constitutes insanity. On this view the Convention has no bearing on the tests for insanity (M'Naghten Rules or the Scottish test or whatever the test may be). Rather the Convention deals with the law on the powers of court to deal with such persons. It follows, as far as the Convention is concerned, that the test for the defence can be drawn up widely or narrowly and can take into account a whole range of policy considerations. The crucial point for the Convention arises only after the test has been established and the court moves onto the separate stage of disposal.

⁷³ Para 39.

⁷⁴ P J Sutherland and C A Gearty, "Insanity and the European Court of Human Rights" [1992] Crim L Rev 418; Estella Baker, "Human Rights, M'Naghten and the 1991 Act" [1994] Crim L Rev 84; R D Mackay and C A Gearty, "On being Insane in Jersey – the case of Attorney General v Jason Prior" [2001] Crim L Rev 560; A Ashworth, *Principles of Criminal Law* (3rd edn) (Oxford, 1999) pp 215-217.

⁷⁵ See Appendix A.

2.63 It should also be noted that by virtue of section 57(4) of the 1995 Act a court cannot make an order for the detention of an insane accused unless satisfied on the evidence of two medical practitioners (at least one of whom must be a mental health specialist) that the grounds for detention under the 1984 Act apply at the time of making the order. These grounds require the presence of a mental disorder for which detention is necessary. Further, the court cannot make such an order unless, having regard to all the circumstances (including the nature of the offence and the character and antecedents of the offender, and to other available methods of dealing with him), that order is the most suitable method of disposing of the case.⁷⁶ In other words any medical evidence (or the lack of such evidence) used in establishing the insanity defence has no direct bearing on any order for detention which the court may subsequently make.

2.64 An exception arises in the case of murder. Where a person has been found insane as a defence or a plea in bar of trial on a charge of murder, the court has no discretion but must make an order for detention subject to special restrictions and without limit of time.⁷⁷ This provision would probably not withstand challenge under the Convention and for that reason the Scottish Executive have introduced measures to amend the law.⁷⁸

2.65 To sum up this part of our discussion, our view is that our proposals for the reform of the test for insanity as a defence do not involve any breach of the requirements of the Convention.

Procedure for recording verdict of mental disorder as a defence

2.66 In proceedings on indictment a verdict of insanity at the time of the offence, even if subject to the agreement of the defence and the Crown, must be returned by a jury.⁷⁹ In other words there is no procedure whereby the Crown can accept a tender of a plea of insanity at the time which enables the court to proceed to record that plea or for the court to return the verdict on its own account. The result is that unnecessary steps in court procedure can occur. For example in *HM Advocate v McAskill*,⁸⁰ the accused lodged a special defence of insanity to various charges of assault and culpable homicide. Prior to the trial the Crown and the defence had entered into a joint minute of agreement, under section 256 of the 1995 Act,⁸¹ in which it was agreed (i) that the accused had committed the acts alleged against him, (ii) that he was insane at the time, and (iii) that he was presently sane and fit to plead. However the effect of section 54(6) was that at the trial diet a jury had to be empanelled so that the joint minute could be read to the jury who were then directed to return a verdict of insanity at the time of the offence.

2.67 We consider the situation we have described to be unsatisfactory. The role of the jury in this sort of case is purely formal. Furthermore in the case of insanity in bar of trial the issue can be decided by the court alone, even in solemn proceedings.⁸² We can identify

⁷⁶ 1995 Act s 58(1).

⁷⁷ 1995 Act s 57(3).

⁷⁸ Criminal Justice (Scotland) Bill s 2 (introduced 26 March 2002). See Appendix B.

⁷⁹ 1995 Act s 54(6).

⁸⁰ High Court of Justiciary, Edinburgh, 28 October 1999.

⁸¹ Where a joint minute has been signed by both parties and lodged with the court all agreed facts are deemed to have been duly proved (s 256(3)).

⁸² 1995 Act s 54(1). See *Stewart v HM Advocate* 1997 JC 183, where the court envisages that unless the question of unfitness to plead arises during the course of a trial the proper mode of disposing of the plea is by a preliminary hearing before a judge sitting alone.

no policy objective which is served by the rule that requires a verdict of insanity at the time to be returned by a jury where the evidence has been agreed by the defence and the Crown.

2.68 Accordingly we propose that:

10. **It should be possible for the court in solemn proceedings to return a verdict that the accused is acquitted by reason of mental disorder at the time of the act or omission charged, where the evidence to that effect has been agreed by the Crown and those acting for the accused.**

Part 3 Diminished responsibility

Background to the present law

3.1 The law on diminished responsibility developed from the practice of juries in the 19th century of returning verdicts of guilty with a recommendation as to mercy or mitigation of sentence to reflect any extenuating circumstances.¹ In a series of decisions, given mainly by Lord Deas, there developed a doctrine that various types of mental weakness of the accused could have the effect of reducing what would otherwise be a conviction for murder (which attracted the death penalty) to one for culpable homicide (where the courts had greater discretion in sentencing). During the course of the 20th century the courts began to adopt a restricted approach to the sorts of mental condition which could give rise to diminished responsibility. The key decision was *HM Advocate v Savage*,² in which Lord Alness addressed the jury as follows:

"It is very difficult to it put in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility – in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied ... that there must be some form of mental disease."

3.2 This statement became the authoritative version of the test for diminished responsibility. Furthermore the various factors mentioned by Lord Alness were regarded as being cumulative in nature. The effect was that the test became difficult to satisfy, and the courts adopted the position that the scope of the plea was not to be further widened.³

3.3 A major change to the judicial approach to diminished responsibility was indicated in the recent Full Bench decision in *Galbraith v HM Advocate*.⁴ In that case the Court held that the formula in *Savage* was not to be read in a narrow sense, and it was not necessary that all the criteria in that formula had to be present. Furthermore although the plea had to be based on some form of mental abnormality, that condition need not be one bordering on insanity. Instead the court ruled that diminished responsibility required the existence of an abnormality of mind which had the effect that the accused's ability to determine or control his actings was substantially impaired. However the Court excluded from the scope of the plea (i) any condition brought on by the consumption of drink or drugs and (ii) psychopathic personality disorder.

¹ For a full account of the development of diminished responsibility, see Gordon pp 458-467. (This edition of Gordon's book was published before the decision in *HM Advocate v Galbraith* 2002 JC 1.)

² 1923 JC 49 at 51.

³ *Carraher v HM Advocate* 1946 JC 108, where the court held that the plea was not available to a person suffering from psychopathic personality.

⁴ 2002 JC 1.

Option of no change

3.4 The immediate background to our receiving our terms of reference was the Millan Report, which was published before the decision in *Galbraith*.⁵ The Millan Committee noted that the existing test for diminished responsibility was said to be obscure and difficult to apply in individual cases. A particular point made was that there was considerable difficulty, especially for psychiatrists, when addressing issues of insanity and that these problems were just as great in relation to states of mind 'bordering on' insanity. This part of the definition of diminished responsibility has been removed by the *Galbraith* decision. It should also be noted that on the whole the *Galbraith* decision has been welcomed. At the seminar which we held in April 2002,⁶ the psychiatrists present expressed general satisfaction with *Galbraith* and indicated that the new law was, from their own perspective, workable. Accordingly a preliminary point arises whether we should be proposing any change to the law at all and whether it is preferable to leave any further modification of the doctrine solely to the courts.

3.5 In order to appreciate the issues involved it is necessary to consider what the Court in *Galbraith* decided. In essence the decision reformulated the criteria for establishing the plea but at the same time expressly excluded two conditions (intoxication and psychopathic personality disorder) from its scope. The following positive criteria were laid down for establishing the plea of diminished responsibility:

- (1) the plea must be based on a condition of the accused at the time of the unlawful killing;
- (2) the condition must be an abnormality of mind which had the effect that the accused's ability to determine or control his conduct was substantially impaired;
- (3) however, the condition need not be one 'bordering' on insanity;
- (4) the condition must be one which can be spoken to by experts in the appropriate science.

3.6 It is important to realise the extent to which the *Galbraith* reformulation has widened the scope of the plea. In *Galbraith* the Court gave a long list of non-exhaustive examples of conditions which would qualify as diminished responsibility:⁷

"We can add other, more specific, examples. Even in the present state of medical knowledge, it is plain ... that many organic disorders in some way affect the operation of the brain and so lead to some mental abnormality which could be of relevance in the present context. For instance, head injuries and brain tumours may affect the patient's consciousness and lead to personality changes of various kinds. Strokes may result in patients becoming more aggressive. Disorders of the thyroid are known to have mental manifestations, while hypoglycaemia is well known to affect people's behaviour, sometimes making them disinhibited and aggressive. Many drugs administered for therapeutic purposes are known to have side-effects of various kinds: some will induce drowsiness or confusion, while others will lead to

⁵ Millan Report paras 29.51-29.61.

⁶ See para 1.4.

⁷ 2002 JC at pp 20-21.

euphoria and still others to depression. The mental abnormalities caused in these different ways could well impair an accused's ability to determine or control his acts and omissions, just as much as the conditions springing from the causes specified in the earlier caselaw. But a lay person, at least, might hesitate to say that someone suffering from one of these conditions was suffering from a 'mental disease' or 'mental illness'. This confirms that these terms may indeed be too narrow to describe the range of possible conditions in respect of which the doctrine of diminished responsibility may apply. ... While we have chosen to highlight conditions brought on by organic disorders, there are, of course, other recognised conditions, such as schizophrenia and certain kinds of depression, which do not appear - in the light of medical knowledge today, at least - to have an organic cause but which result in mental abnormality of a kind that may be relevant for the purposes of diminished responsibility.

If the law has accepted that external causes, such as 'strokes of the sun' and head injuries, may give rise to a relevant mental abnormality for the purpose of diminished responsibility, we can see no reason in principle why a recognised abnormality caused by sexual or other abuse inflicted on the accused might not also be relevant for the same purpose. We stress, of course, that the abuse must result in some recognised mental abnormality. Subject to that important qualification, we again see no reason in principle why evidence of such a condition could not be given by those, such as psychologists, having the appropriate professional expertise, even though they were not medically qualified."

3.7 The immediate question is whether, in the light of this recent decision of a Full Court, we should make any proposals for reform of the law on diminished responsibility. We take the view that we should do so. The *Galbraith* decision does not purport to deal with every issue involved with the plea. In *Galbraith* the Court itself stated that its views were tentative and might have to be modified or refined in later cases.⁸ Moreover the exclusion of intoxication and psychopathic personality from the scope of the plea has proved controversial and requires further consideration. On the other hand the positive elements of the new test have been generally accepted, and there seems to be little call for further consideration of that core part of the decision. Accordingly we shall proceed by asking in the first place whether in general terms the test for diminished responsibility should be a matter of common law formulation and left to the courts for further development. However no matter the ultimate resolution of that question, there are various specific issues which we go on to consider with a view to making proposals for statutory modifications of the general law, whether that law is based on statute or the common law.

A statutory statement of the test for diminished responsibility?

3.8 We set out first of all arguments in favour of a statutory statement of the plea of diminished responsibility. It may also be noted that all other legal systems which have introduced a defence or plea of diminished responsibility have done so by statute.⁹ Accordingly there is nothing inherently impossible or impractical in providing a statutory definition once it is clear what policies and values the plea is intended to reflect. In Scotland these policies and values are contained in the *Galbraith* decision, and are easy to identify. However *Galbraith* fails to bring out, at least explicitly, the very rationale of the plea, which is that the accused's condition at the time of the offence is of such an extenuating nature as to

⁸ 2002 JC at 16. In somewhat unusual circumstances the court in *Galbraith* did not have the benefit of full submissions on what the reformed test should be: 2002 JC at 10.

⁹ See Appendix E.

justify the 'reduction' of the accused's conviction from the crime of murder to one of culpable homicide. This general rationale could be written into a statutory formulation, which could be of value in those cases where the Crown does not accept the plea and the issue is left for the jury to decide. Indeed a statutory statement of the test would make clear the respective roles of expert witnesses (who are to present technical evidence on the accused's condition) and of the jury (who are to decide whether the accused's condition amounts to a sufficient sort of extenuating circumstance for purposes of the plea). Furthermore a statutory definition does not prevent judicial activism and creativity where that is required for legal development. Indeed the English courts have adopted a fairly purposive approach to interpreting the terms of section 2 of the Homicide Act 1957, provisions whose drafting have been the subject of criticism.¹⁰ There may in a practical sense be little difference between a test set out in statute and one in a judicial decision. The statement of Lord Alness in *HM Advocate v Savage* tended to be treated in subsequent cases as something very like a statutory definition until being radically re-interpreted in *Galbraith*.

3.9 On the other hand, there are factors pointing to leaving the law on diminished responsibility to the common law. Our current project is not part of a codification of the criminal law. We are not therefore concerned with broad issues of principle about the respective merits of law reform by statute as opposed to judicial decision. What we are asking is whether, as the law on diminished responsibility now stands, there is anything to be gained by re-stating it in statute. Nor are we suggesting that there can never be any alteration of that law by statutory intervention. Indeed we suggest below various matters on which it might be useful to change or clarify the law of diminished responsibility, both in terms of its content and its source, even if it is decided that the *Galbraith* test should remain broadly as it now is.

3.10 We have not reached a concluded view on this issue. Instead we are asking consultees for their views on whether the test for the plea of diminished responsibility, as set out in the *Galbraith* decision, should be left to further judicial development or whether it should be reformulated in statute. In considering this question it might be useful for consultees to consider our proposed definition of the plea which we set out later.¹¹

3.11 Accordingly we ask the following question:

11. **Subject to potential reforms as proposed below, should the test for the plea of diminished responsibility be (a) left to the common law or (b) contained in statute?**

Option of abolition

3.12 There seems little basis for a proposal that the plea of diminished responsibility should be abolished. It is important to appreciate that whatever conceptual difficulties attend the phrase 'diminished responsibility' the plea has an important practical function. As Gordon notes:¹² "...the doctrine can be seen for what it is, a special case of the rule that

¹⁰ See for example Butler Report para 19.5; Glanville Williams, *Textbook of Criminal Law* (2nd edn) (London, 1983) p 686.

¹¹ Para 3.38.

¹² Gordon p 452. The Butler Committee noted (para 19.8): "The case for the plea of diminished responsibility now rests largely on the fact that precisely because there is a fixed sentence of life imprisonment for murder there

personal factors mitigate sentence." Abolition of diminished responsibility would mean that there would be no mechanism for giving effect to such mitigating conditions in convictions in murder cases but there would be for convictions for all other criminal charges.

3.13 Abolition might be a plausible option if the mandatory sentence for murder was itself to be abolished.¹³ This was the preferred option of the Butler Committee.¹⁴ However our terms of reference do not allow us to consider this wider and controversial question. Nonetheless it should be borne in mind that if the mandatory sentence for murder were to be abolished, then the case for a special doctrine of diminished responsibility would be considerably weaker.¹⁵

3.14 We propose that:

12. **The plea of diminished responsibility should be retained as a special instance of a plea in mitigation in cases of murder. Where successful its effect should be that the accused is liable to be convicted of culpable homicide rather than of murder.**

Name of the plea

3.15 The term 'diminished responsibility' has itself attracted criticism. In *Kirkwood v HM Advocate*,¹⁶ Lord Justice General Normand said: "[T]he defence of impaired responsibility is somewhat inconsistent with the basic doctrine of our criminal law that a man, if sane, is responsible for his acts, and, if not sane, is not responsible."

3.16 However if diminished responsibility is regarded as only a special means of giving effect to mitigating circumstances, this objection is merely a semantic and not a conceptual one. It may be noted that the term is used in English law¹⁷ and other legal systems¹⁸ and it is not easy to identify an alternative expression which would avoid these difficulties.

3.17 We have not reached any concluded view on the name to be given to the plea and accordingly we ask the question:

should be some way for the court to avoid it in cases where there is evidence of mental disorder. Diminished responsibility is a special device for, as it were, untying the hands of the judge in murder cases."

¹³ Section 1 of the Crime and Punishment (Scotland) Act 1997 (c 48) provides for the introduction of other mandatory sentences into Scots law, but this provision has not been brought into effect. It is to be repealed by s 18(3) of the Criminal Justice (Scotland) Bill.

¹⁴ Butler Report para 19.14. A similar recommendation was made in 1989 by a select committee of the House of Lords (House of Lords, *Report of the Select Committee on Murder and Life Imprisonment* (HL 78, 1988-89) paras 83 and 118).

¹⁵ Conversely the case for retaining or widening the plea would be strengthened if other forms of mandatory sentence were to be introduced. It might be noted that the MacLean Committee consulted on the possibility that mandatory life sentences should be extended to other offences. The overwhelming response was against this proposal and the Committee agreed that the mandatory sentence should be confined to murder cases (MacLean Report paras 4.14-4.23).

¹⁶ 1939 JC 36 at p 40.

¹⁷ The side note to section 2 of the Homicide Act 1957 (c 11) refers to 'Persons suffering from diminished responsibility'. The Butler Committee proposed that if its preferred option (abolition of both the mandatory sentence for murder and diminished responsibility) were not accepted a revised version of section 2 should be introduced. It did not suggest any change to the name of the plea, though its various recommendations referred to the term in "scare" quotes. (Butler Report p 251.)

¹⁸ See *Criminal Code Act 1899* (Queensland), s 304A, *Crimes Act 1900* (New South Wales), s 23A, *Crimes Act 1900* (Australian Capital Territory), s 14, *Criminal Code Act 1983* (Northern Territory), s 37.

13. On the assumption that the plea of diminished responsibility is to be retained, should the name of the plea be changed and, if so, what should its name be?

The intoxication exclusion

3.18 In *Galbraith* the Court held that diminished responsibility could not be based on any mental abnormality (short of actual insanity) brought on by the accused himself taking drink or drugs (or sniffing glue).¹⁹ The court gave no reason for this exclusion other than such a rule had been laid down in *Brennan v HM Advocate*.²⁰ While we do not wish to question the appropriateness of this exclusion we are concerned that its scope might be misunderstood. A crucial distinction is to be drawn between states of intoxication (sometimes referred to as 'acute', as opposed to 'chronic', intoxication) where the person happens to have consumed drink or drugs, and intoxication which is part of some underlying condition, such as alcoholism or drug dependency. We see no reason why persons in the latter category should be denied the plea of diminished responsibility. Indeed one of the first cases in the development of the doctrine of diminished responsibility concerned a man who suffered from alcoholism, which brought on occasional attacks of *delirium tremens*.²¹ On the face of it, conditions such as alcoholism or drug dependency would meet the various criteria for establishing the plea which the Court set out in the *Galbraith* decision. By contrast states of acute intoxication by themselves do not, as they are not symptomatic of any underlying condition. It is accordingly difficult to identify any reason why the court needed to make an explicit exclusion of intoxication (in the acute sense, ie in the absence of any underlying or background condition) for it does not fall within the range of the plea in any case.

3.19 Moreover the dictum in *Galbraith* may lead to confusion where an accused suffering from a state of alcohol or drug dependence was at the time of the unlawful killing in an intoxicated state.²² Much would depend on the facts and circumstances of each case whether the acute intoxication was brought on by the underlying condition so as to amount to an extenuating factor and thus bring diminished responsibility into play. However we see no reason in principle why the plea should not be available in appropriate cases. We consider that any possible confusion about the interplay between diminished responsibility and intoxication could, if necessary, be clarified by statute.

3.20 To summarise our thoughts on this point: we consider that it is already the present law that the fact that a person is in a state of acute intoxication at the time of an unlawful killing does not by itself constitute diminished responsibility. However a state of acute intoxication by itself does not prevent diminished responsibility from being established if the intoxication was the consequence of some underlying condition which meets the general criteria for the plea. We consider that the position we have just described represents the

¹⁹ 2002 JC at 17.

²⁰ 1977 JC 38 at 46: "In the law of Scotland a person who voluntarily and deliberately consumes known intoxicants, including drink and drugs, of whatever quantity, for their intoxicating effects, whether these effects are fully foreseen or not, cannot rely on the resulting intoxication as the foundation of a special defence of insanity at the time nor, indeed, can he plead diminished responsibility." The last dictum was obiter (*Brennan* was concerned with the defences of insanity and intoxication). See also *R v Fenton* (1975) 61 Cr App Rep 261; *R v Egan* [1992] 4 All ER 470.

²¹ *Alex Dingwall* (1867) 5 Irv 466. Other earlier cases of diminished responsibility which involved alcoholism include *Andrew Granger* (1878) 4 Couper 86; *HM Advocate v Graham* (1906) 5 Adam 212.

²² Cf *R v Tandy* [1989] 1 WLR 350. For useful discussion, see G R Sullivan, "Intoxicants and Diminished Responsibility" [1994] Crim L Rev 156.

current state of the law but we are not entirely sure that the existing authorities are always understood in this sense.

3.21 Accordingly we ask:

14. Does the law on the relationship between intoxication and diminished responsibility require clarification by statutory statement?

The psychopathy exclusion

3.22 In *Galbraith* the Court made a further exclusion from the scope of diminished responsibility, namely the condition referred to as psychopathic personality disorder. Given the new extent of the plea as formulated in that case, this disorder would appear to fall within its scope in the absence of an explicit exclusion. This is especially so in respect of the court's statement that the effect of the accused's condition must have been one "which substantially impaired the ability of the accused, as compared with a normal person, to determine or control his acts."²³ In fact the *Galbraith* case did not involve any condition akin to personality disorder, and no submissions on this point were made to the Court. It is therefore important to examine the reasons which the court gave for removing psychopathic personality disorder from the ambit of the plea. In making this exclusion in *Galbraith* the court stated that it was following the decision in *Carraher v HM Advocate*.²⁴ In that case an accused claimed to be of diminished responsibility on the basis that he suffered from psychopathic personality and had consumed a considerable amount of alcohol at the time of the killing. The Court rejected this claim:²⁵

"The proposition argued to us was that a man who cannot be found to be suffering from any diminished responsibility must nevertheless, if there is opinion evidence that he suffers from what is called psychopathic personality, be entitled to be treated as not having a normal responsibility for his actions, if by taking alcohol he brings about a condition of diminished responsibility. That is plainly inconsistent with the decision in *Kennedy*.²⁶ I am of opinion that the plea of diminished responsibility, which, as was said in *Kirkwood's* case,²⁷ is anomalous in our law, should not be extended or given wider scope than has hitherto been accorded to it in the decisions."

3.23 It should be noted that the basis of the decision in *Carraher* is far from clear, as the case was concerned as much with the question of intoxication as with psychopathic personality. After the decision several writers noted that it was a special case decided in particular circumstances and would not necessarily prevent the courts from taking a different approach in later cases.²⁸ In the later case of *HM Advocate v Williamson*,²⁹ the court rejected the plea where evidence suggested that the accused had an abnormal personality or a personality disorder but it was not clear whether he could be said to have a mental

²³ 2002 JC at 21 (emphasis added).

²⁴ 1946 JC 108.

²⁵ 1946 JC at 118.

²⁶ 1944 JC 171.

²⁷ 1939 JC 36.

²⁸ The background to the *Carraher* case is discussed in Gordon pp 467-470. At the seminar we held as part of our project (see para 1.4) one of the psychiatrists present stated that *Carraher* would not be seen as suffering from an anti-social personality disorder in today's terms.

²⁹ 1994 JC 149.

disorder. However the Court reached this decision not by following *Carraher* (which was not mentioned in its judgment) but by reference to the *Savage* criteria.³⁰

3.24 It should be noted that in *Galbraith* no other reason, apart from following *Carraher*, was given for the continued exclusion of psychopathic personality disorder from the plea of diminished responsibility. Yet the *Carraher* case was premised on the basis that the scope of the plea should be narrowed, whereas in *Galbraith* the Court was at pains to point out that it wished to widen it beyond the narrow basis of the *Savage* criteria. Nor was any reference made in this context to the *Williamson* decision but again that case was concerned with the application of the *Savage* formula as read in its traditional, and restricted, sense. Indeed in *Galbraith* the Court seemed to recognise that such disorders would fall within the scope of the new definition in the absence of an explicit exclusion.³¹

"...since the court is fixing the boundaries of a legal doctrine, there is no inconsistency between the psychiatrists' recognition of psychopathic personality disorder and the decision of the court that the law does not recognise such a disorder as a basis for diminished responsibility. That is a matter of legal policy for the court, and ultimately for the legislature, and not for psychiatrists or psychologists. Similarly, there may be other disorders recognised by such experts which, for sound policy reasons, the court will exclude from the ambit of diminished responsibility."

3.25 The difficulty with this approach is that the court did not articulate what these policy reasons might be. In *Carraher* the Court gave two reasons for excluding psychopathic personality. The first was the goal of reducing the scope of the plea of diminished responsibility but, as already noted, this goal is inconsistent with the approach taken in *Galbraith*. The second policy in *Carraher* was that the weight to be accorded to psychiatric evidence in cases of psychopathy might result in 'trial by psychiatry'.³² With respect, it is difficult to see what force can be given to such an argument. Psychiatric evidence is a necessary part of the proof in any criminal trial where some form of mental abnormality is in issue. This is certainly true of cases involving the insanity defence and it remains true of diminished responsibility on the *Galbraith* criteria. Why should psychiatric evidence about psychopathic disorder be any different from any other psychiatric evidence? Furthermore the court in *Galbraith* excluded only *psychopathic* personality disorder, not all forms of personality disorder.³³

3.26 It may be that there is a fear that since psychiatric science is divided about its approach to psychopathic disorder, this sort of evidence might confuse juries. But again this situation holds true of any issue on which there can be a conflict of expert testimony. In any case the debate within psychiatry about psychopathy is not whether such a condition exists but whether or not it should be classified as a type of mental disorder. In contrast to the

³⁰ In referring to the evidence of a psychiatric expert witness the court said: "However, when Dr Clark's evidence is properly understood, what is most significant is that he was satisfied that there was no mental or psychotic illness nor was there any mental disorder. His view was that the appellant suffered from a serious personality disorder as evidenced by gross immaturity and seriously irresponsible conduct. A condition of that description is not an adequate basis for contending that the test in *HM Advocate v Savage* has been met." (1994 JC at 153.)

³¹ 2002 JC at 17.

³² "The Court has a duty to see that trial by judge and jury according to law is not subordinated to medical theories." (1946 JC at 117.)

³³ At the seminar (see para 1.4) it was claimed that pleas of diminished responsibility have been accepted in Scotland on the basis of the accused having a schizoid personality disorder.

insanity defence, a condition can be the basis of a plea of diminished responsibility which is not a mental disorder in a narrow sense.³⁴

3.27 The idea that there are clear and overwhelming reasons of public policy for excluding psychopathic personality disorder from the scope of the plea is rendered less likely by the fact that in English law this condition has been recognised as an appropriate basis for the plea for over 40 years,³⁵ and as far as we can identify there have been no calls to remove psychopathy from the scope of the plea. Furthermore we consider that there are good reasons in principle for allowing this form of personality disorder to fall within the definition of diminished responsibility. A key feature of psychopathic personality disorder is that the person concerned lacks the normal moral and social constraints on his capacity to control his actions. As this condition is not based on a clear form of mental disorder, it does not serve as a ground for relieving the person from criminal responsibility.³⁶ However although a person's personality will not excuse his conduct, it is proper to make allowance for his personality in assessing the full extent to which he is to blame for his conduct.³⁷ Making allowance for conditions which do not provide full excuses is the very rationale of the plea of diminished responsibility.

3.28 It may be that what drives moves to exclude psychopathic personality disorder from diminished responsibility is a perceived public fear that an accused who raises the plea somehow 'gets off' or will get a 'light' sentence. It is always necessary to bear in mind that diminished responsibility is a mitigating circumstance and not a complete defence. In other words anyone who falls within the scope of diminished responsibility will by definition be convicted of culpable homicide and be liable to a sentence by the court. The important point is that the sentence will be one which can be tailored to the circumstances of the individual case. The outcome need not be a 'light' sentence. In some cases the court may decide that a life sentence is the appropriate form of disposal. Note should also be made of the provisions in the Criminal Justice (Scotland) Bill, which seek to implement the recommendations of the MacLean Committee.³⁸ These provisions introduce a new sentence (an 'order for lifelong restriction') based on assessment of the risk which the offender if set at liberty will pose to the public at large. They apply inter alia where a person has been convicted of a violent offence (other than murder), which would include culpable homicide. If these provisions are enacted, where a person has diminished responsibility because of a personality disorder *and* is assessed as high risk, the outcome would be that he would not necessarily get a lighter sentence as compared with that for a conviction for murder.

3.29 We fully accept that there may be unease in removing the psychopathic personality disorder exclusion but we are unable to identify a reasoned basis for this concern. We have already pointed out that allowing personality disorders as a form of diminished responsibility would not entail any 'trial by experts.' Nor would the effect be that every accused who raised a plea on this basis would get a light sentence. Further, the experience of English law since the 1960s demonstrates that public confidence in the criminal justice

³⁴ This is particularly the case in respect of the part of the *Galbraith* criteria which refers to the effect of an abnormality of mind on the ability of the accused to control his actions, which seems apt to allow evidence concerning psychopathic disorder.

³⁵ *R v Byrne* [1960] 2 QB 396 (a case of sexual psychopathy); *DPP v Terry* [1961] 2 QB 314.

³⁶ See paras 2.52-2.57.

³⁷ This is a point brought out by McAuley pp 85-90.

³⁸ Section 1 of the Bill seeks to amend the 1995 Act to add a new section 210F dealing with orders for lifelong restriction.

system would not necessarily weaken as a result. However we appreciate that there may be reasons which we have not identified for continuing to exclude this form of personality disorder from the scope of the plea.

3.30 We therefore ask the following questions:

15. **Are there good reasons for continuing to exclude the condition of anti-social personality disorder from the plea of diminished responsibility? If so, what are they?**

Diminished responsibility in crimes other than murder

3.31 It is not entirely clear whether diminished responsibility extends to crimes other than murder. There are many older non-murder cases where mental abnormality short of insanity was taken into account when the court sentenced an offender.³⁹ However these cases seem more to illustrate the practice of allowing mitigating circumstances to reflect the severity of sentence rather than the presence of a doctrine of diminished responsibility in non-murder cases. The practice is also reflected in modern decisions.⁴⁰

3.32 There is one case where the judge directed the jury on a charge of attempted murder that if they found diminished responsibility had been established their verdict would be 'guilty of assault under deletion of attempted murder on the ground of diminished responsibility.'⁴¹ However this was a case in which a defence of insanity had been raised and accordingly evidence as to the accused's mental state was before the jury. Furthermore no reference was made in that case to dicta which suggest that diminished responsibility as a plea is restricted to murder cases. In *HM Advocate v Cunningham*,⁴² Lord Justice General Clyde said: "Any mental or pathological condition short of insanity – any question of diminished responsibility owing to any cause, which does not involve insanity – is relevant only to the question of mitigating circumstances and sentence. An argument was presented to us in regard to diminished responsibility. But diminished responsibility is a plea applicable to murder. It is not open in the case of a lesser crime such as culpable homicide or of a contravention of section 1 of the Road Traffic Act, 1960." In *Brennan v HM Advocate*,⁴³ Lord Justice General Emslie stated that "proof of the mere effects of such intoxication, whatever their degree, cannot in our law support a defence of diminished responsibility – a defence available only where the charge is murder and which, if it is established, can result only in the return of a verdict of guilt of the lesser crime of culpable homicide." This issue was one which the Court in *Galbraith* expressly declined to consider.⁴⁴

3.33 We can identify two different arguments for extending the scope of the plea beyond murder cases. The first is that if diminished responsibility were to apply to all crimes, or some crimes other than murder, this would allow the court to take full account of the

³⁹ See eg *John McLean* (1876) 3 Couper 334 (a case of housebreaking); *John Fothergill Wilson* (1877) 3 Couper 429 (fire-raising); *John Small* (1880) 4 Couper 388 (robbery); *Alan Fergusson* (1894) 1 Adam 517 (fire-raising).

⁴⁰ As in *Andrews v HM Advocate* 1994 SCCR 190 (indecent assault) and *Arthur v HM Advocate* 1994 SCCR 621 (assault). In the rubric in the SCCR report of both cases the expression 'diminished responsibility' is used. However at no point in either case are counsel or judges reported as using this expression, referring instead to a 'mental condition short of insanity' (1994 SCCR at 624).

⁴¹ *HM Advocate v Blake* 1986 SLT 661 at 663.

⁴² 1963 JC 80 at 84.

⁴³ 1977 JC 38 at 47.

⁴⁴ 2002 JC at 18.

accused's condition by giving a lesser sentence. However, this approach only really makes sense in legal systems which have fixed tariffs for specific offences or guideline sentencing principles which set out a going-rate for particular offences. In such systems it is important to be precise about the offence of which an accused is convicted. However, in Scotland there are no sentencing tariffs and the High Court has on the whole refrained from pronouncing sentencing guidelines.⁴⁵ Where in a non-murder case there are mitigating circumstances which in a murder case would constitute diminished responsibility, these can be the subject of a plea in mitigation and be reflected in the actual sentence handed down by the court.

3.34 A second argument about extending diminished responsibility to other crimes is that it provides a means for public acknowledgement that the accused, though guilty, is not deserving of full (or any) punishment. The use of diminished responsibility reflects the level of stigma and blameworthiness appropriate for that offender. However, this approach involves a general difficulty of there being greater and lesser gradations of the same offence which parallel the murder/culpable homicide distinction. It also requires that the evidence for diminished responsibility to be brought out during the trial itself, which might not always be in the interests of the accused. We are not convinced by these arguments for widening the application of the plea beyond murder cases.

3.35 We propose that:

16. **The plea of diminished responsibility should not be extended beyond cases of murder.**

ECHR implications

3.36 We take the view that there are no ECHR implications involved in formulating a definition of diminished responsibility. We argued earlier that article 5 has no application to any test for the defence of insanity but does apply to any 'mental health' disposals which might follow on from it. We consider that the same conclusion applies, *a fortiori*, to the plea of diminished responsibility which has the effect of giving the court the option of using the whole range of sentencing powers available to it. We consider later whether the existing law on burden of proof in relation to diminished responsibility is compatible with the Convention's requirements.⁴⁶

Definition of diminished responsibility

3.37 In this section we are proceeding on the basis that there should be a statutory definition of the test of diminished responsibility. What we are seeking to do is essentially to re-state the test as set out in the *Galbraith* decision. However we also believe that a statutory re-formulation should express the underlying rationale of the plea, namely that the particular condition of the accused at the time of the unlawful killing was such as to amount to an extenuating or mitigating circumstance, with the effect that the accused should be convicted of culpable homicide rather than murder. We have also drafted a provision on intoxication and diminished responsibility in the event that it is considered that clarification of the law on this point is required.

⁴⁵ Sections 118(7) and 189(7) of the 1995 Act gives the High Court the power to pronounce sentencing guidelines which a court in later cases would be required to consider when passing sentence (1995 Act s 197). However, the High Court has shown no indication that it will exercise this power.

⁴⁶ Paras 5.35-5.37.

3.38 We accordingly invite comments on the following definition of the plea of diminished responsibility:

17. The definition of the plea of diminished responsibility should be:

"(1) A person who but for this section would be convicted of murder shall not be so convicted if it is established on medical or other evidence that his or her condition at the time of the commission of the offence amounted to such extenuating circumstances as to justify a conviction for culpable homicide instead of a conviction of murder.

(2) The condition referred to in (1) above is an unsoundness of mind which substantially impaired his or her ability to understand events, or to determine or control his or her acts.

(3) The fact that a person was intoxicated at the time of the commission of the offence does not by itself constitute, or prove that he or she was suffering from, a condition referred to in (1) above but such a fact does not by itself prevent such a condition being established."

Part 4 Insanity as a plea in bar of trial

Background to the existing law

4.1 The law on insanity as a plea in bar of trial is relatively undeveloped in Scots law and there are few reported decisions.¹ Two cases in particular are regarded as defining the nature and scope of the plea. In *HM Advocate v Brown*,² Lord Justice General Dunedin directed the jury in the following terms:

"It means insanity which prevents a man from doing what a truly sane man would do and is entitled to do – maintain in sober sanity his plea of innocence, and instruct those who defend him as a truly sane man would do."

4.2 The leading case is *HM Advocate v Wilson*,³ a case involving an accused who was a deaf-mute. The trial judge directed the jury as follows:

"Now, what exactly is meant by saying that a man is unfit to plead? The ordinary and common case, of course, is the case of a man who suffers from insanity, that is to say, from mental alienation of some kind which prevents him from giving the instructions which a sane man would give for his defence, or from following the evidence as a sane man would follow it, and instructing his counsel as the case goes along upon any point that arises. Now, no medical man says, and no medical man has ever said, that this accused is insane in that sense. His reason is not alienated, but he may be insane [sc in bar of trial] ... although his reason is not alienated, if his condition be such that he is unable either from mental defect or physical defect, or a combination of these, to tell his counsel what his defence is and instruct him so that he can appear and defend him; or if, again, his condition of mind and body is such that he does not understand the proceedings which are going on when he is brought into Court upon his trial, and he cannot intelligibly follow what it is all about."

4.3 Prior to 1995 the finding that a person was insane in bar of trial precluded any consideration of whether he had committed the acts at the basis of the charge against him. However under sections 54-56 of the 1995 Act where a court upholds a plea of insanity in bar of trial it must order that a procedure known as an examination of facts is to be held. Under this procedure the court must acquit the accused unless (i) it is proved beyond reasonable doubt that the accused did the act (or made the omission) constituting the offence charged against him, and (ii) it is proved on the balance of probabilities that there are no grounds for acquitting him.⁴

¹ A possible explanation is that the court will usually accept medical evidence about the accused's condition with the result that few cases require any direction to a jury (Gordon p 448). We discuss the evidential aspects of the plea in bar at paras 4.24-4.26.

² (1907) 5 Adam 312 at 343.

³ 1942 JC 75 at 79.

⁴ In *R v Antoine* [2001] 1 AC 340 the House of Lords in interpreting similar (but not identical) provisions in English law held that whether the accused had done the act or made the omission in question involved proof only of the actus reus but not of the mens rea of the offence. It also held on an interpretation of section 2 of the English Homicide Act 1957 that a defence of diminished responsibility could not be raised in the proceedings to determine the facts but that defences such as mistake, accident, self-defence or involuntariness could be established on the basis of objective evidence. The Scottish provisions are drafted differently. They require an

4.4 It is also worth noting that where the court makes a finding that a person who is insane in bar of trial did the act constituting the offence and that there are no grounds for acquitting him, the court has the same powers of disposal as in a case of insanity as a defence.⁵

Option of no change

4.5 As there appears to be little criticism of the existing law on insanity as a plea in bar, we must consider whether any reform is required. The Millan Committee identified two particular points, neither of which was concerned with the substance of the law. The first was the use of the term 'insanity', the second was the nature of the medical evidence which could be used to establish the plea. We consider that these points do give rise to issues which should be addressed as part of the current project.⁶ Moreover we also believe that there are weaknesses in the substance of the existing law. A major problem is the uncertainty about the exact basis and scope of the plea, features which no doubt reflect the sparse case law on the topic. In particular the law on insanity as a plea in bar has been traditionally influenced by the law on insanity as a defence. However as we pointed out earlier, the plea in bar involves issues about the appropriateness of using the criminal process against certain types of person.⁷ By contrast the defence gives rise to questions of criminal responsibility. Accordingly we are of the view that there should be a re-statement of the general nature of the plea in bar to give an explicit expression of its rationale and purpose and to make clear what is, and is not, covered by it.

4.6 We propose that:

- 18. The test for the plea of 'insanity' in bar of trial should be formulated in statute.**

Option of abolition

4.7 For the sake of completeness we would point out that there is no realistic basis for proposing that the plea in bar should be abolished. As we explain below, the plea gives effect to some fundamental principles of the criminal process and is, moreover, required by article 6 of the European Convention on Human Rights on the right to a fair trial.⁸

Name of the plea

4.8 In our discussion of insanity as a defence, we proposed that the word 'insanity' should no longer be used as the name of the defence.⁹ There we noted that the term was no longer used in medical science and further that it had pejorative and stigmatising overtones.

acquittal after an examination of facts unless it is established on the balance of probabilities that there are no grounds for acquitting the accused (1995 Act s 55(1)(b)). As diminished responsibility does not lead to an acquittal it would not arise under this provision but other defences, including insanity at the time (see s 55(4)), would. It may also be noted that in *R v M* [2002] 1 WLR 824, the Court of Appeal in England held that as the corresponding English provisions did not result in a conviction they did not fall within the scope of article 6 of the ECHR.

⁵ For discussion, see paras 1.6-1.10. The same outcome arises where after an examination of facts the accused is acquitted on the ground of insanity at the time of the offence.

⁶ See paras 4.8-4.12; 4.24-4.26.

⁷ Para 1.12.

⁸ Paras 4.27-4.33.

⁹ Paras 2.19-2.21.

We consider that these points apply *a fortiori* to the name of the plea in bar which applies to a range of conditions that do not coincide with those covered by 'insanity' as a defence. Indeed the plea in bar can extend to physical conditions (such as being a deaf-mute). Accordingly the plea in bar should have a different name from the defence.

4.9 In many legal systems, including England, the plea is known as 'unfitness to plead.' This term has attracted criticism, not least for its focus on pleading to an indictment, which reflects a particular aspect of the historical development of English law.¹⁰ The Butler Committee raised a further objection that the term is inaccurate and misleading but did not specify any basis for this view.¹¹ The Committee recommended that the plea should be re-named 'disability in relation to the trial', an expression which has been adopted in some legal systems.¹² We consider that the term 'disability' is appropriate for the plea in bar in Scots law. It is an accurate description of the general nature of the plea, which we consider shortly. We also believe it avoids the stigmatising overtones of the current name.

4.10 We considered whether we should propose the use of the word 'incapacity' as the label for the plea in bar. We are mindful of the use of this concept in the Adults with Incapacity (Scotland) Act 2000 where the cognate term 'incapable' is defined as meaning:¹³

"incapable of –(a) acting; or (b) making decisions; or (c) communicating decisions; or (d) understanding decisions; or (e) retaining the memory of decisions,

as mentioned in any provisions of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise)."

4.11 However the 2000 Act is concerned with issues of civil law arising from the intervention in the affairs of persons who are incapable in this sense. These issues are not the same as, nor even analogous to, those concerning the appropriateness of using the criminal process against certain categories of people. Our view is that confusion would result if the same term was used to cover these different legal problems.¹⁴

4.12 Accordingly, we propose that:

19. 'Insanity' as a plea in bar of trial should be re-named 'disability in bar of trial.'

Nature of the test

4.13 Many legal systems, including Scots law, define the plea in bar in relation to various tasks or skills in respect of which the accused's suitability to stand trial is measured.

¹⁰ Refusal to plead had the consequence that a trial could not proceed. English law on unfitness to plead developed from a distinction between persons who were mute of malice and those mute by the visitation of God: see N Walker, *Crime and Insanity in England, volume 1: The Historical Perspective* (Edinburgh, 1968) p 220.

¹¹ Butler Report para 10.2.

¹² For example in New Zealand (Criminal Justice Act 1985 s 108).

¹³ asp 4 S 1(6).

¹⁴ This objection would be even stronger if the criminal law were to use the term 'incapacity' but to give it a different definition from that in the 2000 Act. The result would be that the same word would be used to connote two distinct concepts.

However we do not believe that a suitable definition should consist solely in a list of these types of skills. If the list is intended to be exhaustive, how are all the appropriate skills to be identified? If the list is non-exhaustive, what criteria are to be used in assessing the relevance of matters not on it? Instead we favour a reformulation of the law which makes explicit the general principle or principles of the plea in bar, followed by a non-exhaustive list of tasks or skills which illustrate the general rationale and provide instances of the how the plea can be established.

4.14 We believe that the general rationale of the plea in bar in the existing law is that because of a person's mental or physical condition a criminal trial is an inappropriate process for that person.¹⁵ The fundamental ideas are that an accused person should understand and participate in the trial in some meaningful way. In the USA the Supreme Court has formulated the test in terms not simply of the accused's mere cognitive skills (for example in instructing his legal advisers) but also by reference to a full understanding and appreciation of the process in which he is involved. In *Dusky v United States*,¹⁶ the Court stated that:

"the test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as a factual understanding of the proceedings against him."

4.15 Professor Richard Bonnie has developed this test in terms of the 'adjudicative competence' of the accused.¹⁷ At the seminar which we held as part of this project,¹⁸ Professor Bonnie reformulated this test as follows:

"A defendant is competent to proceed to [adjudication] [trial] if he has a rational understanding of the charge against him, the nature and purpose of the proceedings and the adversary process, is able to assist counsel in his defense, and has the capacity for rational decision-making in relation to the defense and disposition of the case."

4.16 Other legal systems have also sought to make more explicit the general context of the accused's cognitive skills which are at the basis of the plea. In English law one of the criteria is expressed in terms of the accused's ability to "understand and reply rationally to the indictment,"¹⁹ and in New Zealand, a Bill has been introduced to amend the test by adding the criterion "to make an informed decision whether or not to give evidence."²⁰ However in our view these provisions do not bring out with sufficient clarity that the factors of rational response or informed decision-making are descriptions of the general nature of the plea rather than merely constituent elements of it.

4.17 We have considered how best to formulate the general rationale of the plea in bar of trial. Case law under the European Convention on Human Rights suggests a general

¹⁵ "A plea in bar of trial, as distinguished from a plea or special defence in exculpation, or in mitigation of the gravity of a charge, is a claim that the accused is not a fit object for trial – at least in the meantime." (*HM Advocate v Russell* 1946 JC 37 per Lord Justice Clerk Cooper at 46.)

¹⁶ 362 US 402, 406 (1960).

¹⁷ See especially Richard J Bonnie, "The Competence of Criminal Defendants: Beyond *Dusky* and *Drope*" (1993) 47 University of Miami Law Review 539.

¹⁸ Para 1.4.

¹⁹ *R v Friend* [1997] 1 WLR 1433.

²⁰ Criminal Justice Amendment (No 7) Bill clause 16.

principle in terms of the accused's 'effective participation' in the criminal process,²¹ and we favour using this idea as the core of the reformulated test in Scots law. The idea of *effective* participation captures the notion of full or 'rational' appreciation by the accused of the proceedings, which the phrase 'adjudicative competence' expresses. We consider that it is preferable to use the formulation derived from ECHR cases, as it will allow Scots law more easily to adapt to developments in the Convention jurisprudence.

4.18 Our approach then is to propose a test in terms of a general principle of effective participation followed by a non-exhaustive list of factors which the court can have regard to in applying the test in particular cases. However it is also necessary to make clear the sorts of condition which are, and are not, within the scope of the plea. Our concern arises from the following consideration. It may well be that many people who are subjected to a criminal trial find the process puzzling and perplexing and cannot be said to 'understand' it. There is therefore a danger that the plea could be over-inclusive and extend to people who cannot understand proceedings because of poor education or social background. Nor is it sufficient to argue that the accused's legal adviser can always be deemed to act as the proxy or 'interpreter' for him because the general principle of the plea requires that an accused can fully and meaningfully communicate with his lawyer. Instead we believe that any problem about over-inclusiveness can be solved by the requirement that what prevents the accused's effective participation in the proceedings is a clinically-recognised condition which has the effect that the accused lacks the capacity for such participation. Such a condition would clearly include mental illness but would also extend to physical conditions which prevented the accused from engaging in any proper process of communication.²² The test would also extend to cases of severe learning disability which had a similar effect on the person concerned. Applying this approach has the effect that a plea of disability in bar of trial would not be available simply on the basis of poor education or inadequate socialisation (which do not necessarily result in lack of capacity to participate) or being a child.²³

4.19 We propose that:

20. **The test for the plea of disability in bar of trial should be that as a consequence of the accused's mental or physical condition at the time of the trial he or she lacks the capacity to participate effectively in the proceedings against him or her. The test would specify a non-exhaustive list of activities which would constitute such lack of capacity.**

Exclusion of amnesia

4.20 In *Russell v HM Advocate*²⁴ the Court held that a plea of insanity in bar of trial could not be founded where the accused at the time of trial suffered from a condition of amnesia in respect of the actings with which she was charged. The Court noted that in *HM Advocate v Brown*,²⁵ Lord Dunedin had referred to a person as within the plea in bar who could not

²¹ Paras 4.27-4.33.

²² As might arise in some cases of deaf-mutism.

²³ The situation would be different if the child also suffered from a condition which affected his capacity to understand and participate in proceedings. See eg *HM Advocate v S* (High Court of Justiciary, 9 July 1999), a case involving the prosecution of a boy aged 13 who had learning disabilities. For discussion, see C Connelly and C McDiarmid, "Children, Mental Impairment and the Plea in Bar of Trial" (2000) 5 SLPQ 157.

²⁴ 1946 JC 37.

²⁵ (1907) 5 Adam 312 at 344. Lord Dunedin also referred to a person who "can tell his counsel, with the certainty of not being deceived, what he was really doing at the time."

"without obliteration of memory as to what has happened in his life, give a true history of the circumstances of his life at the time the supposed crime was committed." However in *Russell* the Court pointed out that in *Brown* the accused had been found to be insane 'in the full sense' and for largely policy reasons the dicta were distinguished:²⁶

"I do not consider that they were intended to be understood, or are capable of being understood, literally as applying to the case of a sane prisoner – in this case one whom all the medical witnesses adduced have pronounced to be completely sane and normal – for so to read them would come near to paralysing the administration of criminal justice. On any such reading the plea in bar would require to be sustained in most cases in which the accused had been under the influence of drink, or had sustained a head injury, at the time of the crime, or even if he was naturally a person of unreliable memory."

4.21 *Russell* was followed in *Hughes v HM Advocate*,²⁷ where the Court stated that problems with memory of events at the time of the offence did not prevent an accused from understanding the proceedings against him or from giving rational and comprehensible instructions to his legal representatives. The law on amnesia as a basis for unfitnes to plead is the same in England.²⁸

4.22 We are inclined to agree with the approach taken by the Court in *Russell*. The general rationale of the plea in bar is that the accused person should be capable of engaging in effective participation in the proceedings against him. By itself amnesia of events at the time of the offence does not prevent such participation, even if it may impose limitations on possible defences which the accused can raise (eg provocation or self-defence).²⁹ However we wish to make clear that the situation is different in respect of clinically-recognised conditions of amnesia or memory lapses which the accused experiences at the time of the trial itself (as, for example, with the onset of Alzheimer's disease). Such conditions would clearly prevent the accused from a proper appreciation of the proceedings and should therefore fall within the scope of the plea in bar.

4.23 Accordingly, we propose that:

21. **The fact that the accused experiences loss of memory of the events forming the basis of the charge against him or her does not by itself constitute a disability in bar of trial.**

Evidential requirements

4.24 Section 54(1) of the 1995 Act requires the court to make various orders where it is satisfied, on the written or oral evidence of two medical practitioners, that the accused is insane in bar of trial. This provision is to be read along with section 61(1) of the Act to the effect that at least one of the medical practitioners must have been approved under the Mental Health (Scotland) Act 1984 as having special experience in the diagnosis or treatment

²⁶ 1946 JC at 47.

²⁷ High Court of Justiciary, 11 April 2001, noted at 2001 GWD 15-572.

²⁸ *R v Podola* [1960] 1 QB 325. In that case a point was advanced as part of the submissions for the accused to the effect that a plea based on lapse of memory could be recognised without having to extend it to a person who was so drunk at the time of the offence that he could not remember what happened. This was based on a distinction in English common law between a condition brought about by a person's own act and a condition by the visitation of God ([1960] 1 QB at 341). The court did not expressly deal with this submission in its judgment.

²⁹ Or indeed the defence of insanity at the time: see *HM Advocate v Kidd* 1960 JC 61 at 64, 69 and 73.

of mental disorder. One effect of these provisions is that evidence from other experts, such as clinical psychologists, would not be a sufficient basis for establishing insanity in bar of trial. In *McLachlan v Brown*,³⁰ the Court pointed out that the statutory provisions did not prevent the medical experts from referring to or incorporating into their own testimony, reports or evidence given by psychologists or other specialists.

4.25 We find the requirements of section 54(1), as read with section 61(1), puzzling. The 1995 Act does not deal with the mode in which insanity as a defence can be proved, yet this is an area in which psychiatric expertise is almost inevitably called for. By contrast, even under the existing law the plea in bar deals with conditions other than mental illness. Furthermore, the other contexts in which the section 61(1) definition applies all concern the making of hospital orders,³¹ again a matter which clearly requires psychiatric evidence. It also appears that no provision on mode of proof of the plea in bar was contained in the statutory provisions from which section 54(1) derives.³² We can identify no clear policy reason for the introduction of this requirement into the 1995 Act.³³ On the contrary its effect is to duplicate evidence which is relevant to the determination of the plea in bar in cases which deal with conditions outwith the expertise of psychiatrists. In our view there should be no restrictions, other than the usual basis of relevancy, on the type of evidence which can be admitted to establish disability in bar of trial.

4.26 Accordingly, we propose that:

22. The expression 'on the written or oral evidence of two medical practitioners' in section 54(1) of the Criminal Procedure (Scotland) Act 1995 should be repealed.

ECHR implications

4.27 There are several ways in which the plea in bar of trial could interact with the provisions of the European Convention on Human Rights. One is in terms of article 5(1) which provides for a right to freedom of the person but allows for deprivation of the liberty of persons of unsound mind in certain strictly defined circumstances. We considered this provision earlier in our discussion of insanity as a defence.³⁴ There we reached the conclusion that article 5(1) was more concerned with the law relating to the powers of courts to deal with persons who fell within the scope of the defence than with the definition of the defence itself. We believe that the same conclusion applies in respect of the test for insanity as a plea in bar of trial.

4.28 Of more relevance to the plea in bar are the provisions of article 6 of the Convention. Article 6(1) provides for the right to a fair hearing in respect of a criminal charge and

³⁰ 1997 JC 222. See also *Stewart v HM Advocate* 1997 JC 183 (where evidence consisted of a joint minute by two medical practitioners which agreed the terms of a report by a clinical psychologist who had examined the accused).

³¹ Namely under sections 53(1), 54(1) and 58(1) of the 1995 Act.

³² Criminal Procedure (Scotland) Act 1975 (c 21), s 174(1); Mental Health (Scotland) Act 1960 (c 61), s 63(1); Lunacy (Scotland) Act 1857 (c 71), s 87.

³³ Sir Gerald Gordon has speculated that the reference to evidence of medical practitioners in section 54(1) may have resulted from a drafting error: see commentary on *Stewart v HM Advocate* 1997 SCCR at 339.

³⁴ See paras 2.59-2.65.

article 6(3) sets out various minimum rights for anyone charged with a criminal offence.³⁵ It is clear that article 6 has implications for our proposals for reform of the plea in bar of trial. There are three relevant decisions to consider. The first is *IH v Federal Republic of Germany*,³⁶ a ruling by the European Commission of Human Rights on the admissibility of the complaint. The applicant was convicted at a criminal trial in 1984, and sentenced at a trial in 1987. Some findings of fact from the 1984 trial were held to be binding in the 1987 trial. In the 1987 trial the applicant submitted that since 1970 he had been suffering from Pickwick syndrome, a condition which causes black-outs and difficulties in concentrating on and judging complex situations. An expert report stated his fitness to stand trial had been limited but not permanently excluded. The applicant complained that due to his illness he was not in a position to follow a significant amount of his first trial in 1984, and this situation was not remedied by the second trial as the subsequent court considered itself bound by the prior findings on which his conviction was based, and therefore he did not receive a fair trial. The Commission found that this part of the application was manifestly ill founded, as there was nothing to show that the defence was prevented from submitting all facts and arguments it considered relevant and that the applicant was denied a fair hearing. The Commission referred to the fact that the applicant's capacity to attend hearings was limited but not excluded and this was duly taken into account by the trial court; and that the applicant had not alleged that he had not been able to instruct his defence counsel in order to be defended in an adequate manner.

4.29 Of more assistance is a decision of the European Court of Human Rights in *Stanford v United Kingdom*.³⁷ The applicant complained that he had not received a fair trial as he was unable to hear the proceedings. The applicant had a hearing problem. The applicant had heard the indictment when it was read out and entered a plea of not guilty. The applicant's solicitor and his counsel were aware of the fact that the applicant could not hear the proceedings. However no complaint was made to the trial court by the applicant or his lawyers concerning his claim about his hearing difficulties. In dealing with this application the Court interpreted the underlying principle of article 6 in terms of the right of an accused to participate effectively in a criminal trial. However it held that there had been no violation of article 6 in this case. The Court noted that the applicant's lawyers chose for tactical reasons to remain silent about the applicant's difficulties and there was nothing to indicate that the applicant disagreed with this decision.³⁸ The applicant had been represented by a solicitor and counsel who had no difficulty in following the proceedings and who would have had every opportunity to discuss with the applicant any points that arose out of the evidence which did not already appear in the witness statements.

4.30 The principle in *Stanford* was further developed in the joint cases of *T v United Kingdom* and *V v United Kingdom*.³⁹ T and V were 11 years old when they were tried for murder and abduction. Their trial was conducted with the formality of an adult criminal trial but procedures were modified to a certain extent in view of the defendants' ages. Part

³⁵ These rights include the right of an accused to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; and the right to have free assistance of an interpreter if he cannot understand or speak the language used in court.

³⁶ Application No 14453/88, decided 12 February 1990.

³⁷ *Stanford v United Kingdom* (Series A282-A).

³⁸ In the Court's view a State could not normally be held responsible for the actions or decisions of an accused's lawyer unless a failure by the lawyer to provide effective representation is manifest or sufficiently brought to the attention of the State authorities.

³⁹ (2000) 30 EHRR 121.

of the applicants' complaint was they had been denied a fair trial in breach of article 6, as they could not participate effectively in the conduct of their case. In relation to T there had been evidence at his trial from one child psychiatrist that his ability to instruct his lawyers and testify adequately in his own defence was limited because of post-traumatic stress disorder. The psychiatrist considered that the applicant was fit to stand trial but had concerns as to how the post-traumatic stress symptoms affected his understanding of the procedures. In his memorial to the Court T stated that he had not been able to follow the proceedings or take decisions in his own best interests. In relation to V a doctor found that he also showed post-traumatic effects and extreme distress and guilt and found it very difficult to think or talk about the events in question. The doctor also found V showed evidence of immaturity, behaving in many ways like a younger child emotionally. Following an interview after the trial the same doctor commented that V did not have the capacity to take in fully the process of the trial except for the major actions for which he was responsible, and that it was very doubtful given his immaturity whether he had an understanding of the situation such that he could give an informed instruction to his lawyer to act on his behalf.

4.31 The Court (with one judge dissenting) held that the applicants were unable to participate effectively in the criminal proceedings against them and were denied a fair hearing guaranteed under article 6(1). The Court stated that it was not sufficient for the purposes of article 6(1) that the applicants had been represented by skilled and experienced lawyers, and distinguished *Stanford*. The Court considered it was highly unlikely that the applicants would have felt sufficiently uninhibited to have consulted with their lawyers during the trial or that given their immaturity and their disturbed emotional states they would have been capable outside the courtroom of co-operating with their lawyers and giving them information for the purposes of their defence.

4.32 We would summarise the Convention case law as follows. The general principle is whether the accused could effectively participate in the trial. An accused may be unable to participate effectively in a trial if he is unable to consult with his lawyers during the trial, or co-operate with his lawyers and give them information for the purpose of conducting the defence. An accused is able to participate effectively in his trial if his capacity is limited but duly taken into account in the proceedings, or if he is able to instruct his defence counsel in order to be defended in an adequate manner and have all relevant facts and arguments submitted, or if the accused is unable to follow the proceedings but his lawyers are able to discuss with him any points that arise.

4.33 In our view our proposals for reform of the plea in bar of trial are compatible with the provisions of article 6 of the Convention as interpreted by the European Court of Human Rights. We propose that the definition should express its general rationale in terms of the capacity of the accused to participate effectively in the proceedings against him, a principle which is derived directly from the Convention case law. Furthermore in its judgments the European Court of Human Rights has referred to various tasks or skills by which effective participation is to be assessed. In our proposed definition we have included all of these skills as part of the non-exhaustive list of activities which constitute disability in bar of trial.

Definition of disability as a plea in bar of trial

4.34 We propose the following definition of disability as a plea in bar of trial to take account of the proposals set out above:

23. The definition of disability in bar of trial should be:

"(1) A person has a disability in bar of trial where as a result of a mental or physical condition at the time of the trial he or she lacks the capacity to participate effectively in the proceedings.

(2) In determining whether a person has a disability referred to in (1) above the court shall have regard to:

- (a) the ability of the accused to understand the nature of the charge;
- (b) the ability of the accused to understand the requirement to tender a plea to the charge or to understand the effect of a plea;
- (c) the ability of the accused to understand the purpose of a trial;
- (d) the ability of the accused to follow the course of a trial;
- (e) the ability of the accused to understand the substantial effect of evidence that may be given against him or her;
- (f) the ability of the accused to communicate adequately with his or her legal representative;
- (g) the ability of the accused to give adequate instructions to his or her legal representative;
- (h) any other relevant factor."

Part 5 Burden and standard of proof

5.1 In this Part we deal with issues relating to the burden and standard of proof in respect of insanity (both as a defence and as a plea in bar of trial) and diminished responsibility. These ideas are fundamental parts of the law of evidence and some preliminary remarks may be of use before dealing with their application in the context of the current project.

5.2 A standard of proof is concerned with the level of evidence required before a court or tribunal can be satisfied that a fact has been proved. In Scots law there are two standards of proof, namely proof beyond reasonable doubt and proof on the balance of probabilities.¹ This distinction is sometimes characterised as a difference between the 'criminal' and the 'civil' standards of proof but, as will be seen shortly, this approach is misleading. Although in criminal cases the Crown has to establish all the crucial facts beyond reasonable doubt, in some instances where the accused has to prove a fact, the relevant standard is the balance of probabilities.² In practice the meaning of the different standards of proof has presented few problems.

5.3 By contrast the situation in respect of a burden (or onus) of proof is more complicated.³ Prior to the 1960s the courts and commentators used the expression burden of proof without attending to two different ways of understanding this concept. In what is now the accepted terminology a distinction is drawn between a *legal* and an *evidential* burden of proof. Where a party bears a legal burden of proof, he is said to run the risk of non-persuasion in that if he fails to meet the appropriate standard of proof required for any particular fact, he will lose on that issue. By contrast, where a party bears only an evidential burden there must be enough evidence on a particular issue to entitle the court or tribunal to treat the issue as one that it must consider. It will be noted that an evidential burden can be discharged even though the party concerned has not adduced sufficient evidence to satisfy either one of the standards of proof. It is enough that there is some evidence before the court in support of the issue in question. Another important point is that where a party bears only an evidential burden and adduces sufficient evidence to discharge it, the other party will bear the legal burden of disproving the fact in question.

A. Insanity as a defence

5.4 *Insanity raised by the accused.* We consider first the situation where insanity as a defence has been raised by the accused.

5.5 **The position at common law.** The current law on burden and standard of proof of insanity as a defence is that the accused bears a legal burden of proof which has to be discharged by proof of insanity on the balance of probabilities.⁴ The cases in the main justify

¹ See *Stair Memorial Encyclopaedia*, vol 10, paras 758-760.

² There are also instances where the standard of proof in a civil case is that of beyond reasonable doubt (eg breach of interdict).

³ *Stair Memorial Encyclopaedia*, vol 10, paras 747-748.

⁴ *HM Advocate v Mitchell* 1951 JC 53; *HM Advocate v Kidd* 1960 JC 61 at 68-69.

this position by reference to a 'presumption' of sanity, which has the effect that the burden of proving insanity is on the party averring it.⁵ These authorities do not pick up the point that such an onus of proof need not be a legal one (to use the more modern terminology) but could be merely an evidential burden.

5.6 An important case is the decision in *Lambie v HM Advocate*.⁶ This case concerned the proper direction to be given to a jury where the accused has raised a special defence. The Court held that the only purpose of a special defence was to give fair notice to the Crown that the accused wished to raise the matters involved in the special defence in question. Once that notice had been given, the issue for the jury was the same as in any criminal case, viz had the Crown established the guilt of the accused beyond reasonable doubt. However the Court also made clear that its observations did not apply to the special defence of insanity at the time of the offence "since it is quite clear that there is in such a case an onus upon the defence to establish it since proof of insanity is required before the presumption of sanity can be displaced."⁷

5.7 In *Lambie* no justification was offered for imposing a legal burden on the accused to prove the defence of insanity apart from the invocation of a presumption of sanity. But this argument is circular since the presumption is only another way of stating on whom the onus lies. Compare insanity with the defence of automatism. Most people do not act in a state of automatism but the courts have not talked in terms of a 'presumption' of non-automatism. Indeed in *Ross v HM Advocate*,⁸ the Court ruled that in respect of the defence of automatism the burden of proof on the accused was an evidential one only. Similarly, any presumption of sanity is one of fact, which can be rebutted by evidence to the contrary. But this evidence could as easily be the result of a requirement of an evidential burden of proof. In other words the presumption of sanity by itself provides no reason why the accused should bear a legal, as opposed to an evidential, burden of proof.

5.8 In the *Ross* case, the Court advanced some views on the reason for the burden of proof in insanity cases. In these cases there had to be an express verdict of acquittal on the ground of insanity to bring into play the special disposal consequences laid down in section 174(3) of the Criminal Procedure (Scotland) Act 1975⁹ By contrast a defence such as automatism is a basis for an outright acquittal, where no express finding as to its basis has to be stated in the verdict. As Lord McCluskey put matters, in the ordinary case there is no presumption that the accused had the requisite mens rea at the material time. Evidence as to a state of automatism may throw doubt on the question of mens rea but since the Crown must prove the accused's mens rea in any case such evidence does not alter the nature of the burden on the Crown to establish the accused's guilt beyond reasonable doubt.

⁵ Dickson, *A Treatise on the Law of Evidence in Scotland* (3rd edn) (Edinburgh, 1887) paras 27 and 114. Note should be made of a passage in Hume (I, 43-44) that the onus of proving furiosity lies on the person claiming it, adding 'like any other defence.' Hume also considers cases where a person suffers from periodical disorder and whether it can be presumed that such a person is (or is not) furious now. However he reaches the general conclusion that there can be no hard and fast presumption and it is really a matter for the whole evidence in the case.

⁶ 1973 JC 53.

⁷ 1973 JC at 57.

⁸ 1991 JC 210.

⁹ See Lord Justice General Hope at 218 and Lord McCluskey at 226. Section 174(3) of the 1975 Act provided for the making of a compulsory hospital order. Much wider disposal powers for acquittal by reason of insanity are now provided for in the 1995 Act. See paras 1.6-1.10; Appendix A.

5.9 However it is far from clear that there is as radical a distinction between the defence of insanity and other defences (such as automatism) as these dicta would suggest. There are two points to note. The first is that there is no necessary or obvious connection between the burden of proof and the terms of the verdict for the insanity defence. A jury or court could not return a verdict in those special terms unless it was so satisfied on the basis of supporting evidence. But this scenario could as much arise where the Crown bore a legal burden of disproving insanity, as where the accused bore the legal burden of proving it. Where the verdict is one of not guilty, the question to be answered before the verdict is returned would still be: did the jury or court acquit the accused because of his insanity at the time?

5.10 Secondly, with all special defences and not just insanity, there will usually be a practical requirement for the defence to lead supporting evidence, but such a requirement does not entail that the burden on the accused is a legal as opposed to an evidential one. Although *Lambie* states that the only function of a special defence is that of giving advance notice to the Crown,¹⁰ it does not follow that there is no requirement in a practical sense for the accused to lead evidence in support of the defence. In other words, there remains an evidential burden on the accused. This position is clearly illustrated in relation to automatism. In *Sorley v HM Advocate*,¹¹ the Court held that in the absence of any evidence from the accused to support the necessary prerequisites of the defence of automatism, it was proper for a trial judge to direct the jury that it was not open to them to consider the defence. The Court pointed out that it was unlikely that the requirements of a foundation for the defence would be satisfied unless there was some supporting expert evidence, since the essence of the defence was a state of mind which had to be properly diagnosed. A similar point was made in *Ross* itself where Lord Weir stated that since "the state of mind of the accused is at the heart of the issue, it is to be expected that medical and possibly other scientific evidence will be required *just as it is in a case where the defence of insanity is raised*."¹²

5.11 **The impact of the ECHR.** There are clear implications for burden and standard of proof of insanity arising from the provisions of the European Convention on Human Rights. Article 6(2) states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The European Court has recognised that presumptions are subject to this fundamental guarantee:¹³

"Presumptions of fact or law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law.... Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

5.12 In an application to the European Commission of Human Rights,¹⁴ it was argued that a legal burden on the accused to prove insanity was in breach of article 6(2). The

¹⁰ Although not technically special defences, advance notice must also be given of the defences of automatism, coercion and consent as a defence to certain sexual offences: 1995 Act s 78(2) (as amended by the Sexual Offences (Procedure and Evidence)(Scotland) Act 2002 (asp 9)).

¹¹ 1992 JC 102.

¹² 1991 JC at 232 (emphasis added).

¹³ *Salabiaku v France* (1988) 13 EHRR 379, 388, para 28.

¹⁴ *H v United Kingdom*, Application 15923/89, decided 4 April 1990.

Commission found the application inadmissible. However it has been suggested that the Commission wrongly equated the nature of a legal burden with that of merely putting forward evidence of insanity.¹⁵ Of more direct guidance on the question of burden of proof is the decision of the House of Lords in *R v Lambert*.¹⁶ In that case the House was concerned with the problem of 'reverse burdens', that is where a statute, usually in the context of creating an offence,¹⁷ allows for a defence but places the burden of proving the defence on the accused. The House formulated a two-stage approach. The first stage is to enquire whether there is a clear social objective to be served in having any reverse onus provisions at all. Normally this objective would be measured by the nature of the mischief which the statutory offence sought to regulate.¹⁸ The second stage concerns the proportionality of the reverse onus provision in dealing with the mischief. On this second point Lord Steyn gave the following analysis:¹⁹

"Where there is objective justification for some inroad on the presumption of innocence the legislature has a choice. The first is to impose a legal burden of proof on the accused. If such a burden is created the matter in question must be taken as proved against the accused unless he satisfies the jury on a balance of probabilities to the contrary. ... The second is to impose an evidential burden only on the accused. If this technique is adopted the matter must be taken as proved against the accused unless there is sufficient evidence to raise an issue on the matter but, if there is sufficient evidence, then the prosecution have the burden of satisfying the jury as to the matter beyond doubt in the ordinary way. A transfer of a legal burden amounts to a far more drastic interference with the presumption of innocence than the creation of an evidential burden on the accused. The former requires the accused to establish his innocence. It necessarily involves the risk that, if the jury are faithful to the judge's direction, they may convict where the accused has not discharged the legal burden resting on him but left them unsure on the point. This risk is not present if only an evidential burden is created."

5.13 The majority of the House in *Lambert* took the view that in relation to the statute which they were considering a legal burden was a disproportionate way of achieving the statute's goals and that the provision on reverse onus should be read down, in terms of section 3 of the Human Rights Act 1998,²⁰ as referring only to an evidential burden. Their Lordships were in particular impressed by the argument that if the burden were a legal one an accused could still be found guilty where he adduced some evidence to support his defence but not enough to discharge the legal burden on him. The effect would be that he would be convicted despite there being doubt about his guilt.²¹ Especially in the speech of

¹⁵ T H Jones, "Insanity, Automatism and the Burden of Proof on the Accused" (1995) 111 LQR 475 at 490-491.

¹⁶ [2002] 2 AC 545.

¹⁷ Sometimes the provision on the burden of proving a defence can arise where statute itself creates one. Thus the plea of diminished responsibility was introduced into English law by the section 2 of the Homicide Act 1957. Section 2(2) provides that on "a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder."

¹⁸ For example the supply of controlled drugs in the *Lambert* case itself.

¹⁹ [2002] 2 AC 545 at 572.

²⁰ "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." (Human Rights Act 1998 s 3(1).)

²¹ [2002] 2 AC 545. See eg Lord Clyde at 609: "By imposing a persuasive burden on the accused it would be possible for an accused person to be convicted where the jury believed he might well be innocent but have not been persuaded that he probably did not know the nature of what he possessed. The jury may have a reasonable doubt as to his guilt in respect of his knowledge of the nature of what he possessed but still be required to convict. Looking to the potentially serious consequences of a conviction at least in respect of class A drugs it does not seem to me that such a burden is acceptable." See also Lord Slynn at 563 and Lord Steyn at 573-574. Lord Hope at 587-590 expressed his doubts about legal burdens of proof in more general terms. Lord Hutton at

Lord Hope, the House came close to the view that it would rarely, if ever, be proper to impose a legal, as opposed to an evidential, burden of proof on an accused person.²²

5.14 However the courts in England have also recognised that article 6(2) of the ECHR is not absolute and unqualified. Not every legal burden placed on the defence will be disproportionate, and it is therefore not inevitable that every such burden will give rise to a finding of incompatibility with article 6(2).²³

5.15 How would the burden of proving the defence of insanity fit into the Convention scheme as explained in the *Lambert* decision? As previously noted, at common law the accused bears a legal burden of proving insanity on the balance of probabilities. However none of the authorities on this point provides any convincing reason why the burden should be a legal rather than an evidential one. Insanity is the only defence for which the more stringent type of burden is required but it is difficult to find any principled reason in the common law cases why insanity is in this respect different from any other defence, such as coercion or automatism.

5.16 In terms of an ECHR analysis the starting point is to note the general justifying aim of the defence as giving effect to a basic principle of criminal responsibility, namely that it is inappropriate to impose a criminal conviction on a person who suffered from a mental disorder at the time of the offence. The potential mischief which the defence may involve is that there could be cases where the defence is upheld without there being a proper foundation for it, and as a consequence the accused receives the special insanity acquittal rather than a conviction. What is a proportionate response in dealing with this mischief as far as concerns the burden of proving the defence? In *Lambert*, the House of Lords made the point that if the accused in that case had to bear a legal burden of proof, then the effect could be that he would be convicted despite the existence of some evidence in favour of his defence. We believe that a similar point can be made about the insanity defence. If the accused adduces some evidence indicating the existence of some mental disorder at the time of the offence, the result could be that he would nonetheless be convicted if that evidence did not meet the standard of balance of probabilities. Yet in such a scenario the prosecution has not shown that the accused is an appropriate person to be found guilty of a criminal offence. Where the mental condition of the accused is in issue it accords with principle that the Crown should provide evidence that the accused is such an appropriate person by proving that he lacks the defence of insanity. In *Davis v United States*,²⁴ this point was put by the Supreme Court of the United States:

"How, then, upon principle or consistently with humanity, can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?"

625 considered that the burden in the Misuse of Drugs Act was appropriate and proportionate and as such did not violate article 6(2) of the European Convention on Human Rights.

²² The reading down of a statutory provision on burden of proof was adopted by the Court of Appeal in England in *R v Carass* [2002] 1 WLR 1714. In *Renton & Brown* (para 24-01) the comment on the *Lambert* case is that the "decision has been accepted in practice by the Crown, and would appear to be applicable to other statutory defences in similar terms."

²³ A point made by Lord Hope both in *R v DPP, ex parte Kebilene* [2000] 2 AC 326 at 384 (see also Lord Cooke at 373 and Lord Hobhouse at 397-398) and *R v Lambert* [2002] 2 AC 545 at 587-588. Provisions on reverse onus of proof were read as imposing legal burdens in *R v Drummond* [2002] EWCA Crim 527 and *L v DPP* [2002] 3 WLR 863.

²⁴ 160 US 469, 488 (1895) per Harlan J.

In other words the accused should have merely an evidential burden to make the question of his mental disorder an issue to be considered. Once it is an issue then the prosecution has a legal burden to prove the accused's sanity. We support this approach.

5.17 The next issue is to set the standard of proof which lies with the Crown once the accused has discharged his own evidential burden. The mental condition of the accused at the time of the offence is an essential fact in the proof of guilt. This is so whether the condition is one indicating guilt (as with the proof of mens rea) or one indicating that the accused has criminal responsibility in a general sense (which requires that his condition falls outwith the insanity defence). Where there is doubt about the criminal responsibility of the accused, he should not be found guilty of an offence. Accordingly we take the view that where the Crown requires to discharge its legal burden of proving the sanity of the accused the appropriate standard of proof is that of beyond reasonable doubt.

5.18 We would stress that the practical effect of these proposals would not necessarily be radical. In *R v Lambert* Lord Hope said:²⁵

"But an evidential burden is not to be thought of as a burden which is illusory. What the accused must do is put evidence before the court which, if believed, could be taken by a reasonable jury to support his defence. ... The practical effect of ... imposing an evidential burden only on the accused and not a persuasive burden ... is likely in almost every case that can be imagined to be minimal."

Where the accused wishes to make a defence of insanity an issue for the court or jury to consider, it would in a practical sense be necessary to adduce expert medical evidence in support of it.²⁶ In the absence of such evidence the accused's sanity would not be a matter for consideration and the legal burden on the Crown would be discharged by reliance on the factual presumption of sanity.

5.19 Accordingly we propose that:

24. (1) **Where the accused lodges a special defence of insanity at the time of the offence, he or she should bear an evidential burden of proving it.**
- (2) **Where sufficient evidence is adduced to raise the issue of the accused's insanity, the court or the jury should regard the defence as made out unless the Crown proves beyond reasonable doubt that it is not.**

5.20 *Insanity raised by the prosecution.* We next consider the situation where the 'defence' of insanity has been raised by the Crown.

5.21 Although insanity is normally characterised as a defence, it appears that it may be raised by the Crown. In *HM Advocate v Harrison*,²⁷ the accused raised a plea of diminished responsibility to a charge of murder. The Crown led evidence to show that the accused was insane at the time of the killing. In the direction to the jury the trial judge stated that in this situation the onus of establishing insanity lay with the Crown but that they need only prove it on the balance of probabilities. It is not clear if the Crown can raise the issue of the

²⁵ [2002] 2 AC at 588-589.

²⁶ A point made about the defence of automatism in *Ross and Sorley*.

²⁷ High Court of Justiciary, Dundee October 1967, unreported but see (1968) 32 JCL 119.

accused's insanity in other circumstances, and there is virtually no other authority on the issues of burden and standard of proof of insanity where the 'defence' is raised by the Crown.²⁸

5.22 In English law it appears that the Crown can raise the issue of the accused's insanity in certain circumstances. In *Bratty v Attorney-General for Northern Ireland*,²⁹ Lord Denning made a comment that the "old notion that only the defence can raise a defence of insanity is now gone. The prosecution are entitled to raise it and it is their duty to do so rather than allow a dangerous person to be at large." Whether this dictum overstates the position in English law is not clear. By section 6 of the Criminal Procedure (Insanity) Act 1964 where the accused raises a defence of diminished responsibility, the prosecution is entitled to lead evidence showing that the accused was insane at the time.³⁰ In this situation the Crown must prove the accused's insanity beyond reasonable doubt.³¹ In *R v Dickie*,³² an elderly man was charged with various counts of arson. The defence introduced evidence that the accused was suffering from a medical condition which had the effect that he was unaware of what he was doing and so lacked the mens rea for the offences with which he was charged. Both the prosecution and the judge asked questions of the medical expert for the defence concerning the nature of this condition. The question whether the jury should be allowed to consider a verdict of insanity was raised by the judge, despite objections from both prosecution and defence counsel. The Court of Appeal held that there might be very exceptional cases where the issue of insanity could be raised by the Court itself,³³ and added:³⁴

"As for the right of the prosecution to raise the issue, we can find no precedent on which we should be inclined to rely for assuming that the prosecution has such a right. The prosecution has a positive duty to prove if it can the allegation which it makes on the indictment. It has the power if the issue is raised by the defence to rebut by its own evidence the attempt by the defence to establish insanity. It has the obligation, if it has evidence in its possession of insanity which will assist the defence to establish that the defendant was in that condition when the crime was committed, to make that evidence available to the defence in good time, so that in its discretion it may make proper use of it."

5.23 It therefore may be that, despite Lord Denning's dictum in *Bratty*, the position in England is that the prosecution is entitled to lead evidence that the accused is insane only where the accused has put his mental state as an issue in the case by raising the plea of diminished responsibility (and possibly also automatism). The position in Scotland is less certain but there is no authority for the view that the Crown in Scotland has a more extensive right to introduce evidence as to the accused's insanity than has the Crown in England.

²⁸ It may be noted that under section 52(1) of the 1995 Act where it appears to the Crown in any proceedings that the accused may be suffering from a mental disorder, the Crown is under a duty to bring before the court any evidence as may be available as to the mental condition of the accused. However this provision focuses on the accused's mental condition at the time of the proceedings. As such it has implications for insanity as a plea in bar but not for the special defence.

²⁹ [1963] AC 386 at 411.

³⁰ This provision reflects earlier case law to the same effect: *R v Bastian* [1958] 1 All ER 568; *R v Russell* [1964] 2 QB 596. The 1964 Act also provides that where the accused raises the defence of insanity, the prosecution can lead evidence to show that the accused's condition fell within the scope of diminished responsibility.

³¹ *R v Grant* [1960] Crim L Rev 424.

³² [1984] 3 All ER 173.

³³ These are that there is already relevant evidence which goes to all of the factors involved in the M'Naghten test and the prosecution and the defence are given an opportunity to call further evidence.

³⁴ [1984] 3 All ER at 178.

5.24 Accordingly existing authority does not clearly suggest the principles which should apply to the issue of insanity as a defence raised by the Crown. There are three possible options to consider:

- (1) The Crown should have no right in any circumstances to seek a verdict that the accused was insane at the time of the offence;
- (2) The Crown should have such a right only where the accused has raised the issue of his mental health (eg by pleading diminished responsibility);
- (3) The Crown should have the right in any case which it considers appropriate to seek the verdict.

5.25 The primary issue is whether or not the Crown should have any such right. There are several points which are relevant to this issue. In the first place, present concern is with insanity as a special defence, not as a plea in bar of trial, where special considerations apply.³⁵ Rather we are considering the situation where the Crown is seeking a verdict of insanity at the time of the offence which the accused, who is ex hypothesi competent to stand trial, does not wish. It is important to note that the question does not involve the need to obtain an appropriate 'mental health' disposal. Any such disposal (except, for the time being, in murder cases) would be concerned with the accused's mental health at the time of the disposal, not at the time of the offence. Furthermore, if there is a problem with the accused's current mental health, the court's powers to make an appropriate order can be used where the accused is convicted, as much as where he is acquitted by reason of insanity.³⁶

5.26 An important principle is that the Crown has a duty to present all evidence which has a bearing on the accused's state of mind at the time of the offence. The Crown might find itself in a difficult situation if it could not present evidence which pointed to the accused's insanity. If the Crown could not seek an insanity verdict, the outcome would be that the accused would be convicted for an offence despite his lack of criminal responsibility at the time of the offence. In some cases this problem would not arise, as the Crown would decide not to prosecute. However there may be circumstances where the Crown needed to proceed with a trial but also show that the accused was insane at the time of the offence. One example would be where there is uncertainty as to who committed an offence. It would be in the public interest if the Crown could establish that the accused was the perpetrator and at the same time seek his acquittal by reason of the insanity defence.

5.27 On the other hand, allowing the Crown to seek the special verdict of insanity would mean that the accused would lose the right to present his defence as he wished. An accused, especially where the charges are minor, may well decide that he would rather run the risk of being convicted than use the defence of insanity, which he might regard as stigmatising. There is no basis for the Crown to force any other defence on an accused who does not seek to avail himself of it, and the question remains why the Crown should have such a right in the case of the insanity defence.

³⁵ Paras 5.43-5.49.

³⁶ The majority of mental health disposals made by the courts follow the conviction of the accused rather than the special defence: see Derek Chiswick, "Mental Disorder and Criminal Justice" in P Duff and N Hutton, *Criminal Justice in Scotland* (Aldershot, 1999) at pp 274-280.

5.28 So far we have been considering the general question whether or not the Crown should have any right to seek an insanity verdict against the wishes of the accused. Matters might be regarded as different where the accused has put the whole question of his mental state at the time of the offence into issue. Indeed it is the existing law, in both Scotland and England, that the Crown has the right to prove that the accused was insane where the accused has pleaded diminished responsibility.³⁷ In this situation the accused has raised the issue of his 'abnormal' mental state and therefore cannot object if the Crown tries to establish that the particular mental state constituted insanity rather than diminished responsibility. However this argument might have less force since the decision in *HM Advocate v Galbraith*.³⁸ Prior to *Galbraith* diminished responsibility was defined as a condition bordering on, but not amounting to, that of insanity. As a consequence where there was evidence of the accused's mental abnormality, a key question was whether it supported the special defence of insanity rather than the plea of diminished responsibility. However under the present law diminished responsibility can be based on conditions which in no sense border on insanity. Accordingly where the accused puts forward evidence that he was of diminished responsibility, it cannot always be said that he is putting in issue an 'insane' mental state.

5.29 We have found these various considerations difficult to assess and have not reached a concluded view on the issues involved. Accordingly we ask the following questions:

25. (1) **Should the Crown have the right to assert and prove that the accused was insane at the time of the offence?**
- (2) **If yes, should the Crown's right exist (a) only where the accused has raised the plea of diminished responsibility or (b) in all cases?**

5.30 If the Crown is to possess the right to seek a verdict that the accused was insane at the time of the offence, the question then arises as to the standard of proof necessary to establish the basis for the verdict. As noted earlier there is some authority in English law that where the Crown is contending that the accused was insane at the time and this contention is being denied by the accused, the standard of proof on the Crown is beyond reasonable doubt. The only Scottish authority, *HM Advocate v Harrison*, suggests that the standard is balance of probabilities. Earlier we proposed that where the Crown was denying the claim by the accused that he was insane at the time of the offence the Crown would be required to disprove insanity beyond reasonable doubt. We are unsure that the same standard need apply where the Crown is seeking to prove the accused's insanity. The effect of the Crown's successful proof would be that the accused would receive the special insanity acquittal. Proof of the accused's insanity is hardly an essential aspect of proof of guilt. Indeed it is the opposite. It certainly appears paradoxical that the Crown should be bound by the higher standard of proof where the successful effect of its evidence would be that the accused is acquitted, albeit that the acquittal leaves the accused open to disposal under section 57 of the 1995 Act. On the other hand this whole situation can only arise where the accused himself is not seeking the special defence. The effect of the Crown's proof of insanity would be to deprive the accused of his standing as a responsible person who is liable to criminal conviction. For this reason we are inclined to the view that the Crown

³⁷ In Scots law the defence of automatism excludes any 'internal' condition of the accused (*Ross v HM Advocate* 1991 JC 210). It follows that where the accused raises the defence of automatism he is not involved in adducing evidence which would have any bearing on insanity as a defence.

³⁸ 2002 JC 1.

should have to prove the accused's insanity beyond reasonable doubt. However we have not reached any concluded view on this matter and we would welcome the views of consultees.

5.31 Accordingly we ask the following question:

- 26. Where the Crown is seeking to prove that the accused was insane at the time of the offence, should the standard of proof be (a) beyond reasonable doubt or (b) on the balance of probabilities?**

5.32 There is an issue consequential upon acceptance of the proposal that the Crown should be allowed to prove the existence of the insanity defence. This relates to the rights of appeal available to an accused person who has found himself proved by the Crown to have been insane at the time of the offence. Under the 1995 Act the accused has no such right of appeal, even though he may appeal against any disposal made as a consequence of the verdict of insanity at the time.³⁹ Significantly the accused can also appeal against a finding that he is insane in bar of trial, a matter which may be raised by the Crown and denied by the accused himself. We note that in English law an accused has a right to appeal against a verdict of not guilty by reason of insanity.⁴⁰ We consider that a similar provision should apply in Scots law.

5.33 Accordingly we propose that:

- 27. The accused should have a right to appeal against a verdict that he or she was insane at the time of the offence where insanity has been proved by the Crown.**

B. Diminished Responsibility

5.34 There is very little authority on the questions of burden and standard of proof in respect of the plea of diminished responsibility. In *HM Advocate v Braithwaite*, Lord Justice Clerk Cooper in a direction to the jury stated that:⁴¹

"If the Crown have established that the accused did this thing, it is not for the Crown to go further and show that he was fully responsible for what he did; it is for the accused to make good his defence of partial irresponsibility, and that means that he must show you that the balance of probability on the evidence is in favour of the view that his accountability and responsibility were below normal."

A similar position exists in English law.⁴²

5.35 There is virtually no discussion in these cases of the reasons for imposing a legal (as opposed to an evidential) burden on the accused. It may be that the approximation of the test for diminished responsibility to the insanity test in the pre-*Galbraith* law meant that the question of burden of proof was treated as being similar for both. However the relationship between the special defence and the plea is not completely identical. The effect of the

³⁹ 1995 Act s 62(1).

⁴⁰ Criminal Appeal Act 1968 (c 19) s 12.

⁴¹ 1945 JC 55 at 58. An identical direction to the jury was given in *HM Advocate v Blake* 1986 SLT 661.

⁴² Section 2(2) of the Homicide Act 1957 provides that the onus of proving diminished responsibility lies with the defence. The standard of proof is balance of probabilities (*R v Dunbar* [1958] 1 QB 1).

defence is that the accused is acquitted, albeit he remains subject to a disposal decision by the court. By contrast the effect of the plea is that the accused is still convicted, though on the lesser charge of culpable homicide instead of murder. It follows that the principle of the presumption of innocence, as enshrined in article 6(2) of the ECHR, has no direct role to play in respect of diminished responsibility. Nonetheless we consider that a similar approach should be adopted for diminished responsibility as for insanity as a defence. Where an accused is seeking a verdict based on diminished responsibility he is claiming a right to be convicted of the lesser charge of culpable homicide rather than the fuller one of murder. We consider that this situation is broadly analogous to that where the accused is claiming a right to receive the special sort of acquittal verdict which follows on from a finding of insanity as a defence. It may be noted that both the Butler Committee and the Criminal Law Revision Committee recommended that for English law the same rules on burden of proof should apply to insanity and diminished responsibility.⁴³

5.36 If the burden on the accused in proving diminished responsibility is an evidential one, it follows that the burden on the Crown of disproving it is a legal one. However if the Crown can discharge this burden only by proof beyond reasonable doubt, it might be thought that the Crown would find it too difficult to disprove diminished responsibility at this level of proof. Moreover as diminished responsibility is not a special defence which requires advance notice being given by the accused, the Crown would find itself in the position of having to produce evidence in rebuttal of diminished responsibility without any advance warning that the plea is to be raised. We consider later whether the plea of diminished responsibility should be treated as if it were a special defence for purposes of advance notice.⁴⁴ Here we consider other factors which should be borne in mind when assessing the argument that the Crown would face too difficult a task if it were required to disprove diminished responsibility on the higher standard of proof. In the first place, the test for diminished responsibility requires that there is expert evidence (usually from psychiatrists or psychologists) that the accused at the time suffered from a condition which had a substantial impact on his mind. The accused is required to lodge in advance of the trial a list of witnesses he intends to call.⁴⁵ Where the accused plans to raise a plea of diminished responsibility that list would normally include the names of the expert witnesses, who would then become liable to being precognosed by the Crown. Furthermore any report prepared by expert witnesses which the accused wished to adduce as evidence would itself have to be lodged in advance of the trial. The Crown and the accused would also be under a duty to seek agreement of this evidence.⁴⁶ We also understand that it is the practice of the Crown in murder cases to have the accused medically examined prior to the trial. Were the Crown to be given the onus of disproving diminished responsibility, then the practice could be made of pursuing issues relevant to the plea as part of these medical examinations. For these reasons we do not believe that placing a full burden on the Crown in respect of diminished responsibility would make its task impossible to achieve in a practical sense.

⁴³ Butler Report para 19.18; Criminal Law Revision Committee, 14th Report, *Offences against the Person* (Cmnd 7844, 1980) para 94.

⁴⁴ Paras 5.38-5.39.

⁴⁵ 1995 Act s 78(4).

⁴⁶ 1995 Act s 257.

5.37 Accordingly we propose that:

28. (1) **Where the accused raises a plea of diminished responsibility, he or she should bear an evidential burden of proving it.**
- (2) **Where sufficient evidence is adduced to raise the issue of the accused's diminished responsibility, the jury should regard the plea as made out unless the Crown proves beyond reasonable doubt that it is not.**

5.38 Under the existing law there is no requirement that the accused gives notice that he intends to raise the plea of diminished responsibility. As the accused bears the legal burden of proving diminished responsibility, there is perhaps little need for the Crown to receive advance notice.⁴⁷ Moreover as diminished responsibility is not a complete defence which results in an acquittal, there is also an argument of principle that the accused should not be required to give advance notice of a plea which involves admission not only of participation in an unlawful killing but also of liability to be convicted for it. Were our proposals for altering the rule on burden of proof to be enacted, then clearly there would be a need to ensure that the issue of diminished responsibility does not take the Crown by surprise. We have already noted certain features of existing practice which would reduce the possibility of such surprise occurring.⁴⁸ The question then is whether it is necessary to go further and add diminished responsibility to the list of pleas which require advance notice under section 78 of the 1995 Act. We note that the Thomson Committee on Criminal Procedure made a recommendation that all defences, including diminished responsibility, should be subject to a notice procedure.⁴⁹ This recommendation was based on the need to reduce the element of surprise and to clarify the main points in issue before any trial begins. However the Thomson Committee did not allude to the potential prejudice to the accused which could arise if the accused had to give advance notice of diminished responsibility and that notice were to be read to the jury at the start of a trial. We agree with the Thomson Committee that requiring advance notice of diminished responsibility would serve the useful function of preventing the Crown being taken by surprise during the course of a trial. Furthermore we do not consider that such a requirement would necessarily prejudice the accused's position. As the point of the proposal is to minimise any element of surprise at the trial, there would be no need for the plea to be disclosed to the jury at the start of the trial. It may be noted that under the existing law it is not the practice to read to the jury advance notice that the accused seeks to incriminate a co-accused.⁵⁰ The rules on advance notice also allow for the court, on cause shown, to admit evidence to establish a special defence in the absence of notice. This rule could apply to a situation where the possibility that an accused falls within the scope of diminished responsibility only becomes apparent during the course of a trial itself.

⁴⁷ However insanity as a defence is a special defence which requires notice (1995 Act s 78).

⁴⁸ Para 5.36.

⁴⁹ Report on *Criminal Procedure in Scotland (Second Report)* by a Committee chaired by the Hon Lord Thomson (Cmnd 6218, 1975) para 37.11.

⁵⁰ *McShane v HM Advocate* 1989 SCCR 687; *Collins v HM Advocate* 1993 SLT 101.

5.39 We propose that:

- 29. The plea of diminished responsibility should be treated as if it were a special defence for the purposes of the provisions of section 78 of the Criminal Procedure (Scotland) Act 1995. However no disclosure should be made to the jury of the advance notice that the plea is to be raised.**

5.40 Our discussion so far has assumed that only the accused can raise the plea of diminished responsibility. It would certainly be unusual for the Crown to raise what is essentially a plea in mitigation against the wishes of the accused. In English law the Crown has the right to lead evidence showing that the accused was of diminished responsibility where the accused has himself raised the defence of insanity at the time.⁵¹ However we doubt if there is any need for statutory provision to deal with the situation where the Crown is of the view that the accused's condition at the time of the killing constituted diminished responsibility. In most cases the outcome would be that the accused and the Crown would agree a plea of guilty to a charge of culpable homicide. Where the accused did not wish to proceed in this way the Crown could achieve the same result either by libelling culpable homicide in place of murder or amending the indictment for murder to one for culpable homicide. To seek to prevent the Crown from raising an issue of diminished responsibility in effect would be to interfere with the right of the Crown as master of the instance in criminal prosecutions.

5.41 We have considered whether specific provision is needed along the lines of English law, that is where in a murder case the accused has lodged a special defence of insanity but the Crown takes the view that the accused's condition amounted instead to diminished responsibility. But here again there is no need for statutory provision. As with any homicide, in this situation the Crown has the option of charging culpable homicide, or amending a murder charge to that effect. Furthermore, where the Crown is challenging the insanity defence raised by the accused, it can disprove it by showing that the accused's condition did not fall within the test for the defence. The Crown can achieve this objective without at the same time having to show that the accused's condition met the requirements for the plea of diminished responsibility.

5.42 Accordingly we are of the view that:

- 30. No provision is required in respect of the right of the Crown to raise the issue, or to lead evidence showing, that the accused's condition at the time of the unlawful killing constituted diminished responsibility.**

C. Insanity as a plea in bar of trial

5.43 Authority is likewise sparse on the issues of burden and standard of proof in respect of insanity as a plea in bar. It seems to be accepted that the issue can be raised by the accused, the Crown and by the court itself.⁵² In *Russell v HM Advocate*,⁵³ where the plea was raised by the accused, the Court stated that the "onus is always on the accused to justify a plea in bar of trial, and to do so not to the satisfaction of expert witnesses but to the

⁵¹ Criminal Procedure (Insanity) Act 1964 (c 84) s 6.

⁵² Renton & Brown para 26-08.

⁵³ 1946 JC 37 at 44.

satisfaction of the Court." This dictum does not mean that only the accused can raise the plea in bar but rather that when the accused raises the plea, the onus on him is a legal rather than an evidential one. It may also be noted that the dictum does not indicate the level of proof required before a court can be 'satisfied' that the plea has been established.

5.44 It seems clear that the Crown can raise the issue of the accused's fitness for trial even if the accused has not done so and even where the accused denies that he is insane in bar of trial. This position is implied by the terms of section 52(1) of the 1995 Act which lays a duty on the Crown to bring before the court such evidence as may be available of the mental condition of the accused where it appears to the prosecutor that the accused may be suffering from a mental disorder. In the sheriff court case *Jessop v Robertson*,⁵⁴ the sheriff on the motion of the Crown held a preliminary proof to determine whether the accused was insane in bar of trial, a condition denied by the accused herself. The sheriff held that in this situation the legal burden of proof lay with the Crown. The sheriff also held that the standard of proof was balance of probabilities. The higher standard (proof beyond reasonable doubt) was required of the Crown to prove the *guilt* of the accused but the issue in the preliminary proof in the present case did not relate to the guilt of the accused but to the fitness of the accused to stand trial.⁵⁵

5.45 The position in English law is clearer. Where the contention that the accused is unfit to plead is raised by the defence, the defence bears a legal burden of proof which is to be discharged by proof on the balance of probabilities.⁵⁶ Where the prosecution alleges insanity as the basis of unfitness to plead, the onus is on the Crown to prove it at the "ordinary standard in criminal cases of proof beyond a reasonable doubt."⁵⁷

5.46 We do not find it easy to identify the appropriate underlying principles for these issues. We consider that the question whether the accused is a fit person to be subjected to a criminal trial is not merely a procedural preliminary to a case proceeding but is a substantive precondition of the legitimacy of the whole trial process. On this basis where an accused has adduced evidence which puts into issue the question of his ability to participate effectively in a trial, the onus should be on the Crown to establish that the accused is a fit person for that process. In other words, the burden of proof on the accused in this situation is only an evidential one.

5.47 Accordingly we propose that:

31. (1) **Where the accused raises a plea of insanity in bar of trial, he or she should bear an evidential burden of proving it.**
- (2) **Where sufficient evidence is adduced to raise the issue of insanity as a bar in trial, the court should regard the plea in bar as made out unless the Crown proves beyond reasonable doubt that it is not.**

⁵⁴ 1989 SCCR 600.

⁵⁵ Somewhat inconsistently the sheriff also held that the Crown's proof of insanity in bar of trial must be corroborated, as the fitness of the accused was a crucial fact, as opposed to a merely procedural one, in a criminal trial (1989 SCCR at 605).

⁵⁶ *R v Podola* [1960] 1 QB 325.

⁵⁷ *R v Robertson* [1968] 3 All ER 557 at 560.

5.48 The situation where the issue is raised by the Crown or by the court is more difficult. The accused's denial of his unfitness may itself be the result of the very condition which leads to his lack of capacity to participate effectively in the proceedings against him. The accused may not have legal representation who would be alerted to possible problems as to the accused's condition. In that situation only the Crown, or the court, would be in a position to raise the issue of his fitness. We consider that it is wrong in principle that a trial should proceed against an accused where there is a doubt about his fitness to participate in it.

5.49 Accordingly we propose that:

- 32. Where the issue of the accused's being insane in bar of trial is raised other than by the accused himself or herself, the court should be able to find the accused insane if so satisfied on the balance of probabilities.**

Part 6 Summary of proposals for reform

1. The current test of insanity as a defence should not be left solely to further development by the courts but should be reformulated in statute.
(Paragraph 2.14)
2. The defence of insanity should be retained as part of Scots criminal law.
(Paragraph 2.17)
3. The defence of 'insanity' should be known as 'mental disorder' and where successfully raised should result in a verdict of 'not guilty by reason of mental disorder'.
(Paragraph 2.21)
4. The defence of mental disorder should require the presence of a mental disorder suffered by the accused at the time of the alleged offence. The term 'mental disorder' should not be defined by statute except to specify any condition which is to be excluded from the range of the defence.
(Paragraph 2.25)
5. The defence of mental disorder should be defined in terms of a specific effect, or specific effects, on the accused's mental state (at the time of the offence with which he or she is charged) which has been brought about by the accused's disorder.
(Paragraph 2.36)
6. The defence of mental disorder should be defined in terms of the accused's appreciation of his or her conduct at the time of the offence.
(Paragraph 2.46)
7. Should the definition of the defence of mental disorder contain any reference to volitional incapacities or disabilities of the accused?
(Paragraph 2.51)
8. The condition of anti-social personality disorder should be excluded from the definition of the defence of mental disorder.
(Paragraph 2.57)

9. The definition of mental disorder as a defence should be:

Test with cognitive element only

- A. "No person shall be convicted of an offence if at the time of acting or omitting to act he or she was, by reason of mental disorder, unable to appreciate the nature of the conduct forming the basis of the charge."
- B. "No person shall be convicted of an offence if at the time of acting or omitting to act he or she was, by reason of mental disorder, unable to appreciate the wrongfulness of the conduct forming the basis of the charge."
- C. "No person shall be convicted of an offence if at the time of acting or omitting to act he or she was, by reason of mental disorder, unable to appreciate that he or she ought not so to act or omit to act."
- D. "No person shall be convicted of an offence if at the time of acting or omitting to act he or she was, by reason of mental disorder, unable to appreciate the nature of the conduct forming the basis of the charge or the wrongfulness of that conduct."
- E. "No person shall be convicted of an offence if at the time of acting or omitting to act he or she was, by reason of mental disorder, unable to appreciate the nature of the conduct forming the basis of the charge or that he or she ought not so to act or omit to act."

Test with volitional element

- F. "No person shall be convicted of an offence if at the time of acting or omitting to act he or she, by reason of mental disorder, was unable to appreciate [*cognitive elements as above ...*] or was unable to conform his or her actions to the requirements of the law."

Exclusion of anti-social personality disorder

- G. "(1) [*Tests as above*]

(2) The term 'mental disorder' referred to in (1) above does not include a personality disorder which is characterised solely by criminal or anti-social conduct."

(Paragraph 2.58)

10. It should be possible for the court in solemn proceedings to return a verdict that the accused is acquitted by reason of mental disorder at the time of the act or omission charged, where the evidence to that effect has been agreed by the Crown and those acting for the accused.

(Paragraph 2.68)

11. Subject to potential reforms as proposed below, should the test for the plea of diminished responsibility be (a) left to the common law or (b) contained in statute?

(Paragraph 3.11)
12. The plea of diminished responsibility should be retained as a special instance of a plea in mitigation in cases of murder. Where successful its effect should be that the accused is liable to be convicted of culpable homicide rather than of murder.

(Paragraph 3.14)
13. On the assumption that the plea of diminished responsibility is to be retained, should the name of the plea be changed and, if so, what should its name be?

(Paragraph 3.17)
14. Does the law on the relationship between intoxication and diminished responsibility require clarification by statutory statement?

(Paragraph 3.21)
15. Are there good reasons for continuing to exclude the condition of anti-social personality disorder from the plea of diminished responsibility? If so, what are they?

(Paragraph 3.30)
16. The plea of diminished responsibility should not be extended beyond cases of murder.

(Paragraph 3.35)
17. The definition of the plea of diminished responsibility should be:

"(1) A person who but for this section would be convicted of murder shall not be so convicted if it is established on medical or other evidence that his or her condition at the time of the commission of the offence amounted to such extenuating circumstances as to justify a conviction for culpable homicide instead of a conviction of murder.

(2) The condition referred to in (1) above is an unsoundness of mind which substantially impaired his or her ability to understand events, or to determine or control his or her acts.

(3) The fact that a person was intoxicated at the time of the commission of the offence does not by itself constitute, or prove that he or she was suffering from, a condition referred to in (1) above but such a fact does not by itself prevent such a condition being established."

(Paragraph 3.38)

18. The test for the plea of 'insanity' in bar of trial should be formulated in statute.
(Paragraph 4.6)
19. 'Insanity' as a plea in bar of trial should be re-named 'disability in bar of trial'.
(Paragraph 4.12)
20. The test for the plea of disability in bar of trial should be that as a consequence of the accused's mental or physical condition at the time of the trial he or she lacks the capacity to participate effectively in the proceedings against him or her. The test would specify a non-exhaustive list of activities which would constitute such lack of capacity.
(Paragraph 4.19)
21. The fact that the accused experiences loss of memory of the events forming the basis of the charge against him or her does not by itself constitute a disability in bar of trial.
(Paragraph 4.23)
22. The expression 'on the written or oral evidence of two medical practitioners' in section 54(1) of the Criminal Procedure (Scotland) Act 1995 should be repealed.
(Paragraph 4.26)
23. The definition of disability in bar of trial should be:
- "(1) A person has a disability in bar of trial where as a result of a mental or physical condition at the time of the trial he or she lacks the capacity to participate effectively in the proceedings.
- (2) In determining whether a person has a disability referred to in (1) above the court shall have regard to:
- (a) the ability of the accused to understand the nature of the charge;
 - (b) the ability of the accused to understand the requirement to tender a plea to the charge or to understand the effect of a plea;
 - (c) the ability of the accused to understand the purpose of a trial;
 - (d) the ability of the accused to follow the course of a trial;
 - (e) the ability of the accused to understand the substantial effect of evidence that may be given against him or her;
 - (f) the ability of the accused to communicate adequately with his or her legal representative;

- (g) the ability of the accused to give adequate instructions to his or her legal representative;
- (h) any other relevant factor."

(Paragraph 4.34)

24. (1) Where the accused lodges a special defence of insanity at the time of the offence, he or she should bear an evidential burden of proving it.

(2) Where sufficient evidence is adduced to raise the issue of the accused's insanity, the court or the jury should regard the defence as made out unless the Crown proves beyond reasonable doubt that it is not.

(Paragraph 5.19)

25. (1) Should the Crown have the right to assert and prove that the accused was insane at the time of the offence?

(2) If yes, should the Crown's right exist (a) only where the accused has raised the plea of diminished responsibility or (b) in all cases?

(Paragraph 5.29)

26. Where the Crown is seeking to prove that the accused was insane at the time of the offence, should the standard of proof be (a) beyond reasonable doubt or (b) on the balance of probabilities?

(Paragraph 5.31)

27. The accused should have a right to appeal against a verdict that he or she was insane at the time of the offence where insanity has been proved by the Crown.

(Paragraph 5.33)

28. (1) Where the accused raises a plea of diminished responsibility, he or she should bear an evidential burden of proving it.

(2) Where sufficient evidence is adduced to raise the issue of the accused's diminished responsibility, the jury should regard the plea as made out unless the Crown proves beyond reasonable doubt that it is not.

(Paragraph 5.37)

29. The plea of diminished responsibility should be treated as if it were a special defence for the purposes of the provisions of section 78 of the Criminal Procedure (Scotland) Act 1995. However no disclosure should be made to the jury of the advance notice that the plea is to be raised.

(Paragraph 5.39)

30. No provision is required in respect of the right of the Crown to raise the issue, or to lead evidence showing, that the accused's condition at the time of the unlawful killing constituted diminished responsibility.

(Paragraph 5.42)

31. (1) Where the accused raises a plea of insanity in bar of trial, he or she should bear an evidential burden of proving it.

(2) Where sufficient evidence is adduced to raise the issue of insanity as a bar in trial, the court should regard the plea in bar as made out unless the Crown proves beyond reasonable doubt that it is not.

(Paragraph 5.47)

32. Where the issue of the accused's being insane in bar of trial is raised other than by the accused himself or herself, the court should be able to find the accused insane if so satisfied on the balance of probabilities.

(Paragraph 5.49)

Appendix A

Disposal of cases involving insanity: powers of the courts under Part VI of the Criminal Procedure (Scotland) Act 1995

Insanity in bar of trial

Insanity in bar of trial

54. (1) Where the court is satisfied, on the written or oral evidence of two medical practitioners, that a person charged with the commission of an offence is insane so that his trial cannot proceed or, if it has commenced, cannot continue, the court shall, subject to subsection (2) below—

- (a) make a finding to that effect and state the reasons for that finding;
- (b) discharge the trial diet and order that a diet (in this Act referred to as an "an examination of facts") be held under section 55 of this Act; and
- (c) remand the person in custody or on bail or, where the court is satisfied—
 - (i) on the written or oral evidence of two medical practitioners, that he is suffering from mental disorder of a nature or degree which warrants his admission to hospital under Part V of the Mental Health (Scotland) Act 1984; and
 - (ii) that a hospital is available for his admission and suitable for his detention,

make an order (in this section referred to as a "temporary hospital order") committing him to that hospital until the conclusion of the examination of facts.

(2) Subsection (1) above is without prejudice to the power of the court, on an application by the prosecutor, to desert the diet *pro loco et tempore*.

(3) The court may, before making a finding under subsection (1) above as to the insanity of a person, adjourn the case in order that investigation of his mental condition may be carried out.

(4) The court which made a temporary hospital order may, at any time while the order is in force, review the order on the ground that there has been a change of circumstances since

the order was made and, on such review—

(a) where the court considers that such an order is no longer required in relation to a person, it shall revoke the order and may remand him in custody or on bail;

(b) in any other case, the court may—

(i) confirm or vary the order; or

(ii) revoke the order and make such other order, under subsection (1)(c) above or any other provision of this Act, as the court considers appropriate.

(5) Where it appears to a court that it is not practicable or appropriate for the accused to be brought before it for the purpose of determining whether he is insane so that his trial cannot proceed, then, if no objection to such a course is taken by or on behalf of the accused, the court may order that the case be proceeded with in his absence.

(6) Where evidence is brought before the court that the accused was insane at the time of doing the act or making the omission constituting the offence with which he is charged and he is acquitted, the court shall—

(a) in proceedings on indictment, direct the jury to find; or

(b) in summary proceedings, state,

whether the accused was insane at such time as aforesaid, and, if so, to declare whether he was acquitted on account of his insanity at that time.

(7) It shall not be competent for a person charged summarily in the sheriff court to found on a plea of insanity standing in bar of trial unless, before the first witness for the prosecution is sworn, he gives notice to the prosecutor of the plea and of the witnesses by whom he proposes to maintain it; and where such notice is given, the court shall, if the prosecutor so moves, adjourn the case.

(8) In this section, "the court" means—

(a) as regards a person charged on indictment, the High Court or the sheriff court;

(b) as regards a person charged summarily, the sheriff court.

Examination of facts

Examination of facts

55.(1) At an examination of facts ordered under section 54(1)(b) of this Act the court shall, on the basis of the evidence (if any) already given in the trial and such evidence, or further

evidence, as may be led by either party, determine whether it is satisfied—

(a) beyond reasonable doubt, as respects any charge on the indictment or, as the case may be, the complaint in respect of which the accused was being or was to be tried, that he did the act or made the omission constituting the offence; and

(b) on the balance of probabilities, that there are no grounds for acquitting him.

(2) Where the court is satisfied as mentioned in subsection (1) above, it shall make a finding to that effect.

(3) Where the court is not so satisfied it shall, subject to subsection (4) below, acquit the person of the charge.

(4) Where, as respects a person acquitted under subsection (3) above, the court is satisfied as to the matter mentioned in subsection (1)(a) above but it appears to the court that the person was insane at the time of doing the act or making the omission constituting the offence, the court shall state whether the acquittal is on the ground of such insanity.

(5) Where it appears to the court that it is not practical or appropriate for the accused to attend an examination of facts the court may, if no objection is taken by or on behalf of the accused, order that the examination of facts shall proceed in his absence.

(6) Subject to the provisions of this section, section 56 of this Act and any Act of Adjournal the rules of evidence and procedure and the powers of the court shall, in respect of an examination of facts, be as nearly as possible those applicable in respect of a trial.

(7) For the purposes of the application to an examination of facts of the rules and powers mentioned in subsection (6) above, an examination of facts—

(a) commences when the indictment or, as the case may be, complaint is called; and

(b) concludes when the court—

(i) acquits the person under subsection (3) above;

(ii) makes an order under subsection (2) of section 57 of this Act; or

(iii) decides, under paragraph (e) of that subsection, not to make an order.

Examination of facts: supplementary provisions

56.(1) An examination of facts ordered under section 54(1)(b) of this Act may, where the order is made at the trial diet, be held immediately following the making of the order and, where it is so held, the citation of the accused and any witness to the trial diet shall be a

valid citation to the examination of facts.

(2) Where an examination of facts is ordered in connection with proceedings on indictment, a warrant for citation of an accused and witnesses under section 66(1) of this Act shall be sufficient warrant for citation to an examination of facts.

(3) Where an accused person is not legally represented at an examination of facts the court shall appoint counsel or a solicitor to represent his interests.

(4) The court may, on the motion of the prosecutor and after hearing the accused, order that the examination of facts shall proceed in relation to a particular charge, or particular charges, in the indictment or, as the case may be, complaint in priority to other such charges.

(5) The court may, on the motion of the prosecutor and after hearing the accused, at any time desert the examination of facts *pro loco et tempore* as respects either the whole indictment or, as the case may be, complaint or any charge therein.

(6) Where, and to the extent that, an examination of facts has, under subsection (5) above, been deserted *pro loco et tempore*—

(a) in the case of proceedings on indictment, the Lord Advocate may, at any time, raise and insist in a new indictment; or

(b) in the case of summary proceedings, the prosecutor may at any time raise a fresh libel,

notwithstanding any time limit which would otherwise apply in respect of prosecution of the alleged offence.

(7) If, in a case where a court has made a finding under subsection (2) of section 55 of this Act, a person is subsequently charged, whether on indictment or on a complaint, with an offence arising out of the same act or omission as is referred to in subsection (1) of that section, any order made under section 57(2) of this Act shall, with effect from the commencement of the later proceedings, cease to have effect.

(8) For the purposes of subsection (7) above, the later proceedings are commenced when the indictment or, as the case may be, the complaint is served.

Disposal in case of insanity

Disposal of case where accused found to be insane

57.(1) This section applies where—

(a) a person is, by virtue of section 54(6) or 55(3) of this Act, acquitted on the ground of his insanity at the time of the act or omission; or

(b) following an examination of facts under section 55, a court makes a finding under subsection (2) of that section.

- (2) Subject to subsection (3) below, where this section applies the court may, as it thinks fit—
- (a) make an order (which shall have the same effect as a hospital order) that the person be detained in such hospital as the court may specify;
 - (b) in addition to making an order under paragraph (a) above, make an order (which shall have the same effect as a restriction order) that the person shall, without limit of time, be subject to the special restrictions set out in section 62(1) of the Mental Health (Scotland) Act 1984;
 - (c) make an order (which shall have the same effect as a guardianship order) placing the person's personal welfare under the guardianship of a local authority or of a person approved by a local authority;
 - (d) make a supervision and treatment order (within the meaning of paragraph 1(1) of Schedule 4 to this Act); or
 - (e) make no order.
- (3) Where the offence with which the person was charged is murder, the court shall make orders under both paragraphs (a) and (b) of subsection (2) above in respect of that person.
- (4) Sections 58(1), 58(1A), (2) and (4) to (7) and 59 and 61 of this Act shall have effect in relation to the making, terms and effect of an order under paragraph (a), (b) or (c) of subsection (2) above as those provisions have effect in relation to the making, terms and effect of, respectively, a hospital order, a restriction order and a guardianship order as respects a person convicted of an offence, other than an offence the sentence for which is fixed by law, punishable by imprisonment.
- (5) Schedule 4 to this Act shall have effect as regards supervision and treatment orders.
- (6) Section 58A of this Act shall have effect as regards guardianship orders made under subsection (2)(c) of this section.

...

Medical evidence

Requirements as to medical evidence

61.(1) Of the medical practitioners whose evidence is taken into account in making a finding under section 54(1)(a) of this Act or under any of the relevant provisions, at least one shall be a practitioner approved for the purposes of section 20 of the Mental Health (Scotland) Act 1984 by a Health Board as having special experience in the diagnosis or treatment of mental disorder.

(1A) Of the medical practitioners whose evidence is taken into account under section 53(1), 54(1)(c), 58(1)(a)(i) or 59A(3)(a) and (b) of this Act, at least one shall be employed at the hospital which is to be specified in the order or, as the case may be, direction.

(2) Written or oral evidence given for the purposes of any of the relevant provisions shall include a statement as to whether the person giving the evidence is related to the accused and of any pecuniary interest which that person may have in the admission of the accused to hospital or his reception into guardianship.

(3) For the purposes of making a finding under section 54(1)(a) of this Act or of any of the relevant provisions a report in writing purporting to be signed by a medical practitioner may, subject to the provisions of this section, be received in evidence without proof of the signature or qualifications of the practitioner; but the court may, in any case, require that the practitioner by whom such a report was signed be called to give oral evidence.

(4) Where any such report as aforesaid is tendered in evidence, otherwise than by or on behalf of the accused, then—

(a) if the accused is represented by counsel or solicitor, a copy of the report shall be given to his counsel or solicitor;

(b) if the accused is not so represented, the substance of the report shall be disclosed to the accused or, where he is a child under 16 years of age, to his parent or guardian if present in court;

(c) in any case, the accused may require that the practitioner by whom the report was signed be called to give oral evidence, and evidence to rebut the evidence contained in the report may be called by or on behalf of the accused,

and where the court is of the opinion that further time is necessary in the interests of the accused for consideration of that report, or the substance of any such report, it shall adjourn the case.

(5) For the purpose of calling evidence to rebut the evidence contained in any such report as aforesaid, arrangements may be made by or on behalf of an accused person detained in a hospital or, as respects a report for the purposes of the said section 54(1), remanded in custody for his examination by any medical practitioner, and any such examination may be made in private.

(6) In this section the "relevant provisions" means sections 53(1), 54(1)(c), 58(1)(a) and 59A(3)(a) and (b) of this Act.

Appeals under Part VI

Appeal by accused in case involving insanity

62.(1) A person may appeal to the High Court against–

- (a) a finding made under section 54(1) of this Act that he is insane so that his trial cannot proceed or continue, or the refusal of the court to make such a finding;
- (b) a finding under section 55(2) of this Act; or
- (c) an order made under section 57(2) of this Act.

(2) An appeal under subsection (1) above shall be–

- (a) in writing; and
- (b) lodged–
 - (i) in the case of an appeal under paragraph (a) of that subsection, not later than seven days after the date of the finding or refusal which is the subject of the appeal;
 - (ii) in the case of an appeal under paragraph (b), or both paragraphs (b) and (c) of that subsection, not later than 28 days after the conclusion of the examination of facts;
 - (iii) in the case of an appeal under paragraph (c) of that subsection against an order made on an acquittal, by virtue of section 54(6) or 55(3) of this Act, on the ground of insanity at the time of the act or omission, not later than 14 days after the date of the acquittal;
 - (iv) in the case of an appeal under that paragraph against an order made on a finding under section 55(2), not later than 14 days after the conclusion of the examination of facts,

or within such longer period as the High Court may, on cause shown, allow.

(3) Where the examination of facts was held in connection with proceedings on indictment, subsections (1)(a) and (2)(b)(i) above are without prejudice to section 74(1) of this Act.

(4) Where an appeal is taken under subsection (1) above, the period from the date on which the appeal was lodged until it is withdrawn or disposed of shall not count towards any time limit applying in respect of the case.

(5) An appellant in an appeal under this section shall be entitled to be present at the hearing of the appeal unless the High Court determines that his presence is not practicable

or appropriate.

- (6) In disposing of an appeal under subsection (1) above the High Court may—
 - (a) affirm the decision of the court of first instance;
 - (b) make any other finding or order which that court could have made at the time when it made the finding, order or other disposal which is the subject of the appeal; or
 - (c) remit the case to that court with such directions in the matter as the High Court thinks fit.
- (7) Section 60 of this Act shall not apply in relation to any order as respects which a person has a right of appeal under subsection (1)(c) above.

Appeal by prosecutor in case involving insanity

- 63. (1) The prosecutor may appeal to the High Court on a point of law against—
 - (a) a finding under subsection (1) of section 54 of this Act that an accused is insane so that his trial cannot proceed or continue;
 - (b) an acquittal on the ground of insanity at the time of the act or omission by virtue of subsection (6) of that section;
 - (c) an acquittal under section 55(3) of this Act (whether or not on the ground of insanity at the time of the act or omission); or
 - (d)
- (2) An appeal under subsection (1) above shall be—
 - (a) in writing; and
 - (b) lodged—
 - (i) in the case of an appeal under paragraph (a) or (b) of that subsection, not later than seven days after the finding or, as the case may be, the acquittal which is the subject of the appeal;
 - (ii) in the case of an appeal under paragraph (c) of that subsection, not later than seven days after the conclusion of the examination of facts,

or within such longer period as the High Court may, on cause shown, allow.

(3) Where the examination of facts was held in connection with proceedings on indictment, subsections (1)(a) and (2)(b)(i) above are without prejudice to section 74(1) of this Act.

(4) A respondent in an appeal under this subsection shall be entitled to be present at the hearing of the appeal unless the High Court determines that his presence is not practicable or appropriate.

(5) In disposing of an appeal under subsection (1) above the High Court may—

(a) affirm the decision of the court of first instance;

(b) make any other finding order or disposal which that court could have made at the time when it made the finding or acquittal which is the subject of the appeal;
or

(c) remit the case to that court with such directions in the matter as the High Court thinks fit.

(6) In this section, "the prosecutor" means, in relation to proceedings on indictment, the Lord Advocate.

Appendix B

Insanity and mental disorder in the criminal justice system: Criminal Justice (Scotland) Bill and Mental Health (Scotland) Bill

The Criminal Justice (Scotland) Bill and the Mental Health (Scotland) Bill were introduced in the Scottish Parliament on 26 March 2002 and 16 September 2002 respectively. Both Bills contain measures relating to insanity and mental disorder in the criminal justice system. At a meeting of the Justice 2 Committee (which is the lead Committee of the Parliament for the Criminal Justice Bill) the Scottish Executive lodged two notes summarising these measures.¹ This Appendix reproduces the Scottish Executive notes.

A. EXECUTIVE NOTE ON DISPOSALS IN CASES WHERE THE ACCUSED IS FOUND TO BE INSANE (J2/02/43/02)

1. Criminal Justice (Scotland) Bill. Disposal of case where accused is found to be insane

The statutory arrangements covering cases where the accused is found to be insane are contained in **Part VI of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) – sections 54–57.**

Section 54 of the 1995 Act provides that where the court is satisfied that an accused's trial cannot proceed or, if commenced cannot continue, because the accused is insane, it shall make a finding to that effect and order an examination of the facts under **section 55 of the 1995 Act**. Until the examination of facts is concluded, the accused may be remanded in custody, admitted to bail or admitted to hospital under a 'temporary hospital order'.

Following an examination of the facts, the court may make a finding (**under section 55**) that the accused did the act or made the omission constituting the offence and on the balance of probabilities, there are no grounds for acquitting him. However, **section 55** also provides that if the court, following an examination of the facts, is not satisfied that the accused committed the offence and is satisfied that there are grounds for acquitting him it shall acquit that person. If it appears to the court that the person committed the criminal act but was insane at the time it shall acquit the person and state that the acquittal is on grounds of insanity.

¹ Justice 2 Committee, 43rd Meeting 2002 (Session 1), 20 November 2002.

Section 57(2) of the 1995 Act provides that where a person is dealt with under section 54 or 55 of the 1995 Act it may:

- Make a hospital order (**section 58 of the 1995 Act**).
- In addition to a hospital order make a restriction order (**section 59 of the 1995 Act**).
- Make a guardianship order
- Make a supervision and treatment order (a community disposal where an insane person does not meet the tests for a hospital order- **Schedule 4 of the 1995 Act**).
- Make no order.

However, where the charge is murder, **section 57(3)** requires that the court must impose a hospital order and a restriction order (the consequence of the proposed repeal of section 57(3) in the Criminal Justice (Scotland) Bill is discussed below).

New Proposals

Criminal Justice (Scotland) Bill

Section 2 of the Criminal Justice (Scotland) Bill as presently drafted makes 2 separate provisions relating to accused dealt with on grounds of insanity.

1. It adds the Interim Hospital Order to the list of disposals available to the court under section 57 of the 1995 Act when dealing with a person acquitted on grounds of insanity under sections 54 or 55 or where the court had made a finding of insanity under section 55. [The objective is to enable a thorough assessment to be made about the person's mental disorder and level of risk. This reflects MacLean Committee recommendation 32.]

2. Where the assessment report prepared under the Interim Hospital Order finds that the offender poses a high risk to the public and meets the criteria for detention under the Mental Health (Scotland) Act 1984, the court must make a hospital order with a restriction order (sections 58 and 59 of the 1995 Act). [This reflects MacLean Committee recommendation 33.]

As highlighted above, section 57(3) of the 1995 Act requires the court when dealing with a person acquitted on grounds of insanity where the crime is murder to make a hospital order and a restriction order. Amendments 33 and 34 to the Criminal Justice Bill have the effect of removing the mandatory requirement. The practical effect is that the court will have available to it the disposals at section 57(2) for all cases dealt with on grounds of insanity, regardless of the crime involved.

Mental Health (Scotland) Bill

The Mental Health (Scotland) Bill will amend the disposals available for insane offenders to link them to the new disposals being introduced for other mentally disordered offenders. Hospital orders and hospital orders with restrictions will be replaced by compulsion orders and compulsion orders with restrictions, and the requirements for evidence to obtain such orders will be the same (two medical recommendations and a report by a mental health

officer). The temporary hospital order which may be imposed pending completion of the examination of facts will be replaced by assessment orders and treatment orders. Supervision and treatment orders and guardianship orders are unaffected.

2. Criminal Justice (Scotland) Bill. Purpose and effect note: Amendments: numbers 33 & 34

Disposal of case where accused found to be insane

Background

1. Section 57 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") deals with the disposal of cases where the accused is found to be insane. It applies where a person is:

- under section 54(6) acquitted on the grounds of insanity at the time of the act (or omission) but is nonetheless fit to plead;
- under section 55(3) not fit to plead and following an Examination of the Facts is acquitted on the grounds of insanity at the time of the act or omission;
- under section 55(2) not fit to plead and following an Examination of the Facts, a court is satisfied that the accused did the act (or omission) constituting the offence and (on the balance of probabilities) there are no grounds for acquittal.

2. Section 57(2) provides that subject to subsection (3) the court may as it thinks fit make:

- a hospital order;
- in addition to a hospital order, a restriction order;
- a guardianship order if the person is certified incapable under the Adults with Incapacity (Scotland) Act 2002;
- a supervision and treatment order;
- no order.

3. Section 57(3) provides that where the charge is murder the court shall make a hospital order and a restriction order.

Purpose

4. Amendments 33 and 34 remove the restriction on the court's power when dealing with cases of insanity where the charge is murder. The court will be able to apply any of the disposals available under section 57(2) as it considers appropriate. It is intended that the change will ensure compliance with Article 5 of the ECHR – right to liberty and security.

Consultation

5. The Millan Committee which reviewed the Mental Health (Scotland) Act 1984 addressed the question of murderers found insane at the time of commission of the offence in their second consultation exercise. They asked recipients if they supported an amendment to the 1995 Act to make people who commit homicide and who are acquitted by reason of insanity, subject to the same range of disposals as others acquitted by reason of insanity. Respondents to the consultation who replied to this question were generally supportive of the proposal. These included the British Medical Association, the Faculty of Advocates and the Mental Welfare Commission for Scotland.

6. In its report to Scottish Ministers published in January 2001, the Millan Committee recommended that the range of disposal available to a court in relation to a person charged with murder and acquitted by reason of insanity should be the same as for persons charged with other offences who are acquitted on that basis.

Effect

Amendments 33 and 34

7. Section 2 of the Bill as drafted amends section 57 of the 1995 Act to provide that in addition to the disposals currently available under this section the court will also have the option of imposing an interim hospital order (IHO). Section 2 also inserts new subsection (3A) into section 57 which provides that where the court, having regard to the assessment report produced under the IHO, considers, on the balance of probabilities, that an offender is high risk and that the level of risk relates directly or in significant part to a mental disorder it must impose a hospital order with restrictions.

8. Amendments 33 and 34 amend section 2 by removing the existing section 57(3) (the mandatory requirement on disposals in cases of insanity where the crime is murder). For strictly drafting purposes, the provisions relating to the disposal of an offender who is considered, following an assessment under an interim hospital order to be high risk will become section 57(3). This measure does not replace the provision that is being replaced.

Mental Health (Scotland) Bill

9. The Mental Health (Scotland) Bill currently before the Parliament will also amend section 57 of the 1995 Act. Section 95 of the Mental Health Bill provides for a new compulsion order to replace the hospital order. The order requires reports from two medical practitioners (one being an experienced psychiatrist), together with a report from a mental health officer. The compulsion order (with a restriction order in appropriate cases) will be available where the court makes a finding of insanity and these evidential requirements are satisfied. Amendments will be brought forward at Stage 2 of the Mental Health Bill to clarify the operation of the new order in insanity cases.

B. EXECUTIVE NOTE ON THE TREATMENT OF MENTALLY DISORDERED OFFENDERS (J2/02/43/03)

Criminal Justice (Scotland) Bill

Treatment of mentally disordered offenders

This note sets out the statutory arrangements for dealing with mentally disordered offenders. The proposals in the Criminal Justice (Scotland) Bill and the Mental Health (Scotland) Bill build on the existing provisions in **Part VI of the Criminal Procedure (Scotland) Act 1995**.

Existing Provisions

Pre conviction

Section 52 of the 1995 Act gives the court the power to commit an accused to hospital who appears to the court to be suffering from a mental disorder. The court cannot commit without evidence from a medical practitioner. This power may be exercised before the trial commences or during the trial.

The purpose of the order is to allow the accused person to receive treatment pending the conclusion of criminal proceedings. It does not affect the final disposal.

Post conviction but pre-sentence

Before proceeding to a final disposal, the court may make an Interim Hospital Order under **section 53 of the 1995 Act** to assess and if possible, treat the offender. The order shall be in force for such a period that the court specifies of up to 12 weeks but can be renewed for further periods of up to 28 days. An interim hospital order shall not continue in force for more than twelve months in total. An interim hospital order cannot be made unless the court is satisfied, on the written or oral evidence of two medical practitioners, that the offender is suffering from a mental disorder and that there is reason to suppose that it is appropriate for a hospital order to be made. In addition, it is necessary for the hospital to be specified in the order and that the hospital is available for admission before an IHO is made. The court is unable to make any other order or pass any sentence upon the accused whilst an IHO is in force. Where an IHO ceases to have effect the court can either deal with the offender through the mental health route (as described below) or impose a conventional sentence.

Final disposal

Section 58 of the 1995 Act provides that where a person who is convicted of a criminal offence in the High Court or the sheriff court and there is medical evidence that the offender meets the criteria for detention under the Mental Health (Scotland) Act 1984, the court can make a hospital order or guardianship order. In addition to a hospital order under section 58, the court may impose a restriction order under **section 59 of the 1995 Act**.

Under section 59A of the 1995 Act, the court may, in respect of an offence punishable by imprisonment, in addition to any sentence of imprisonment, make a hospital direction. The hospital direction may not be made unless the court is satisfied on the written or oral

evidence of two medical practitioners that the grounds set out in section 17(1) of the Mental Health (Scotland) Act 1984 apply. In addition, the medical practitioners must each describe the offender as suffering from the same mental disorder and the hospital to be specified in the direction can admit the offender within 7 days of the direction being made.

All of these final disposals require written or oral evidence of 2 medical practitioners.

As illustrated below, subject to the unique risk assessment requirements, the new sentence of an OLR [order for lifelong restriction] works with the Part VI provisions in the same way as existing sentences.

New Proposals

Criminal Justice (Scotland) Bill

Section 1 of the Bill inserts **new section 210D into the 1995 Act**. This provides that the court shall make a risk assessment order where

- an offender has been convicted of a sexual offence (as defined by section 201A (10) of the 1995 Act), a violent or life endangering offence (or it appears to the court that the nature or circumstances of the offence are such as to indicate a propensity to commit such an offence), if it considers that
- the person may meet the risk criteria at **section 210E**, unless
- the court makes an interim hospital order in respect of the person; or
- the person is subject to an order for lifelong restriction previously imposed.

Following the IHO and assessment of risk the court has the following options.

*Where the offender meets the 'Risk Criteria' at **section 210E** of the Bill*

- Not mentally disordered– an OLR (**new section 210B**).
- Mentally disordered (but the mental disorder does not meet the criteria for detention under the Mental Health (Scotland) Act 1984 (MHA)- e.g. it is an anti-social personality disorder which is "not treatable") - an OLR (**new section 210B**).
- Mentally disordered (where the mental disorder meets the criteria for detention under the Mental Health (Scotland) Act 1984) - an OLR with a hospital direction (**new section 210B read alongside section 59A of the 1995 Act**).

*Where the offender does not meet the Risk Criteria at **section 210E***

- Not mentally disordered– any competent court disposal.
- Mentally disordered but does not meet the criteria for detention under the Mental Health (Scotland) Act 1984- any competent court disposal.

- Mentally disordered and meets MHA detention criteria, where offending behaviour is related to treatable mental disorder –hospital order or hospital order with restrictions (**sections 58 and 59** of 1995 Act).
- Mentally disordered and meets MHA detention criteria, where offending behaviour not directly related to treatable mental disorder- prison sentence plus hospital direction (**section 59A** of 1995 Act).

Mental Health (Scotland) Bill

Replaces pre-conviction committal under section 52 with Assessment and Treatment Orders (**section 92**)

Replaces hospital orders with compulsion orders, and interim hospital orders with interim compulsion orders (**sections 95 and 93**)

Provides that the court should not impose a compulsion order with restrictions without having first considered an interim compulsion order (**section 95-new section 57A(12)(a)** added to 1995 Act)

Will clarify the criteria for imposing a hospital direction instead of a compulsion order. (These are not explicit in the 1995 Act. The Executive intends to table amendments at Stage 2 of the Mental Health Bill to make clear that hospital directions should be imposed where the offender behaviour is not related to the mental disorder or where treatment of the mental disorder is not likely to reduce risk.)

Adds a new requirement for a report by a qualified social worker (a 'mental health officer') in addition to 2 medical reports before making a compulsion order (**section 95**).

Replaces the power of Ministers to discharge patients subject to restriction orders, and provides that all discharges must be approved by a Mental Health Tribunal chaired by a sheriff (**Part 10**).

Retains the effect of the 'Ruddle Act': a person subject to a restriction order cannot be discharged if the effect of their mental disorder is that they pose a serious risk to public safety (**section 133(2)**).

Pre conviction		
<i>Now:</i> Court can remand in custody, admit to bail or commit to hospital for treatment before/during trial. No effect on final disposal.	<i>Mental Health Bill:</i> Assessment order for report within 28 days. Treatment order – ends on sentencing or interim compulsion order.	<i>Criminal Justice Bill link:</i> Either of MHB options could be used at this stage where may be mental illness – OLR does not arise until after conviction. CJB does not alter the court's powers at this stage in the proceedings.
Post conviction/pre sentence		
<i>Now:</i> Interim hospital order (IHO) to allow assessment/ treatment. IHO in force for up to 12 weeks but can be renewed for further periods of up to 28 days. IHO can last in total for up to 12 months. Leading to either mental health disposal or conventional sentence.	<i>Mental Health Bill:</i> Interim compulsion order (ICO) – only for high risk cases: more restricted than IHO. Up to 12 months. [Lower risk cases – remand for reports – existing procedure]	<i>Criminal Justice Bill link:</i> CJB makes an IHO mandatory where offender convicted of serious violent or sexual offence may meet the risk criteria for a RAO and the criteria for an IHO.
Final disposal		
<i>Now:</i> Hospital order if meet criteria for detention under Mental Health Act and disorder is treatable or conventional disposal.	<i>Mental Health Bill:</i> Compulsion order – if mentally ill + treatable + convicted for offence punishable by imprisonment. Community treatment or hospital detention up to 6 months, then renewable.	<i>Criminal Justice Bill link:</i> Hospital order can't be combined with any sentence of imprisonment – including OLR. If offended because mentally ill and treatable, should have mental health disposal not criminal justice route.
Restriction order.	Compulsion order with restriction – if meet compulsion order tests plus high risk. Must pass public safety ("Ruddle") test before release.	
Sentence of imprisonment plus hospital direction.	Sentence of imprisonment plus hospital direction – not significantly different to existing procedure.	CJB creates the OLR. No change to court's power to combine with a HD where mental illness is treatable.

Appendix C Statistics¹

Frequency of use of mental health disposals relative to total offences

Table 1 shows the total number of persons proceeded against in Scottish courts for the 5 years 1996 to 2000, and the number of those persons with a charge proved where the penalty was a mental health disposal.

Table 1: Persons proceeded against in Scottish courts and mental health disposals 1996-2000

Year	Number of persons proceeded against	Number of persons with a charge proved where the main penalty was insanity, hospital, guardianship order
1996	175,457	159
1997	172,556	162
1998	159,232	129
1999	146,841	135
2000	137,026	108

Scottish Executive Statistical Bulletin CrJ/2001/7, Table 2(a) and Table 7.

Mental health disposals: research findings

The Criminal Procedure (Scotland) Act 1995, which came into force on 1 April 1996 introduced new procedures to deal with mentally disordered offenders. The operation and impact of the provisions in relation to the insanity as a defence and plea in bar of trial were assessed in a report to the Scottish Office in 1999.² The Report included a study of the use of the legislation from 1 April 1996 to 1 September 1998. The main findings of the Report, contained in Crime and Criminal Justice Research Findings No 27 are reproduced in Appendix D.

Insanity as a plea in bar of trial

Table 2 shows the number of cases during the research period covered by the Report in which a plea of insanity in bar of trial was involved. Of the 52 cases, 37 involved a plea in bar of trial. 3 (6%) of the 52 cases involved a defence of insanity **and** a plea in bar of trial. In all 3 cases the plea was successful.

Table 2: Cases involving a plea in bar of trial: April 1996 to August 1998

Total number of cases notified to researchers	Number of cases involving a plea in bar of trial	Number of cases in which accused found unfit to plead	Number of cases in which accused found sane and fit to plead
52	37 ³	29	5

See Michele Burman and Clare Connelly, *Mentally Disordered Offenders and Criminal Proceedings*, p v.

¹ See paras 1.17-1.21 above.

² Michele Burman and Clare Connelly, *Mentally Disordered Offenders and Criminal Proceedings* (The Scottish Office Central Research Unit, 1999).

³ In 2 of the 37 cases the question of fitness to plead was raised by the Crown and in one case the magistrate in the District Court detected something was wrong and remitted the case to the sheriff court. In 2 of the 37 cases the Crown deserted the cases *pro loco et tempore* before the fitness of the accused was determined and in 1 case the plea was withdrawn by the defence.

Table 3 shows the disposals made in the 29 cases in which the accused was found to be insane in bar of trial.

Table 3: Cases with a finding of unfitness to plead

Case	Plea in Bar	E.O.F.	Disposal
001	Found unfit	Facts established s.55(1)(a)	Supervision & Treatment Order
005	Found unfit	Facts established s.55(1)(a)	Hosp. Order (Parkhead)
010	Found unfit	Facts established s.55(1)(a)	Supervision & Treatment Order
011	Found unfit	Facts estab (8 chs) Not estab (2 chs)	Guardianship Order s.57(2)(c)
014	Found unfit	Facts established s.55(1)(a)	Supervision & Treatment Order
016	Found unfit	Facts established s.55(1)(a)	No order made s.57(2)(e)
017	Found unfit	Not established. Acquittal	Disposal under Mental Health (S) Act
018	Found unfit	Facts established s.55(1)(a)	Hosp. Order s.57(2)(a) (Parkhead)
019	Found unfit	Facts established s.55(1)(a)	Hosp. Order s.57(2)(a) (Carstairs)
020	Found unfit	Not established. Acquittal	Hosp. Order (for other offences)
023	Found unfit	Facts established s.55(1)(a)	Hosp. Order s.57(2)(a) (Woodilee)
024	Found unfit	Facts established s.55(1)(a)	Hosp. Order s.57(2)(a) (Sthn Gen)
026	Found unfit	Facts established s.55(1)(a)	Supervision & Treatment Order
028	Found unfit	Not established. Acquittal	Accused free to go
029	Found unfit	Facts established s.55(1)	Hosp. Order s.57(2)(a) (Leverndale)
030	Found unfit	E.O.F. set, then case deserted	Acquittal. Accused free to go
032	Found unfit	Facts established s.55(1)	Hosp. Order s.57(2)(a) (Leverndale)
034	Found unfit	Facts established s.55(1)	Hosp. Order (Restriction)
035	Found unfit	Facts established s.55(1)	Hosp. Order s.57(2)(a) (Law)
036	Found unfit	Facts established s.55(1)	Hosp. Order s.57(2)(a) (Bangower)
039	Found unfit	Facts estab (1 ch) Not estab (5 chs)	Hosp. Order s.57(2)(a)
040	Found unfit	Facts established. Acquittal	Accused free to go
041	Found unfit	Not established (deletions)	Hosp. Order (restriction) (Carstairs)
042	Found unfit	Facts established s.55(1)(a)	Hosp. Order (restriction) (Carstairs)
044	Found unfit	Facts estab (ch 1) Not estab (ch 2)	Hosp. Order s.57(2)(a) (Murray R)
045	Found unfit	Facts established s.55(1)(a)	Hosp. Order (restriction) (Murray R)
047	Found unfit	Not established. Acquittal	Accused free to go
049	Found unfit	E.O.F. not yet resolved ⁴	
052	Found unfit	Facts established s.55(1)(a)	Hosp. Order s.57(2)(a) (Leverndale)

Michele Burman and Clare Connelly, *Mentally Disordered Offenders and Criminal Proceedings*, Table 6, p 27.

⁴ This case was still ongoing at the time of the Report.

Insanity defence

Table 4 shows the number of cases during the period covered by the Report which involved the defence of insanity. A total of 52 cases arose in the period 1 April 1996 to 31 August 1998 and were notified to the researchers. Of the 52 cases, 12 (23%) involved a defence of insanity. In 10 of the 12 cases where the defence of insanity was lodged the accused was successful in establishing the defence and was acquitted on the grounds of insanity. 3 (6%) of the 52 cases involved a defence of insanity **and** a plea in bar of trial. In all 3 cases the defence was successful.

Table 4: Cases involving a defence of insanity: 1 April 1996 to 31 August 1998

Total number of cases notified to researchers	Number of cases involving a defence of insanity	Number of cases in which accused found to be insane	Number of cases in which accused not found to be insane
52	12	10	2

See Michele Burman and Clare Connelly, *Mentally Disordered Offenders and Criminal Proceedings*, pp v-vi.

Table 5 shows the disposals made in the 12 cases in which the insanity defence alone was involved.

Table 5: Cases involving an insanity defence only

Case	Finding		Disposal
002	Found insane	Acquitted on grounds on insanity	Hosp. Order s.57(2)(a) & (b) (Carstairs)
004	Found insane	Acquitted on grounds on insanity	Hosp. Order s.57(2)(a) (Bangower)
006	Found insane	Acquitted on grounds on insanity	No order made
007	Found sane	Convicted of offence	Hosp. Order s.57(2)(a) & (b) (Carstairs)
009	Found insane	Acquitted on grounds on insanity	Hosp. Order s.57(2)(a) & (b) (Carstairs)
013	Found insane	Acquitted on grounds on insanity	No order made
015	Found sane	Convicted of offence	240 Hours Community Service
021	Found insane	Acquitted on grounds on insanity	Supervision & Treatment Order
043	Found insane	Acquitted on grounds on insanity	Hosp. Order s.57(2)(a)
046	Found insane	Acquitted on grounds on insanity	Hosp. Order s.57(2)(a) & (b) (Royal Cornhill)
048	Found insane	Acquitted on grounds on insanity	Hosp. Order s.57(2)(a) & (b) (Carstairs)
050	Found insane	Acquitted on grounds on insanity	Hosp. Order s.57(2)(a) & (b) (Carstairs)

Michele Burman and Clare Connelly, *Mentally Disordered Offenders and Criminal Proceedings*, Table 8, p 32.

Table 6 shows the disposals in the 3 cases involving both a plea in bar of trial and the insanity defence, in which the accused was found to be unfit to plead but also to have been insane at the time of the offence.

Table 6: Cases involving a plea in bar of trial and an insanity defence

Case	Plea in Bar	E.O.F.	Insanity Defence	Disposal
003	Found unfit	Facts established	Insane at time of offence	Hosp. Order s.57(2)(a) & (b) (Carstairs)
008	Found unfit	Facts established	Insane at time of offence	Hosp. Order s.57(2)(a)
038	Found unfit	Facts established	Insane at time of offence	Hosp. Order s.57(2)(a) & (b) (Stratheden)

Michele Burman and Clare Connelly, *Mentally Disordered Offenders and Criminal Proceedings*, Table 7, p 31.

Diminished Responsibility

There are no available recorded statistics on the use of the plea of diminished responsibility.⁵ The plea only arises in relation to a charge of murder and if successful results in a conviction for culpable homicide instead of murder. Table 7 shows the number of persons accused in homicide cases for the 5 years 1996-2000.

Table 7: Number of persons accused in homicide cases 1996-2000⁶

Crime	Year recorded				
	1996	1997	1998	1999	2000
All accused persons	171	126	140	172	128
Persons accused of murder	100	66	86	126	75
Persons accused of culpable homicide	57	55	41	40	50
Other crimes	14	5	13	6	3

The statistics in Table 7 are taken from Scottish Executive Statistical Bulletin, Criminal Justice Series CrJ/2001/9 *Homicide in Scotland 2000*, Table 8, p 22.

⁵ See para 1.20 above.

⁶ The figures given in Table 7 above do not include figures for statutory homicide - causing death by dangerous or reckless driving. The figures are for cases recorded by the police as homicide as at 26 October 2001. The figures for 1996 include the 17 cases of homicide at Dunblane. See further the Note on Statistics used in the Bulletin contained in the Annex at SE CrJ/2001/9 p 31.

Appendix D

Findings of a research project on mentally disordered offenders and criminal proceedings¹

This study was undertaken by Dr Michele Burman and Ms Clare Connelly of the University of Glasgow. Its purpose was to monitor and assess the operation and impact of the provisions contained within Part VI of the Criminal Procedure (Scotland) Act 1995 relating to unfitness to plead, examination of facts and the insanity defence.

Main Findings

- The legislation was invoked in 52 cases during the research period. Three quarters of the cases (n=39) were heard in Sheriff Courts; 9 (23%) were on indictment and 30 (77%) were summary complaints. The remaining 13 cases were heard in the High Court.
- 37 (71%), of the cases involved a plea in bar of trial. The accused was found unfit to plead in 29 cases. In 5 cases the accused was found sane and fit to plead, and 2 cases were deserted by the Crown before the fitness of the accused was determined. In one case the plea was withdrawn by the defence.
- 3 cases (6%) involved both a plea in bar of trial and an insanity defence and in all 3 cases the accused was found unfit to plead.
- 12 cases (23%) involved an insanity defence. The accused was successful in establishing the defence and acquitted on the grounds of insanity in 10 cases.
- In all but 3 of the 37 plea in bar of trial cases the issue of the accused's unfitness to stand trial was identified and raised by the defence solicitor at an early stage, normally before the first court diet.
- A total of 30 examination of the facts (E.O.F.) hearings were conducted during the research period. The facts were held to be established in 22 cases; in 3 cases the facts were held to be established but on the balance of probabilities the accused was insane at the time of the offence and in the remaining 5 cases the facts were held not to be established.
- Hospital orders were imposed in a total of 26 cases (9 had restriction orders attached); Supervision and Treatment orders were made in 5 cases, a Guardianship order in one case, and in 3 cases no order was made.

¹ Crime and Criminal Justice Research Findings No 27 (1999). The Research Findings are reproduced by permission of the Scottish Executive Finance and Central Services Department, Social Research Group (formerly the Scottish Office Central Research Unit).

- Five cases involved appeal proceedings. All of the appeals focused on the issue of fitness to plead. No appeals arose against disposal during the research period.
- Both legal and medical personnel largely welcomed the new provisions.

Introduction

The main aim of the research was to assess the operation and impact of the provisions contained within the 1995 Act relating to unfitness to plead, examination of facts and the insanity defence.

The key objectives of the research were to:

- review the pattern of use of the legislation;
- examine the stages at which the accused's mental state was determined to merit a plea in bar of trial;
- examine the use of the disposal options and investigate any problems arising from their use;
- ascertain the views of both legal and medical practitioners on the interpretation and use of the legislation; and
- assess the impact of the reforms, particularly in relation to defence submissions of unfitness to plead and the use of the insanity defence in solemn and summary proceedings.

The research period was from 1 April 1996, when the provisions of the 1995 Act came into force, until August 1998. A notification procedure in respect of all cases invoking the legislation was established with the Sheriff Clerks in all Sheriff Courts across Scotland and with the Judiciary Office of the High Court. Researchers attended courts throughout Scotland to observe cases involving a plea in bar of trial and recorded the proceedings, beginning with the proof dealing with the issue of fitness to plead, following each case through the E.O.F. (where this took place), up until the disposal of the case. The insanity defence cases were followed up by telephone or in writing to obtain information on the success of the defence and the disposal chosen by the court. The use of the appeal provisions contained within the 1995 Act were also monitored as part of the study. Formal Interviews were carried out with Judges, Sheriffs, Advocates Depute, Procurators Fiscal and defence agents. In addition, psychiatrists and psychologists were interviewed. In all cases the individuals had experience of the 1995 Act provisions and some had experience of the previous provisions contained within the Criminal Procedure (Scotland) Act 1975. The individuals interviewed were involved in cases which raised issues particularly relevant and of interest to the research and were located across Scotland. In addition to these formal interviews, informal discussions with court personnel took place while attending court hearings, providing further insight into the operation of the legislation.

The pattern of the use of legislation and the impact of the reforms

A total of 52 cases in which the legislation was invoked were notified to the researchers. Three quarters of these cases (n=39) were heard at the Sheriff Court level and of these 9

(23%) were on indictment and 30 (77%) were summary complaints. The remaining 13 cases were heard at High Court level. It was originally estimated that the 1995 legislation would be invoked in approximately 12 cases per annum.

Cases invoking the legislation involved a wide spread of crimes and offences, of varying levels of seriousness from breach of the peace to murder. All but 2 of the cases involved a single accused. In the majority of cases (81%) the accused was male and the majority of male accused were aged between 21 and 35 years. In 6 cases, the accused was from an ethnic minority and 3 cases involved an accused who was deaf and dumb. In 70% of cases, information regarding previous convictions was available and of these, 30% (11 cases) were first time offenders and 69% (25 cases) had a previous conviction. In 52% (27 cases), the accused had some form of documented history of psychiatric or psychological problems.

Of the 52 cases, 37 (71%) involved a plea in bar of trial, 12 (23%) involved an insanity defence and 3 (6%) involved both a plea in bar of trial and an insanity defence. In most of the cases involving a plea in bar of trial, the plea was raised by the defence and unopposed by the Crown. In several cases a joint minute was lodged to this effect.

In 29 of the 37 cases involving a plea in bar of trial, the accused was found unfit to plead. In 5 cases the accused was found sane and fit to plead, and in 2 cases the Crown deserted the cases pro loco et tempore before the fitness of the accused was determined. In one case the plea was withdrawn by the defence. In 10 of the 12 cases where an insanity defence was lodged, the accused was successful in establishing the defence and acquitted on the grounds of insanity. In all 3 cases involving both a plea in bar of trial and an insanity defence both pleas were successful.

The examination of the facts

E.O.F.s were conducted in 27 of the 29 cases where the accused successfully pled unfitness to plead. Of the 2 remaining cases, in one the Crown deserted the case prior to the E.O.F. and in the other the E.O.F. was still ongoing at the end of the research period. E.O.F.s also took place in the 3 cases where both a plea in bar of trial and an insanity defence were lodged.

Of the 30 E.O.F.s which were conducted, the facts were held to be established in 22 cases, in a further 3 cases the facts were held to be established but on the balance of probabilities the accused was insane at the time of the offence and in the remaining 5 cases the facts were held not to be established. The reasons for this were due to insufficiency of evidence and problems of identification of the accused when his presence had been dispensed with by means of s.54(5) of the legislation. A key issue which arose in relation to the E.O.F. was the difficulties caused where there was a co-accused.

The issue of mental impairment complicated plea in bar of trial cases. There was never any clear consensus from legal or medical personnel on mental impairment as a reason for unfitness to plead and these cases prompted much contention and debate. In almost all cases where mental impairment was involved, clinical psychologists were called upon to provide written or oral evidence, however, there was little consensus amongst judges and sheriffs as to the relevance of psychological evidence in relation to determining fitness to plead.

Psychiatrists in all but a few instances appeared in court to speak to their written reports. Approximately a third of plea in bar of trial cases were characterised by problems concerning the interpretation of the legal tests determining fitness to plead. In a small number of cases there was the additional problem of the language used in reports, which was highly technical and largely inaccessible to the courts. In some instances the presiding judge or sheriff expressed extreme dissatisfaction with the psychiatric evidence that was presented, describing it as unhelpful or misleading.

The stage at which the issue of the accused's mental state was raised

In all but 3 of the 37 cases in which a plea in bar of trial was made, the issue of the accused's unfitness to stand trial was identified and raised by the defence solicitor at an early stage, normally before the first court diet. In 2 cases the issue of fitness to plead was raised by the Crown under s.52(1) of the legislation. In one case the presiding magistrate in the District Court detected something was wrong and remitted the case to the Sheriff Court. In most cases the accused was present for the plea in bar of trial diet.

The use of disposals

Of the 22 plea in bar of trial cases where the facts were held to be established at the E.O.F., a Hospital order was imposed in 16 cases (4 of these had restriction orders attached), a Supervision and Treatment order was made in 4 cases; a Guardianship order was made in one case, and in the remaining case no order was made. In the 3 cases which involved both a plea in bar of trial and an insanity defence, Hospital orders were imposed (one with a restriction order). In 7 of the 10 successful insanity defence cases a Hospital order was imposed (4 with a restriction order), in one case a Supervision and Treatment order was imposed and in 2 cases no order was made. In the vast majority of cases, resource issues did not affect the choice of disposal.

A consistent pattern of disposal in relation to previous psychiatric history or offending was not evident. In many cases the disposal corresponded to the seriousness of the offence, however, there were exceptions to this where community based disposal were used for relatively serious offences and hospital disposals for less serious offences.

Appeal Proceedings

Five cases involved appeal proceedings. All of the appeals focused on the issue of fitness to plead; all were initiated by the defence and all but one were unsuccessful. One case involved two appeals. No appeals arose against disposal during the research period.

Interviews with legal and medical personnel

Interviews were carried out with legal personnel that focused on general views on the legislation, the drafting of the legislation and issues arising from the medico-legal interface. All interviewees welcomed the legislation. In particular the introduction of E.O.Fs and the subsequent establishment of the accused's liability for the offence, together with the wider range of disposals were welcomed. Psychiatric evidence was viewed positively for the most part, though there was some comment in relation to psychiatrist's knowledge of the legal tests of insanity and unfitness to plead. The treatment of accused suffering from mental impairment as opposed to mental illness and the lack of recognition of psychologists as the appropriate expert witness in such cases attracted mixed opinion.

Formal interviews and informal discussions were carried out with 28 psychiatrists and 3 psychologists. All of the psychiatrists had experience of the new legislative provisions and the main issues which arose in these interviews included, the lack of notification of psychiatrists of the new legislation, the quality of instructions received by psychiatrists from solicitors, the relationship between legal and medical personnel, knowledge and understanding of the relevant legal tests, issues around mental impairment, giving evidence in court and general views on the workings of the legislation including the E.O.F. and disposals. Interviews with psychologists focused on their role in mental impairment cases, namely the assessment of the accused, giving oral evidence and their general views on the working of the legislation.

Appendix E

Definitions of insanity and diminished responsibility based on historical and comparative research

Part 1 Insanity defence

Scotland

Hume, *Commentaries on the Law of Scotland Respecting Crimes* (1997) I, 37:

"To serve the purpose of a defence in law, the disorder must therefore amount to an absolute alienation of reason, '*ut continua mentis alienatione, omni intellectu careat*' – such a disease as deprives the patient of the knowledge of the true aspect and position of things about him, - hinders him from distinguishing friend or foe, - and gives him up to the impulse of his own distempered fancy."

HM Advocate v Kidd 1960 JC 61 at 70:

"First, in order to excuse a person from responsibility for his acts on the ground of insanity, there must have been an alienation of the reason in relation to the act committed. There must have been some mental defect, to use a broad neutral word, a mental defect, by which his reason was overpowered, and he was thereby rendered incapable of exerting his reason to control his conduct and reactions. If his reason was alienated in relation to the act committed, he was not responsible for that act, even although otherwise he may have been apparently quite rational."

Brennan v HM Advocate 1977 JC 38 at 45:

"[I]nsanity in our law requires proof of total alienation of reason in relation to the act charged as the result of mental illness, mental disease or defect or unsoundness of mind and does not comprehend the malfunctioning of the mind of transitory effect."

Ross v HM Advocate 1991 JC 210 at 213:

"In principle it would seem that in all cases where a person lacks the evil intention which is essential to guilt of a crime he must be acquitted. ... if a person cannot form any intention at all because, for example, he is asleep or unconscious at the time, it would seem impossible to hold that he had *mens rea* and was guilty in the criminal sense of anything he did when he was in that state. The same result would seem to follow if, for example, he was able to form intention to the extent that he was controlling what he did in the physical sense, but had no conception whatever at the time that what he was doing was wrong. His intention, such as it was, would lack the necessary evil ingredient to convict him of a crime. Insanity provides the clearest example of this situation..."

and at 222:

"[T]he external factor which is alleged ... must be one which resulted in a total loss of control of his actions in regard to the crime with which he is charged."

Cardle v Mulrainey 1992 SLT 1152 at 1160:

"Where, as in the present case, the accused knew what he was doing and was aware of the nature and quality of his acts and that what he was doing was wrong, he cannot be said to be suffering from some total alienation of reason in regard to the crime with which he is charged which the defence [automatism] requires ... [T]his inability to exert self control, which the sheriff has described as an inability to complete the reasoning process, must be distinguished from the essential requirement that there should be a total alienation of the accused's mental faculties of reasoning and of understanding what he is doing. As in the case of provocation ... this may mitigate the offence but it cannot be held to justify an acquittal on the ground that there is an absence of *mens rea*. ... What will amount to a total alienation of reason, or as was said in *Ross*, 1991 JC at 222, a total loss of control of the accused's actions in regard to the crime with which he is charged, must be a question of fact in each case."

(Unofficial) Draft Criminal Code (Scotland) Bill (Discussion draft 6 March 2002) section 101:

"Mental disorder

- (1) A person is not guilty of an offence if at the time off the acts in question the person was, as a result of mental disorder, incapable of conforming to the requirements of the criminal law or appreciating the nature or quality of the acts.
- (2) An accused cannot be acquitted on the ground of mental disorder unless the requirements of subsection (1) are proved on the balance of probabilities."

England, Wales and the Channel Islands

M'Naghten's Case (1843) 10 Cl & F 200 at 210:

"[T]he jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

Attorney General v Jason Cyril Prior 9 February 2001, Royal Court of Jersey (Judgment No 2001/035) Paragraph 30:

"At the time of the commission of the offence, his unsoundness of mind affected his criminal behaviour to such a substantial degree that the jury consider that he ought not to be found criminally responsible."

Report of the Committee on Insanity and Crime chaired by the Rt Hon Lord Justice Atkin (Cmd 2005, 1924) recommendations 1 and 2 at p 21:

"1. It should be recognised that a person charged criminally with an offence is irresponsible for his act when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist. It may require legislation to bring this rule into effect.

2. Save as above, the rules in M'Naghten's case should be maintained."

Royal Commission on Capital Punishment, (Cmnd 8932, 1953) paragraph 333 (iii):

"[A] preferable amendment of the law would be to abrogate the Rules and to leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not be held responsible."

Report of the Committee on Mentally Abnormal Offenders, chaired by the Rt Hon Lord Butler, (Cmnd 6244, 1975) paragraphs 18.37 and 18.35:

"The result of our proposals is that the jury would be directed to return a verdict of 'not guilty on evidence of mental disorder' if (1) they acquit the defendant solely because he is not proved to have had the state of mind necessary for the offence and they are satisfied on the balance of probability that at the time of the act or omission he was mentally disordered, or (2) they are satisfied on the balance of probability that at that time he was suffering from severe mental illness or severe subnormality ... in cases under (2) the causal connection can safely be presumed from the severity of the mental condition required.

"A mental illness is severe when it has one or more of the following characteristics:

- (a) Lasting impairment of intellectual functions shown by failure of memory, orientation, comprehension and learning capacity.
- (b) Lasting alteration of mood of such degree as to give rise to delusional appraisal of the defendant's situation, his past or his future, or that of others, or lack of any appraisal.
- (c) Delusional beliefs, persecutory, jealous or grandiose.
- (d) Abnormal perceptions associated with delusional misinterpretation of events;
- (e) Thinking so disordered as to prevent reasonable appraisal of the defendant's situation or reasonable communication with others."

A Criminal Code for England and Wales (Law Com No 177) (1989) clauses 34, 35 and 36:

"34. - In this Act-

'mental disorder' means:

- (a) severe mental illness; or
- (b) a state of arrested or incomplete development of mind; or

- (c) a state of automatism (not resulting only from intoxication) which is a feature of a disorder, whether organic or functional and whether continuing or recurring, that may cause a similar trait on another occasion;

...

'severe mental illness' means a mental illness which has one or more of the following characteristics –

- (a) lasting impairment of intellectual functions shown by failure of memory, orientation, comprehension and learning capacity;
- (b) lasting alteration of mood of such degree as to give rise to delusional appraisal of the defendant's situation, his past or his future, or that of others, or lack of any appraisal;
- (c) delusional beliefs, persecutory, jealous or grandiose;
- (d) abnormal perceptions associated with delusional misinterpretation of events;
- (e) thinking so disordered as to prevent reasonable appraisal of the defendant's situation or reasonable communication with others;

'severe mental handicap' means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning

35. - (1) A mental disorder verdict shall be returned if the defendant is proved to have committed an offence but it is proved on the balance of probabilities (whether by the prosecution or by the defendant) that he was at the time suffering from severe mental illness or severe mental handicap.

(2) Subsection (1) does not apply if the court or jury is satisfied beyond reasonable doubt that the offence was not attributable to the severe mental illness or severe mental handicap....

36. - A mental disorder verdict shall be returned if-

- (a) the defendant is acquitted of an offence only because, by reason of evidence of mental disorder or a combination of mental disorder and intoxication, it is found that he acted or may have acted in a state of automatism, or without the fault required for the offence, or believing that an exempting circumstance existed; and
- (b) it is proved on the balance of probabilities (whether by the prosecution or by the defendant) that he was suffering from mental disorder at the time of the act."

Australia

Criminal Code 1899 (Queensland) section 27; (also Criminal Code Act 1902 (Western Australia) section 22):

"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the

person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act or make the omission."

Criminal Code Act 1924 (Tasmania) section 16:

"(1) A person is not criminally responsible for an act done or an omission made by him:

(a) when afflicted with mental disease to such an extent as to render him incapable of-

(i) understanding the physical character of such act or omission;
or

(ii) knowing that such act or omission was one which he ought not to do or make; or

(b) when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist."

Crimes Act 1900 (Australian Capital Territory) sections 428B and 428N (added 1994):

"428B ... 'mental dysfunction' means a disturbance or defect, to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgement, memory, motivation or emotion ...

428N(1) An accused is entitled to be acquitted of an indictable offence on the grounds of mental illness if it is established on the balance of probabilities that, at the time of the alleged offence, the accused was, as a result of mental dysfunction:

(a) incapable of knowing what he or she was doing; or

(b) incapable of understanding that what he or she was doing was wrong."

Criminal Code Act 1995 (Commonwealth) section 7.3 subsections (1), (8) and (9) (implementing the same provisions of the Model Criminal Code by the Criminal Law Officers Committee of the Standing Committee of Attorneys-General, Final Report, December 1992):

"(1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:

(a) the person did not know the nature and quality of the conduct; or

(b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong);
or

(c) the person was unable to control the conduct.

...

(8) In this section:

mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.

(9) The reference in subsection (8) to mental illness is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur."

Criminal Law Consolidation Act 1935 (South Australia) section 269C (added 1995):

"A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment-

- (a) does not know the nature and quality of the conduct; or
- (b) does not know that the conduct is wrong; or
- (c) is unable to control the conduct."

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Victoria) section 20(1):

"The defence of mental impairment is established for a person charged with an offence if, at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that had the effect that —

- (a) he or she did not know the nature and quality of the conduct; or
- (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong)."

Criminal Code Act 1983 (Northern Territory) section 43C (added 2002):

"43C. Defence of mental impairment

(1) The defence of mental impairment is established if the court finds that a person charged with an offence was, at the time of carrying out the conduct constituting the offence, suffering from a mental impairment and as a consequence of that impairment –

- (a) he or she did not know the nature and quality of the conduct;
- (b) he or she did not know that the conduct was wrong (that is he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or
- (c) he or she was not able to control his or her actions.

(2) If the defence of mental impairment is established, the person must be found not guilty because of mental impairment."

Canada

Canadian Criminal Code R.S. 1985 (as amended in 1992) section 2 and section 16:

"2. In this Act, ... 'mental disorder' means a disease of the mind;

...

16.(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong."

India

Indian Penal Code 1860 section 84:

"... nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

Israel

Israeli Criminal Code 1995 paragraph 34(8):

"A defendant does not assume criminal responsibility for his actions if at the time of action, as a result of a disease which affected his spirit and as a result of some defect of intellect he was substantially incapable of understanding his actions or what was wrong about them or could not prevent himself from committing those actions."

New Zealand

New Zealand Crimes Act 1961 section 23:

"(1) Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.

(2) No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render him incapable---

(a) of understanding the nature and quality of the act or omission; or

(b) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.

(3) Insanity before or after the time when he did or omitted the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he did or omitted the act, in such a condition of mind as to render him irresponsible for the act or omission."

South Africa

South Africa Criminal Procedure Act 1977 section 78(1) as amended by the Criminal Matters Amendment Act 1998 section 5(a):

"A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable –

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission."

United States of America

State of New Hampshire v Pike 49 N.H. 399, 422 (1870):

"[If] the defendant killed Brown in a manner that would be criminal and unlawful if the defendant were sane - the verdict should be 'not guilty by reason of insanity' if the killing was the offspring or product of mental disease in the defendant; that neither delusions nor knowledge of right and wrong nor design nor cunning in planning and executing the killing and escaping or avoiding detection nor ability to recognize acquaintances or to labor or to transact business or manage affairs is as a matter of law a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury".

State of New Hampshire v Jones 50 N.H. 369, 394 (1871):

"... no man shall be held accountable, criminally, for an act which was the offspring and product of mental disease."

Durham v US 214 F 2d 847 (DC Cir 1954):

"The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

New Hampshire Criminal Code Section 628:2(I) (amended 1987):

"A person who is insane at the time he acts is not criminally responsible for his conduct. Any distinction between a statutory and common law defense of insanity is hereby abolished and invocation of such defense waives no right an accused person would otherwise have."

The American Law Institute, Model Penal Code, Official Draft (Philadelphia, 1985) section 4.01:

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

Alternative formulations of paragraph (1) from the Tentative Draft No 4 (Philadelphia, 1955):

"(a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible.

(b) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or is in such state that the prospect of conviction and punishment cannot constitute a significant restraining influence upon him."

Extracts from Michigan Compiled Laws 768.21a (enacted 1975, amended 1994), 768.36 (enacted 1975, amended 2002), 330.1400 (enacted 1974, amended 1995) and 750.520a (enacted 1974, amended 2000):

"768.21a: (1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness ... or as a result of being mentally retarded ..., that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity."

"768.36: (1) If the defendant asserts a defense of insanity in compliance with section 20a of this chapter, the defendant may be found 'guilty but mentally ill' if, after trial, the trier of fact finds all of the following:

- (a) The defendant is guilty beyond a reasonable doubt of an offense.
- (b) The defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of that offense.
- (c) The defendant has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law."

"330.1400 (g): 'Mental illness' means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."

"750.520a (i): 'Mentally retarded' means significantly subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior."

Montana Code Annotated section 46-14-102 (1979):

"Evidence that the defendant suffered from a mental disease or defect is admissible to prove that the defendant did or did not have a state of mind that is an element of the offence."

Idaho Code section 18 – 207 (1982):

"(1) Mental condition shall not be a defense to any charge of criminal conduct.

...

(3) nothing herein is intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense, subject to the rules of evidence."

Alaska Statutes section 12.47.010(a) (1982; Supp 1986):

"In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct."

Utah Code section 76 – 2 – 305 (1983):

"(1)(a) It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged.

(b) Mental illness is not otherwise a defense, but may be evidence in mitigation of the penalty in a capital felony ... and may be evidence of special mitigation reducing the level of a criminal homicide or attempted criminal homicide"

Pennsylvania Consolidated Statutes (1983) title 18 sections 314 and 315:

"§ 314. Guilty but mentally ill.

(a) General rule.--A person who timely offers a defense of insanity in accordance with the Rules of Criminal Procedure may be found 'guilty but mentally ill' at trial if the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense.

(b) Plea of guilty but mentally ill.--A person who waives his right to trial may plead guilty but mentally ill. No plea of guilty but mentally ill may be accepted by the trial judge until he has examined all reports prepared pursuant to the Rules of Criminal Procedure, has held a hearing on the sole issue of the defendant's mental illness at which either party may present evidence and is satisfied that the defendant was mentally ill at the time of the offense to which the plea is entered. If the trial judge refuses to accept a plea of guilty but mentally ill, the defendant shall be permitted to withdraw his plea. A defendant whose plea is not accepted by the court shall be entitled to a jury trial, except that if a defendant subsequently waives his right to a jury trial, the judge who presided at the hearing on mental illness shall not preside at the trial.

(c) Definitions.--For the purposes of this section and 42 Pa C.S. § 9727 (relating to disposition of persons found guilty but mentally ill):

1. 'Mentally ill.' One who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

2. 'Legal insanity.' At the time of the commission of the act, the defendant was laboring under such a defect of reason, from disease of the mind, as not to

know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong.

(d) Common law M'Naghten's Rule preserved.--Nothing in this section shall be deemed to repeal or otherwise abrogate the common law defense of insanity (M'Naghten's Rule) in effect in this Commonwealth on the effective date of this section.

§ 315. Insanity.

(a) General rule.--The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense when the actor proves by a preponderance of evidence that the actor was legally insane at the time of the commission of the offense.

(b) Definition.--For purposes of this section, the phrase 'legally insane' means that, at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong."

Insanity Defence Reform Act 1984 (Federal), now 18 USC section 17(a):

"Affirmative Defense. - It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense."

California Penal Code (Supp 1987) section 25(b):

"(b) In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offence."

Part 2 Insanity as a plea in bar of trial

Scotland

H.M. Advocate v Brown (1907) 5 Adam 312 at 343:

"It means insanity which prevents a man from doing what a truly sane man would do and is entitled to do – maintain in sober sanity his plea of innocence, and instruct those who defend him as a truly sane man would do.... [T]he person who is giving these instructions should not only intelligently, but without obliteration of memory as to what happened in his life, give a true history of the circumstances of his life at the time the supposed crime was committed."

H.M. Advocate v Wilson 1942 JC 75 at 78-79:

"No plea has been taken on behalf of the accused that he is unfit to plead; indeed, I understand it is to be maintained on his behalf that he is fit so to do, but the evidence you will hear I think will show that his mental and physical condition is such as to raise a question as to whether any plea can be accepted from him - that is to say, as to whether he is fit to instruct a defence and fit to follow the proceedings in this Court. ... The ordinary and common case, of course, is the case of a man who suffers from insanity, that is to say, from mental alienation of some kind which prevents him giving the instructions which a sane man would give for his defence, or from following the evidence as a sane man would follow it, and instructing his counsel as the case goes along upon any point that arises. ...if his condition be such that he is unable either from mental defect or physical defect, or a combination of these, to tell his counsel what his defence is and instruct him so that he can appear and defend him; or if, again, his condition of mind and body is such that he does not understand the proceedings which are going on when he is brought into Court upon his trial, and cannot intelligibly follow what it is all about."

Stewart v H.M. Advocate (No. 1) 1997 JC 183 at 190:

"The question for [the trial judge] was whether the appellant, by reason of his material handicap, would be unable to instruct his legal representatives as to his defence or to follow what went on at his trial. Without such ability he could not receive a fair trial."

England and Wales

R v Pritchard (1836) 7 C & P 303 at 304-305:

"There are three points to be inquired into:- First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence – to know that he might challenge any of you [jurors] to whom he may object –and to comprehend the details of the evidence ... It is not enough that he may have a general capacity of communicating in ordinary matters."

R v Friend [1997] 1 WLR 1433 at 1441:

"The test of unfitness is whether the defendant will be able to comprehend the course of proceedings so as to make a proper defence. Whether he can understand and reply rationally to the indictment is obviously a relevant factor, but the jury must also consider whether he would be able to exercise his right to challenge jurors,

understand details of the evidence as it is given, instruct his legal advisers and give evidence himself if he so desires."

Report of the Committee on Mentally Abnormal Offenders chaired by the Rt Hon Lord Butler, (Cmnd 6244, 1975) p 158:

1. The expression 'unfit to plead' is unsatisfactory, and should be replaced by the phrase 'under disability in relation to the trial', shortened colloquially to 'under disability'.
2. The criteria for determining whether a defendant is under disability should be whether he can:
 - (i) understand the course of the proceedings at the trial so as to make a proper defence;
 - (ii) understand the substance of the evidence;
 - (ii) give adequate instructions to his legal advisers;
 - (iv) plead with understanding to the indictment.
3. We do not favour any change in the present rule under which amnesia does not of itself constitute disability."

Test proposed by Professor R D Mackay at the Scottish Law Commission / University of Edinburgh Law School Seminar on Insanity and Diminished Responsibility, 25 and 26 April 2002

"In determining whether a defendant is unfit to plead to the charges which he faces the trier of fact must be satisfied that the accused (1) has the capacity to assist his lawyer and (2) has decisional competence.

In order to be so satisfied the trier of fact must consider whether as a result of unsoundness of mind or inability to communicate the accused lacks capacity to:

1. understand the course of the proceedings so as to make a proper defence;
2. understand the substance of the evidence;
3. give rational instructions to his lawyers;
4. give evidence on his own behalf;
5. make rational decisions in relation to his participation in the trial process, including whether or not to plead guilty, which reflect true and informed choices on his part."

Australia

Criminal Law (Mentally Impaired Defendants) Act (Western Australia) 1996 section 9:

"A defendant is not mentally fit to stand trial for an offence if the defendant, because of mental impairment, is—

- (a) unable to understand the nature of the charge;

- (b) unable to understand the requirement to plead to the charge or the effect of a plea;
- (c) unable to understand the purpose of a trial;
- (d) unable to understand or exercise the right to challenge jurors;
- (e) unable to follow the course of the trial;
- (f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or
- (g) unable to properly defend the charge."

Crimes (Mental Impairment and Unfitness to be Tried) Act (Victoria) 1997 section 6:

"(1) A person is unfit to stand trial for an offence if, because the person's mental processes are disordered or impaired, the person is or, at some time during the trial, will be-

- (a) unable to understand the nature of the charge; or
- (b) unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury; or
- (c) unable to understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence); or
- (d) unable to follow the course of the trial; or
- (e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
- (f) unable to give instructions to his or her legal practitioner.

(2) A person is not unfit to stand trial only because he or she is suffering from memory loss."

Criminal Law Consolidation Act 1935 (South Australia) section 269H:

"269H. A person is mentally unfit to stand trial on a charge of an offence if the person's mental processes are so disordered or impaired that the person is-

- (a) unable to understand, or to respond rationally to, the charge or the allegations on which the charge is based; or
- (b) unable to exercise (or to give rational instructions about the exercise of) procedural rights (such as, for example, the right to challenge jurors); or
- (c) unable to understand the nature of the proceedings, or to follow the evidence or the course of the proceedings."

Canada

Canadian Criminal Code R.S. 1985 (as amended in 1992) section 2:

" ... "unfit to stand trial" means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

- (a) understand the nature or object of the proceedings,
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel."

Ireland

State (Coughlan) v The Minister for Justice [1967] IR 106:

"[Start of sentence]...has the prisoner sufficient intellect to comprehend the course of the proceedings of the trial, so as to make a proper defence, to challenge a juror to whom he may wish to object, and to understand the details of the evidence..."

New Zealand

Criminal Justice Act 1985:

"108. Interpretation:

(1) For the purposes of this Part of this Act, a person is under disability if, because of the extent to which that person is mentally disordered, that person is unable---

- (a) To plead; or
- (b) To understand the nature or purpose of the proceedings; or
- (c) To communicate adequately with counsel for the purposes of conducting a defence."

Proposed amendment in Criminal Justice Amendment (No 7) Bill to add: -

"To make an informed decision whether or not to give evidence."

United States of America

Dusky v United States 362 U.S. 402 (1960):

"We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,' but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him."

Adaptation of Dusky test proposed by Professor Richard J Bonnie at the Scottish Law Commission / University of Edinburgh Law School Seminar on Insanity and Diminished Responsibility, 25 and 26 April 2002:

"A defendant is competent to proceed to [adjudication][trial] if he has a rational understanding of the charges against him, the nature and purpose of the proceedings and the adversary process, is able to assist counsel in his defense, and has the capacity for rational decision-making in relation to the defense and disposition of the case."

Part 3 Diminished responsibility

Scotland

HM Advocate v Savage 1923 JC 49 at 51:

"[I]t appears, as I say, equally well established, although it has been variously phrased, that the state of mind of the prisoner may be such, short of insanity, as to reduce the quality of his act from murder to culpable homicide. It is very difficult to put it in a phrase, but it has been put in this way : that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility – in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied – as Lord Stormonth-Darling in terms said in the case to which the Lord Advocate referred [*HM Advocate v Aitken* (1902) 4 Adam 88] – that there must be some form of mental disease. Well, ladies and gentlemen of the jury, that is a very difficult region of law. I have told you the kind of thing that is necessary. Aberration or weakness of mind; mental unsoundness; a state of mind bordering on insanity although not reaching it; a mind affected so that the responsibility is diminished from full responsibility to partial responsibility. That is the sort of thing that must be proved in order to establish that the crime which would otherwise be murder is only culpable homicide"

Galbraith v HM Advocate 2002 JC 1 at 21-22:

"We can summarise our conclusions on that matter in this way: 1. Where, on the facts found proved by the jury, the law holds that the accused's responsibility was diminished at the time when he killed his victim, the proper course is for the jury to convict the accused of culpable homicide. 2. But, precisely because diminished responsibility is a legal concept, it is for the trial judge to determine whether there is evidence on which the jury would be entitled to convict the accused of culpable homicide rather than of murder, on the ground of diminished responsibility. In determining that issue, the judge must consider the kinds of issue that we have discussed. In essence, the judge must decide whether there is evidence that, at the relevant time, the accused was suffering from an abnormality of mind which substantially impaired the ability of the accused, as compared with a normal person, to determine or control his acts. 3. The abnormality of mind may take various forms. It may mean that the individual perceives physical acts and matters differently from a normal person. Or else it may affect his ability to form a rational judgment as to whether a particular act is right or wrong or to decide whether to perform it. In a given case any or all of these effects may be operating. 4. The abnormality must be one that is recognised by the appropriate science. But it may be congenital or derive from an organic condition, from some psychotic illness, such as schizophrenia or severe depression, or from the psychological effects of severe trauma. In every case, in colloquial terms, there must, unfortunately, have been something far wrong with the accused, which affected the way he acted. 5. While the plea of diminished responsibility will be available only where the accused's abnormality of mind had substantial effects in relation to his act, there is no requirement that his state of mind should have bordered on insanity. 6. It is for the court to determine, having regard always to relevant policy considerations, whether any particular abnormality can found a plea of diminished responsibility. Thus, no mental abnormality, short of actual insanity, which is brought on by the accused himself taking drink or controlled drugs or sniffing glue, will found a plea of diminished responsibility (*Brennan v HM Advocate* 1977 JC 38). Similarly, our law does not recognise psychopathic personality disorder as a basis for diminished responsibility (*Carraher v*

HM Advocate 1946 JC 108). 7. If, applying the appropriate tests, the judge concludes that the evidence is not capable of supporting a plea of diminished responsibility, he should direct the jury that, if convicting, they should convict of murder. 8. If, on the other hand, the judge concludes that there is evidence to support the plea, then he must leave it for the jury to consider. In that event the judge's directions to the jury should not simply recite the *Savage* formula but should be tailored, so far as possible, to the facts of the particular case. The amount of detail required will also depend on the facts of the particular case and on the precise issue in controversy between the Crown and the defence. In essence, the jury should be told that they must be satisfied that, by reason of the abnormality of mind in question, the ability of the accused, as compared with a normal person, to determine or control his actions was substantially impaired."

England and Wales

Homicide Act 1957, section 2(1):

"Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

Report of the Committee on Mentally Abnormal Offenders, chaired by the Rt Hon Lord Butler (Cmnd 6244, 1975) paragraph 19.17:

"Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in section 4 of the Mental Health Act 1959 and if, in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter."

A Criminal Code for England and Wales (Law Com No 177) (1989) clause 56:

"56.-(1) A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he is suffering from such mental abnormality as is a substantial enough reason to reduce his offence to manslaughter.

(2) In this section "mental abnormality" means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication.

(3) Where a person suffering from mental abnormality is also intoxicated, this section applies only where it would apply if he were not intoxicated."

Test proposed by Professor R D Mackay at the Scottish Law Commission / University of Edinburgh Law School Seminar on Insanity and Diminished Responsibility, 25 and 26 April 2002:

"A defendant who would otherwise be guilty of murder is not guilty of murder if, at the time of the commission of the alleged offence, his unsoundness of mind affected his criminal behaviour to such a material degree that the offence ought to be reduced to one of manslaughter."

Australia

Criminal Code Act 1899 (Queensland) section 304A (added 1961):

"(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.

(3) When 2 or more persons unlawfully kill another, the fact that 1 of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons."

Crimes Act 1900 (New South Wales) section 23A (added 1974):

"Substantial impairment by abnormality of mind:

(1) A person who would otherwise be guilty of murder is not to be convicted of murder if:

(a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and

(b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

(2) For the purposes of subsection (1) (b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.

(3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.

(4) The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.

(5) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder is to be convicted of manslaughter instead.

(6) The fact that a person is not liable to be convicted of murder in respect of a death by virtue of this section does not affect the question of whether any other person is liable to be convicted of murder in respect of that death.

- (7) If, on the trial of a person for murder, the person contends:
- (a) that the person is entitled to be acquitted on the ground that the person was mentally ill at the time of the acts or omissions causing the death concerned, or
 - (b) that the person is not liable to be convicted of murder by virtue of this section,
- (8) Evidence may be offered by the prosecution tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.
- (9) In this section:(8) "underlying condition" means a pre-existing mental or physiological condition, other than a condition of a transitory kind.

Crimes Act 1900 (Australian Capital Territory) section 14:

- (1) A person on trial for murder shall not be convicted of murder if, when the act or omission causing death occurred, the accused was suffering from an abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent cause or whether it was induced by disease or injury) that substantially impaired his or her mental responsibility for the act or omission.
- (2) An accused has the onus of proving that he or she is, by virtue of subsection (1), not liable to be convicted of murder.
- (3) A person who, but for subsection (1), would be liable (whether as principal or accessory) to be convicted of murder is liable to be convicted of manslaughter.
- (4) The fact that a person is, by virtue of subsection (1), not liable to be convicted of murder does not affect the question whether any other person is liable to be convicted of murder in respect of the same death.
- (5) Where, on a trial for murder, the accused contends:
- (a) that he or she is entitled to be acquitted on the ground that he or she was mentally ill at the time of the act or omission causing the death; or
 - (b) that he or she is, by virtue of subsection (1), not liable to be convicted of murder;

the prosecution may offer evidence tending to prove the other of those contentions and the court may give directions as to the stage of the proceedings at which that evidence may be offered.

Criminal Code Act 1983 (Northern Territory) section 37:

"When a person who has unlawfully killed another under circumstances that, but for this section, would have constituted murder, was at the time of doing the act or making the omission that caused death, in such a state of abnormality of mind as substantially to impair his capacity to understand what he was doing or his capacity to control his actions or his capacity to know that he ought not do the act, make the omission or cause that event, he is excused from criminal responsibility for murder and is guilty of manslaughter only."

