



# Scottish Law Commission

## *MEDIA BRIEFING NOTE*

ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION  
NOT FOR PUBLICATION OR BROADCAST  
BEFORE 1100 HOURS FRIDAY 24 JANUARY 2003

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**A MEDIA CONFERENCE WILL BE HELD AT THE SCOTTISH LAW COMMISSION ON  
FRIDAY 24 JANUARY AT 11AM**

### **INSANITY AND DIMINISHED RESPONSIBILITY**

The Scottish Law Commission publishes today Discussion Paper (No 122) on Insanity and Diminished Responsibility in the Criminal Law.

## Background

1. The civil law relating to mental health and the care and treatment of persons suffering from various forms of mental disorder were subject to many changes during the 20<sup>th</sup> Century. In 2001 an expert Committee chaired by the Rt Hon Bruce Millan made recommendations for further reform of the law on mental health. The Mental Health (Scotland) Bill, currently before the Scottish Parliament, seeks to give effect to the bulk of the Millan Committee's recommendations. Although the Millan Committee was mainly concerned with the civil law, it noted that criticisms had been made about insanity and diminished responsibility as part of the criminal law, and it recommended that these topics should be considered by the Scottish Law Commission. In October 2001 the Commission was asked by the Scottish Ministers to consider whether the existing definitions of insanity and diminished responsibility required reform. The publication of our Discussion Paper is an important step in our work on this project.

2. Another significant development in this area were changes in the law relating to the powers of the court when dealing with mentally disordered offenders. In the past two extreme positions have been adopted in respect of these offenders. At one time an accused who successfully put forward a defence of insanity was given an outright acquittal. The result was that courts could not make any order about the treatment or confinement of such an accused person. The other extreme position was one which applied in Scots law until recently. A person who was found to be insane at the time of the offence was given an acquittal. But at the same time he or she was automatically detained for an indefinite period in a mental hospital. The same outcome arose when a person was found to be insane in bar of trial (that is his or her condition was such that he or she was unable to understand or follow the proceedings against him or her).

3. Important changes were made by the Criminal Procedure (Scotland) Act 1995, which came into effect on 1 April 1996. Now, when a finding of insanity has been made in respect of an accused person, the court can make any of a range of orders (including, for example, a hospital order, a guardianship order, a treatment and supervision order, and a complete discharge). Furthermore the court's order must be based on medical assessment of the accused at the time of making the order. The 1995 Act also introduced a new procedure where an accused was found to be insane in bar of trial. Before the court could make an order against the accused the Crown had to prove (at an 'examination of facts') that he or she had in fact carried out the criminal acts he or she had been charged with.

4. Accordingly our remit does not deal with the consequences of a finding that an accused is insane or of diminished responsibility but with the prior question of the meaning, or definition, of these terms. What are the correct tests for the criminal law to apply when a finding of this sort is to be made?

## Our general approach

5. We are of the view that the law relating to insanity in the criminal law is in many ways unsatisfactory and at the least it requires to be re-stated in order to reflect contemporary legal, medical, and social ideas and beliefs. Insanity is a term used in two different contexts in the criminal law.

6. First insanity is a defence to a criminal charge. An accused person using this defence is claiming that because of his or her mental state at the time of the offence he or she is not a proper person to be subject to criminal punishment. Where insanity as a plea in bar of trial is in issue the focus of attention is the accused's condition at the time of the trial, not the time of the offence. Here concern is with the accused's ability to understand the proceedings against him or her. Although the same word 'insanity' is used, we consider that there are significant differences between the two situations and we discuss them separately in our Discussion Paper.

7. Special issues arise in respect of diminished responsibility. We deal with these later in this briefing note.

### **Insanity as a defence**

8. We take the view that the law of insanity as a defence to a criminal charge needs to be brought up to date to reflect the language and concepts of the 21<sup>st</sup> Century. Indeed we think that the word 'insanity' itself should no longer be used in the criminal law, and we suggest instead a 'defence of mental disorder.'

9. But it is not just the name but the substance of the defence that calls for reform. At present Scots law uses a test which derives from a book written in 1797 (Hume's Commentaries) and uses out-of-date language ('absolute alienation of reason') which causes problems for people, such as psychiatric experts and jurors, who have to apply the test. We believe that the test would be easier to apply if it simply referred to the existence of a mental disorder suffered by the accused. In our view a person should be excused from criminal liability if the presence of a mental disorder meant that he or she did not fully or rationally understand his or her conduct at the time of the offence. For this reason we propose that the defence should be defined in terms of the accused's failure to appreciate his or her conduct.

10. In some legal systems the 'insanity' defence includes failures by the accused to control his or her behaviour as a result of mental disorder (a so-called volitional element of the defence). We are undecided whether Scots law should include any volitional element in the new mental disorder defence. The proposed test of appreciation of conduct, if understood in a wide sense, should cover all cases where a person's mental disorder should excuse his or her criminal acts. However we have not reached a concluded view on this particular issue.

### **In summary our proposals on 'insanity' as a defence are as follows:**

- The defence should be known as 'mental disorder.' Where it is successfully raised, the accused would receive a verdict of 'not guilty by reason of mental disorder.'
- The defence 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 in statute. The existence (or non-existence) of a mental disorder in a particular case would be a matter for expert, psychiatric evidence.
- The core element of the defence is that by reason of a mental disorder at the relevant time the accused was unable to appreciate the nature of the conduct forming the basis of the charge.
- Rather than make a positive proposal, we ask the question whether the definition of the defence should contain any reference to the accused's volitional incapacities or disabilities.

## **Insanity as a plea in bar of trial**

11. 'Insanity' as a plea in bar of trial is concerned with the situation where the accused suffers from a condition which prevents him or her from fully understanding the proceedings against him or her and participating in them. We believe that this area of law requires reform. In the first place, the term 'insanity' is again inappropriate in this context, and we suggest that the plea should be re-named 'disability' in bar of trial. Furthermore the law in Scotland on 'insanity' in bar of trial is very much under-developed. There are few authoritative court decisions and it is not always easy to know which conditions count as 'insanity' for this purpose and which do not.

12. In common with many legal systems Scots law formulates the test in terms of tasks or skills which the accused cannot perform (for example, understanding the charge against him or her, instructing his or her legal advisers). We believe that it would be beneficial if a new test was formulated in terms of the general underlying principle, followed by illustrative examples. We suggest that the general principle should be stated in terms of the accused's ability to participate effectively in the proceedings.

### **In summary our proposals on 'insanity' as a plea in bar of trial are as follows:**

- The plea in bar of trial should be re-named 'disability in bar of trial'.
- The test for the plea 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 criminal proceedings against him or her.
- The test would also include a non-exhaustive list of activities by which such a lack of capacity may be tested.

## **Diminished responsibility**

13. In many situations there may be mitigating circumstances relating to a person accused of a crime. These circumstances may not be enough to excuse the accused from criminal liability but if the accused is found guilty they are taken into account at the stage of sentencing and result in a lighter sentence than would otherwise have been the case.

14. However there can only be one sentence where a person is convicted on a charge of murder: life imprisonment. In Scots law in the 19<sup>th</sup> Century a practice developed in murder cases where certain types of mitigating circumstances had the effect that instead of being convicted of murder the accused was convicted of culpable homicide (where the courts have discretion as to sentence). This practice became known as the doctrine of diminished responsibility. However in the early part of the 20<sup>th</sup> Century the courts considerably narrowed the types of condition which constituted diminished responsibility, by insisting that the condition must be one 'bordering' on insanity. The linking of diminished responsibility and insanity had the effect that the scope and meaning of diminished responsibility became uncertain. As psychiatric witnesses put it to the Millan Committee if it was difficult to say what 'insanity' meant it was even more difficult to explain something which bordered on insanity.

15. However many of these problems were removed by a recent decision of the High Court of Justiciary in *HM Advocate v Galbraith* 2002 JC 1. In that case the Court widened the range of conditions which could be the basis for the plea of diminished responsibility and emphasised that these conditions need not border on insanity.

16. We take the view that the approach in the *Galbraith* decision is correct and that it has been welcomed by most practitioners and commentators. Accordingly we propose that on the whole the law should remain as it now is but we ask for views on whether the test for diminished responsibility should be re-stated in a statutory form.

**In summary our proposals on diminished responsibility are as follows:**

- Scots law should retain the plea of diminished responsibility for murder cases but there is no need to introduce it for other types of offence.
- We ask whether the existing law (as laid down in *HM Advocate v Galbraith*) should be formulated in statute or left to develop at common law.
- We also ask whether there is any need to clarify the application of diminished responsibility where an accused person suffers from alcohol or drug dependency.

**The problem of anti-social personality disorder**

17. Difficult issues arise in connection with the condition of anti-social personality disorder (ASPD), sometimes known as psychopathic personality disorder. The nature of this disorder has been the subject of acute controversy in psychiatric medicine. In essence the disorder concerns character or personality failings in that the person concerned cannot apply the normal moral and social constraints on behaviour. Debate continues to the extent, if any, to which ASPD is truly a mental disorder. In addition many legal systems do not allow ASPD to form the basis of an insanity defence. We are inclined to take the same view. The existence of ASPD does not prevent an accused person from fully appreciating the nature of his or her conduct. It is rather an aspect of an accused's personality or character and does not excuse him or her from criminal liability. Accordingly we propose that ASPD should not give rise to the new proposed defence of mental disorder.

18. However the same result may not necessarily apply in respect of the plea of diminished responsibility. Making allowances for the accused's condition which affects his or her personality or behaviour is what diminished responsibility is all about. Yet in *HM Advocate v Galbraith* the court followed an earlier case which stated that psychopathic personality disorder could not be the basis of a plea of diminished responsibility. However the court in the *Galbraith* case was not required to consider this issue in depth. We wonder if there are still good reasons for excluding ASPD from diminished responsibility. Where the plea is successful the accused is still convicted of culpable homicide and is liable to be sentenced (which is not necessarily a 'light' sentence). Furthermore the exclusion of ASPD does not apply in some other legal systems (such as England). We have not reached a conclusion on this issue but would welcome the views of our consultees.

**In summary our proposals in relation to anti-social personality disorder are as follows:**

- The condition of anti-social personality disorder should be excluded from the definition of the new defence of mental disorder.
- We ask the question whether anti-social personality disorder should continue to be excluded from the scope of the plea of diminished responsibility.

## Further proposals for consultation

19. In our Discussion Paper we make various proposals on which party (the Crown or the accused) should bear the burden of proving the defence of mental disorder and the pleas of disability in bar of trial and diminished responsibility. We also consider what should be the required standard of proof in order to establish the defence or the pleas. We make further proposals in respect of the procedure to be followed in proving mental disorder, disability in bar of trial and diminished responsibility.

## What happens next?

20. Our Discussion Paper sets out our provisional views on reform of the law of 'insanity' and diminished responsibility in the criminal law of Scotland. We look forward to receiving responses to the proposals in the Paper from persons and organisations who have an interest in the administration of criminal justice, mental health, and the treatment of mentally disordered offenders.

21. Our consultation period extends to **18 April 2003**. After that we will consider the points raised in the responses we receive and we will make our final recommendations for reform in a Report. We intend to submit the final Report to the Scottish Ministers by the end of 2003.

## NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Honourable Lord Eassie. The other Commissioners are currently Mr Patrick S Hodge QC, Professor Gerry Maher, Professor Kenneth G C Reid and Professor Joseph M Thomson.

2. A Media Conference will be held on **Friday 24 January 2003 at 11 am** within the Commission's offices at 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, e-mail: [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk)). You are invited to be represented. Media copies of the paper will be available at the Media Conference or can be collected from the Commission's offices. The paper may also be viewed on our website at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk) or purchased from The Stationery Office Bookshops.

3. Further information can be obtained by contacting Professor Gerry Maher, Scottish Law Commission (contact addresses and numbers as above).