



# Scottish Law Commission

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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NOT FOR PUBLICATION OR BROADCAST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**

**A fuller briefing note will be available at the media conference or may be obtained by  
e-mailing: [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk)**

## **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. In October 2001 the Scottish Law Commission was asked by the Scottish Ministers to consider whether the existing definitions of insanity and diminished responsibility in the criminal law required reform. This reference followed the publication of a report by an expert Committee (the Millan Committee) which made recommendations for reform of the civil law on mental health. The Millan Committee received representations that the tests for insanity and diminished responsibility in criminal law often posed problems for mental health practitioners.

2. Accordingly our remit is to consider the tests for, or definitions of, the concepts of insanity and diminished responsibility. We are not concerned with civil law aspects of mental health or with wider issues relating to mentally disordered offenders. (The powers of the courts to deal with these offenders were substantially reformed by the Criminal Procedure (Scotland) Act 1995, which came into effect on 1 April 1996.)

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

3. The word insanity is used in two quite different contexts in the criminal law. First, insanity is a defence to 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. Secondly, insanity can act as a plea in bar of trial. Where the accused's condition at the time of the trial is such that he or she cannot understand the proceedings against him or her, the effect is that the accused cannot be subjected to a trial.

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

### The Commission's provisional proposals

5. Our Discussion Paper sets out our provisional proposals on reform of the law of insanity and diminished responsibility.

#### (1) Insanity as a defence

- The old-fashioned term 'insanity' is out of place in a modern legal system. The defence should be known instead as 'mental disorder.' Where it is successfully raised, the accused would receive a verdict of 'not guilty by reason of mental disorder.'
- The present law derives from a book written in 1797. The current test uses out-of-date language which cannot easily be understood by persons who have to apply it (eg psychiatric experts, jurors). The test should be re-stated to reflect modern terminology and thinking on mental health.
- The reformed 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.
- We are unsure whether the new test needs to deal with the accused's incapacity to control his or her behaviour as a result of mental disorder. Accordingly we ask the question whether the defence should contain any reference to such 'volitional' incapacities or disabilities.
- The condition of anti-social personality disorder should be excluded from the definition of the new defence of mental disorder. This condition is often not regarded as a form of mental disorder. It is an aspect of the accused's character rather than his or her ability to appreciate the nature of conduct.

## (2) Insanity as a plea in bar of trial

- The term 'insanity' is equally out-of-place in connection with the plea in bar as it is with the defence. The plea in bar of trial should be re-named 'disability in bar of trial'.
- At present the law does not express the general principle underlying the plea in bar. We propose that the general 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 could be judged (for example, understanding the charge against him or her, instructing his or her legal advisers).

## (3) Diminished responsibility

- 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.
- The decision in the *Galbraith* case has been generally welcomed. We do not intend to make any radical change to the law as set out in that case. However, we do ask whether the existing law should be formulated in statute or instead left to develop at common law.
- We ask whether there is any need to clarify the application of diminished responsibility where an accused person suffers from alcohol or drug dependency.
- We also ask the question whether anti-social personality disorder should continue to be excluded from the scope of the plea of diminished responsibility.

## What happens next?

6. 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 our 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).