promoting law reform

Report on Insanity and Diminished Responsibility

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965
Laid before the Scottish Parliament by the Scottish Ministers

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NOTES

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SCOTTISH LAW COMMISSION

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Report on Insanity and Diminished Responsibility

To: Ms Cathy Jamieson MSP, Minister for Justice

We have the honour to submit to the Scottish Ministers our Report on Insanity and Diminished Responsibility

(Signed) RONALD D MACKAY, *Chairman*
GERARD MAHER
KENNETH G C REID
JOSEPH M THOMSON
COLIN TYRE

Miss Jane L McLeod, *Chief Executive*
7 May 2004

Contents

Abbreviations

1995 Act
: Criminal Procedure (Scotland) Act 1995

2003 Act
: Mental Health (Care and Treatment) (Scotland) Act 2003

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*, Vol I, (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)

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)

Part 1 Introduction

Terms of reference

1.1 In October 2001 we received the following reference[1] from the Scottish Ministers:

> "(1) To consider –
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> (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; and
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> (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 as a plea in bar of trial) or diminished responsibility has been established."

1.2 We received the reference following the report of a committee chaired by the Rt Hon Bruce Millan, which undertook a comprehensive review of the Mental Health (Scotland) Act 1984.[2] In the course of preparing its report, the committee received representations about difficulties encountered in practice arising from the tests 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 as a result we received the reference from Scottish Ministers.

1.3 The bulk of the Millan Committee's recommendations have been implemented by the Mental Health (Care and Treatment) (Scotland) Act 2003. This Act is mainly concerned with the civil law on mental health. By contrast, our project concentrates on specific aspects of the criminal law relating to persons with mental disorder. The provisions of our bill, if enacted, would form another part of the process of reform of the law relating to mental health.

The Criminal Procedure (Scotland) Act 1995

1.4 Since the time of its enactment the Criminal Procedure (Scotland) Act 1995, which is a consolidation statute, has been the subject of numerous amendments. As a consequence the Act has become cumbersome in form and difficult to use. Moreover, the Scottish Executive has announced that the main provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003, which makes extensive and complicated amendments to the 1995 Act, will be brought into force in April 2005. In view of the fact that the

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[1] Under section 3(1)(e) of the Law Commissions Act 1965.
[2] *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984* (SE/2001/56).
[3] Millan Report, ch 29, esp paras 43-61.

amendments are relevant to our recommendations, we have decided to proceed on the basis that all the amendments to the 1995 Act have been commenced. Accordingly, our recommendations and the provisions of the draft bill annexed to this report[4] have been drafted to take account of the changes made by legislation up to and including the 2003 Act.[5]

Consultation

1.5 The topics covered by our reference involve a wide range of issues in both law and mental health. At the start of the project we held a seminar with a view to discovering current thinking on these issues. The seminar was attended by academic lawyers as well as legal and medical practitioners, and helped us considerably in identifying and developing the principles which were the subject of our proposals for reform. Our thanks are due to the speakers and the other participants who contributed to the seminar proceedings.[6]

1.6 Our Discussion Paper on Insanity and Diminished Responsibility was published in January 2003.[7] It invited comments on our proposals to introduce statutory tests to replace the common law rules on diminished responsibility and on insanity as a defence and plea in bar of trial. The paper also sought comments in relation to the burden and standard of proof required to establish the defence and pleas. We are grateful to all the persons and organisations who responded to the Discussion Paper.[8]

1.7 We also held a meeting with a number of experts in the field of mental health to discuss various matters arising from the responses to the Discussion Paper. This meeting was extremely valuable for our task of ensuring that our recommendations for reform of the law cohered with medical practice.[9] Furthermore, throughout the project we received considerable assistance on a wide range of topics relating to psychiatric medicine from Dr Derek Chiswick and Dr John Crichton. Their contribution, as well as that of all the other mental health experts whom we consulted, is very much appreciated.

1.8 In the course of preparing our draft bill we consulted with the Crown Office on a number of issues relating to criminal procedure and the workings of the 1995 Act. We wish to record our thanks for this assistance.

Disposals

1.9 Our terms of reference do not extend to a wide-ranging review of the disposals available to the courts in cases involving mentally disordered persons, and our recommendations make only incidental reference to the powers of the criminal courts in

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[4] The list of recommendations is set out in Part 6. The draft bill is contained in Appendix A.

[5] The main amending Acts are the Crime and Punishment (Scotland) Act 1997; Crime and Disorder Act 1998; Mental Health (Public Safety and Appeals) (Scotland) Act 1999; Adults with Incapacity (Scotland) Act 2000; Convention Rights (Compliance) (Scotland) Act 2001; Criminal Procedure (Amendment) (Scotland) Act 2002; Sexual Offences (Procedure and Evidence) (Scotland) Act 2002; Criminal Justice (Scotland) Act 2003; Mental Health (Care and Treatment) (Scotland) Act 2003.

[6] 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.

[7] Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility* (Discussion Paper No 122, 2003).

[8] A list of consultees who submitted a written response to the Discussion Paper is set out in Appendix B.

[9] The details of the mental health experts who assisted in the project are provided in Appendix C.

relation to mental disorder. Nonetheless, we wish to say something at this stage on disposals for there are clear links between the tests for what constitutes insanity and the consequences of a finding that an accused person is insane.

1.10 Indeed historically much of the concern with insanity (and to a lesser extent, diminished responsibility) has been with what happens to persons who use a state of mental disorder as a defence or a plea. Consider the famous example of James Hadfield. In 1800 Hadfield was found to be insane on a charge of the attempted murder of George III. The result was that he received an outright acquittal. Public and political reaction to this case led 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. A similar approach was used in respect of persons found insane in bar of trial.

1.11 The fact that a finding of insanity had a direct consequence on the disposal of a case involving an insane accused had a significant influence on the development of the definition 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 and cover persons who, though in some way mentally abnormal, did not require such drastic treatment.

1.12 However in the modern law the approach to the disposal of cases involving mentally disordered persons is quite different.[10] Where a person is acquitted on the ground of insanity, the court must consider the appropriate means of disposal. Under the amended version of section 57 of the Criminal Procedure (Scotland) Act 1995, the court has the power to make the following orders:

(a) a compulsion order authorising the detention of the person in hospital;

(b) a compulsion hospital order coupled with a restriction order;

(c) an interim compulsion order;

(d) a guardianship order;

(e) a supervision and treatment order; and

(f) a discharge with no further order made.

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[10] See 1995 Act, Part VI, especially s 57. The provisions of s 57 first appeared in the Criminal Justice (Scotland) Act 1995, which was consolidated into the 1995 Act. The 'new' law on disposals in insanity cases came into effect on 1 April 1996.

Accordingly, the court has 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.

1.13 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. Moreover, 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. The 1995 Act introduced a three-staged approach 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.[11] The court's powers of disposal at this final stage are the same as those for cases of insanity as a defence.

1.14 Accordingly, a crucial characteristic of the 1995 Act provisions is that a finding of insanity (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 consequence, in this project we have been able to focus on issues relating to the definition of insanity free from any implications as regards disposal.

1.15 Matters are to some extent different in respect of diminished responsibility. This plea arises only in cases of murder and, if successful, its effect is that the accused is liable to a conviction for the lesser charge of culpable homicide. But even so 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.[12] Here the question concerning the test for the plea is that of identifying the category of persons whose sentence for unlawful killing should be something other than mandatory life imprisonment.

Statistics

1.16 A further matter with a bearing on the context of our recommendations is the statistical data on the use made of the defence and the pleas and the outcome of cases where they are involved.[13]

1.17 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 Scottish Courts sets out statistics on the number of persons proceeded against in the criminal courts. The Bulletin also provides figures for the main

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[11] 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.
[12] 1995 Act, s 205(1).
[13] See Discussion Paper, paras 1.17-1.21 and Appendix C for further details.

disposal used against all persons in respect of whom a criminal charge has been proved.[14] These figures include a general category of 'insanity, hospital, guardianship order' but the basis on which these disposals were made is not explained.[15] However the figures do provide a general indication of the use of mental disorder issues in criminal proceedings. The number of persons proceeded against for each of the 7 years 1996-2002 was 175,457, 172,556, 159,232, 146,841, 137,026, 139,596, and 142,900. The number of persons with an 'insanity, hospital, guardianship order' disposal for the same years was 159, 164, 131, 137, 109, 113 and 114.[16]

1.18 A more useful source of information is the report of a research project on the operation of Part VI of the 1995 Act.[17] The project took place over a two year period from September 1996 to August 1998. Its aim was to assess the workings of the provisions of the 1995 Act relating to insanity as a plea in bar (including the procedure of examination of facts) and the insanity defence over that period. During the period the researchers were notified by clerks of court of 52 cases.[18] 37 involved the plea in bar, 12 the insanity defence and in a further three cases 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, four treatment and supervision orders, one guardianship order, and in one case no order was made.[19] Of the 12 cases involving the insanity defence only, in two cases the accused was found to be sane.[20] Of the remaining ten cases, hospital orders were made in seven cases, a supervision and treatment order in one, and no order made in two. Of the three 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 three cases.

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,[21] 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.[22] As a result, even examination of the relevant court papers would not necessarily disclose all

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[14] These data refer to the former names for the disposal, which were changed by the Mental Health (Care and Treatment) (Scotland) Act 2003.
[15] See Discussion Paper, Appendix C, Table 1. The figures in the text above have been revised to take account of data published after the Discussion Paper.
[16] Ibid.
[17] M Burman and C Connelly, *Mentally Disordered Offenders and Criminal Proceedings. The Operation of Part VI of the Criminal Procedure (Scotland) Act 1995* (The Scottish Office Central Research Unit, 1999). Data derived from this study are contained in the Discussion Paper, Appendix C.
[18] 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.
[19] It may also be noted that in one of the cases in which the facts were not established, a disposal was made under the Mental Health (Scotland) Act 1984.
[20] 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.
[21] See Scottish Executive Statistical Bulletin CrJ/2003/9, *Homicide in Scotland 2002*, Table 8. The number of persons accused of homicide for the years 1996-2002 were 171, 126, 140, 173, 126, 151, and 186. The number of these cases classified as murder were 100, 66, 86, 117, 65, 101 and 128. See further Discussion Paper, Appendix C.
[22] See paras 5.50-5.53.

cases in which diminished responsibility was raised. However, prior to the publication of the Discussion Paper 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 in *Galbraith v HM Advocate*.[23]

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*, many cases resulted in a hospital order, whereas since that case the courts were thought to impose sentences of imprisonment (including life sentences) more frequently than before.

Main recommendations for reform

1.22 Part 2 of the Report deals with the insanity defence. We recommend that the common law defence should be replaced by a statutory defence that an accused lacked criminal responsibility by reason of mental disorder. The defence would apply where at the time of the offence the accused was unable by reason of mental disorder to appreciate the nature or the wrongfulness of his conduct. The definition of the defence would not contain any reference to volitional incapacities of the accused. In addition the condition of psychopathic personality disorder would be excluded from the scope of the defence.

1.23 Part 3 deals with the plea of diminished responsibility. We recommend that the definition of the plea should be set out in statute on substantially the same basis as formulated in the decision of *Galbraith v HM Advocate*, namely that the accused's ability to determine or control his conduct was substantially impaired by reason of mental abnormality. Unlike the common law, the statutory test for the plea would include abnormality in the form of psychopathic personality disorder. We also recommend that the statute should make clear that a state of acute intoxication does not by itself constitute diminished responsibility but that such a state would not prevent the plea being proved if there is some other basis for establishing it. The plea would apply only in cases of murder and its effect would be that an accused who would otherwise be convicted of murder would be convicted instead of culpable homicide.

1.24 Part 4 of the report deals with insanity as a plea in bar of trial. We recommend that the common law plea should be replaced by a statutory plea called 'unfitness for trial.' The general test for the plea should be that an accused person is unfit for trial where as a consequence of his mental or physical condition at the time of the trial he lacks the capacity to participate effectively in the proceedings against him. In addition the test for the plea is to include a non-exhaustive list of skills or activities which would indicate such lack of capacity. The fact that an accused experiences loss of memory of the events forming the basis of the charge against him should not by itself constitute unfitness for trial.

1.25 Part 5 deals with matters of evidence and procedure in relation to the defence based on mental disorder, diminished responsibility and unfitness for trial. The burden of proof for

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[23] 2002 JC 1.

the new defence based on mental disorder should be on the accused, who has to establish it on the balance of probabilities. A similar rule should apply in respect of diminished responsibility. The Crown would not be able to raise the defence based on the accused's mental disorder. This defence is to be a special defence. In addition the plea of diminished responsibility is to be treated as if it were a special defence for the purpose of giving advance notice. There should be no change to the existing law whereby the issue of an accused being unfit for trial may be raised by the accused, the Crown or by the court. Where the issue of the accused's unfitness for trial has been raised, the court should find the accused unfit if so satisfied on the balance of probabilities.

Legislative competence

1.26 A matter which calls for consideration is whether the terms of our draft bill fall within the legislative competence of the Scottish Parliament.[24] The first question is whether our draft bill relates to reserved or devolved matters.[25] The provisions of the bill concern criminal law and procedure and mental health. With a few exceptions which are not relevant to the bill, these areas of law are devolved to the Scottish Parliament.

1.27 A further requirement of legislative competence is that an Act of the Scottish Parliament must be compatible with the rights set out in the European Convention on Human Rights.[26] For the reasons we give later, we are of the view that our recommendations and the provisions of the draft bill would not be in breach of the Convention.[27]

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[24] An Act of the Scottish Parliament is not law in so far as any provision is outside the legislative competence of the Parliament (Scotland Act 1998, ss 29 and 126(1)).
[25] See Scotland Act 1998, s 29(2).
[26] Scotland Act 1998, s 29(2)(d); Human Rights Act 1998, s 1.
[27] See paras 2.64-2.68; 3.51; 4.24-4.30; 5.10-5.28; 5.64; 5.66.

Part 2 Insanity as a defence

Introduction

2.1 In this Part we set out our recommendations for the reform of the law relating to insanity as a defence. The starting-point for considering the current law is a passage in Hume's Commentaries:[1]

> "We may next attend to the case of those unfortunate persons, who have to 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 such 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 or foe, - and gives him up to the impulse of his own distempered fancy."

2.2 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 *HM Advocate v Kidd*,[2] Lord Strachan directed the jury on the definition of insanity on broadly similar lines:

> "[I]n 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.
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> …

[1] Hume I, 37.
[2] 1960 JC 61 at 70-71.

> 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."

2.3 In *Brennan v HM Advocate*,[3] 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… ."

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. 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 took the view that the expression 'total alienation of reason' had the same meaning in both defences, and held that the defence of automatism was not available in the present case. 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 from 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."

2.5 An important factor in the general development of the law on insanity as a defence is the set of rules which derive from 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

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[3] 1977 JC 38 at 45.
[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 658 at 668. The Court explicitly referred to Hume, and the decisions in the *Kidd* and *Brennan* cases.

on insanity not only for English law but also for many other legal systems in the Anglo-American tradition. The key part of the Rules lies in the following passage:[7]

> "[T]he jurors ought to be told in all cases that every man is to be 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."

2.6 It is probably the case that the M'Naghten Rules do not represent the current Scots law on insanity.[8] However the Rules are significant, if for no other reason than indicating problems in defining the scope of the insanity defence. Ever since the M'Naghten Rules were first promulgated they have been subject to considerable criticism. The general weakness of the Rules is said to be 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]

Option of no change to the current law

2.7 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 leaving the law as it is. First, unlike many other jurisdictions (especially those using some variant of the M'Naghten Rules), Scots law has avoided any deep-rooted controversy about the definition of the defence of insanity. Secondly, in its practical operation the definition in Scots law does not appear to have presented any major problems. The test is a broad one, almost a

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[7] (1843) 10 Cl & F 200 at 210 per Lord Chief Justice Tindal.

[8] See *HM Advocate v Kidd* 1960 JC 61 at 71: "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." However the language used by the Court in *Cardle v Mulrainey* is very similar to that of the Rules. For general 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.

[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 (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.

jury question, which can be easily adapted to the facts and circumstances of each individual case.[11]

2.8 However we do not support the option of leaving the law as it is. In our view there are good reasons for reforming the law on the defence of insanity.

2.9 In the first place, 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 centre 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."

2.10 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 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

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[11] Consider in this regard Lord Cooper's well-known remarks in evidence to the Royal Commission on Capital Punishment: "[H]owever 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, 1949-1952, 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 paras 2.19-2.24 the desirability of continuing to use the term 'insanity' itself.

[13] 1977 JC 38 at 42-43.

[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, which used contemporary language to

to identify any good reason why the criminal law should not do the same. We therefore 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.

2.11 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? More recent decisions, such as *Brennan v HM Advocate* and *Cardle v Mulrainey*, contain dicta suggesting 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.

2.12 In our Discussion Paper we proposed that the test of insanity as a defence should be reformed and put on a statutory basis. There was widespread support for this proposal from our consultees. A point emphasised in several responses was the need to make the law more consonant with current medical understanding of mental disorder. Moreover, the existing law was said to cause problems in the presentation of evidence by mental health expert witnesses.

2.13 We take the view that the existing test for the defence of insanity requires reform. The substance of the test is uncertain and its language obsolete. Furthermore we believe that statute is the appropriate mechanism for reform. One reason why the law is so undeveloped is the relative paucity of cases in which insanity is raised.[17] By contrast, the civil law on mental health has been the subject of a continuing process of modernisation by statute, most recently in the Mental Health (Care and Treatment) (Scotland) Act 2003.[18] We accept that the goals of the civil law on mental health (care and treatment) are different from those of the criminal law (attribution of responsibility). Nonetheless, it would in our view be wrong if major discrepancies were to be allowed to exist in the two branches of the law in respect of the conceptual framework which each uses in its approach to mental disorder.

2.14 Accordingly we recommend that:

1. The common law test for insanity as a defence should be abolished.

(Draft bill, section 5)

Abolition of insanity as a defence

2.15 A radical approach to the reform of the defence is that it should be abolished altogether. Abolition of the insanity defence has been considered in academic literature for

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describe forms of mental disorder. The 1960 Act along with subsequent legislation was consolidated in the Mental Health (Scotland) Act 1984. This Act was the subject of the review by the Millan Committee whose recommendations led in turn to the 2003 Act.

[17] See paras 1.16-1.21.

[18] Other important statutory statements of the civil law were the Mental Health (Scotland) Acts of 1960 and 1984.

some time.[19] 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.[20] A further point in support of abolition is that criminal courts now have very wide powers of disposal in respect of mentally disordered offenders. A person who is suffering from a mental disorder should receive appropriate treatment, even if he is convicted of an offence.

2.16 In the 1980s some states in the USA enacted measures to abolish the insanity defence.[21] However, the practice in those states suggests a number of undesirable consequences of the abolitionist approach. One effect was to distort the concept of mens rea in order to accommodate cases where the accused suffered from a mental disorder but could still 'form' a mental element for specific offences. A similar effect arose 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.[22]

2.17 In the Discussion Paper we also identified an objection in principle to abolition of the defence of insanity. The defence 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. 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."[23] The Royal Commission concluded that support should continue for this "ancient and humane principle," a view with which we are in total agreement. None of our consultees dissented from this view.[24]

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

[20] 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). 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, pp 124-125).

[21] These measures were largely prompted by the case of *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] Paul S Appelbaum, "The Insanity Defense: Moral Blameworthiness and Criminal Punishment" in Appelbaum, *Almost a Revolution: Mental Health Law and the Limits of Change* (1994) 163, esp pp 181-183.

[23] Royal Commission on Capital Punishment (Cmnd 8932, 1953), para 278.

[24] The Law Society of Scotland in stating its agreement with our view cited a passage from the trial of James Hadfield in 1800: "It is agreed by all jurists, and is established by the law of this and every other country that it is the reason of man which makes him accountable for his actions; and that the deprivation of reason acquits him of crime." (Jas Hadfield (1800) 27 St Trials 1281 at 1309-1310.)

2.18 We recommend that:

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

(Draft bill, section 1)

Name of the reformed defence

2.19 We are of the view that the reformed defence should no longer use the term 'insanity.' This word was once used in both law and medicine,[25] 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.[26] There is evidence which suggests that stigma may attach to persons found by the criminal law to be 'insane.'[27] 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 Discussion Paper we noted that in the civil law the general term used is 'mental disorder' and we proposed that the criminal law should use the same terminology. All of our consultees who commented on these proposals accepted that the term 'insanity' should no longer be used as the name of the defence. Some, however, expressed doubts whether the phrase 'mental disorder' was an appropriate replacement, though the substance of their concerns was directed not to the name of defence but to the separate issue of the definition of mental disorder.[28]

2.21 Our initial response to the views of consultees was to adhere to our proposal that the defence should be re-named 'mental disorder.' However, after further reflection we have changed our approach. One difficulty is that we recommend later that one constituent part of the test for the defence should be the presence of a mental disorder at the time of the offence. But that element is not the only part of the proposed definition. We are concerned that confusion might follow if the name of the defence was the same as one of its constituent parts.

2.22 Moreover, we discovered a more pragmatic objection to naming the defence 'mental disorder.' Part VI of the Criminal Procedure (Scotland) Act 1995, the provisions of which deal with the disposals following from the defence being established, is headed 'Mental Disorder.' That phrase is also used in many of the provisions of Part VI. For the purposes of Part VI mental disorder is defined in a way that is less specific than the definition of the defence which we propose. We take the view that further confusion would arise if Part VI of the 1995 Act used that same term to refer to a defence which has its own particular definition.

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[25] 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.

[26] 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.)

[27] 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."

[28] We consider the question of how mental disorder should be defined as a constituent element of the defence at paras 2.25-2.30.

2.23 A further advantage of a more distinctive name for the defence is that it would emphasise that the defence reflects issues of legal policy and not simply the use of purely medical concepts. The difficulty is in identifying a suitable name. One approach is to use the analogy of diminished responsibility.[29] In respect of a defence based on mental disorder, a similar expression would be 'mental non-responsibility' or more fully 'non-responsibility by reason of mental disorder.'[30] While we see these expressions as cumbersome, we have been unable to identify any more suitable short name or nickname. The heading of the section in the draft bill which defines the defence is 'criminal responsibility of persons with mental disorder' and the proposed amendments to the 1995 Act cross-refer to the defence as the 'special defence set out in section 1 of the 2004 Act.' We are satisfied that these expressions are suitable ones for use in statute.[31]

2.24 We recommend that:

3. The defence dealing with the criminal responsibility of persons with mental disorder should no longer be known as the 'insanity' defence.

(Draft bill, section 1)

Constituent elements of the defence

2.25 **The presence of mental disorder.** The first element 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 criminal law as a mental defect or disease, or a disease of the mind in terms of the M'Naghten Rules). In other words, in the absence of a mental disorder there will be no basis for the defence. We consider shortly the question whether mental disorder is a sufficient precondition for establishing the defence. The point for immediate consideration is what is to be understood by mental disorder.

2.26 The Mental Health (Care and Treatment) (Scotland) Act 2003 defines mental disorder for the purposes of that Act as any (a) mental illness; (b) personality disorder; or (c) learning disability.[32] This definition has now also been extended to the expression 'mental disorder' in Part VI of the 1995 Act.[33]

2.27 In the Discussion Paper we proposed that, although the test for the defence should use the criterion of the presence of mental disorder, the term should not itself be defined. This proposal was based on the view that mental disorder played a different role in civil law (identifying the persons who fell within the care and treatment provisions) from that in the

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[29] It should be noted that the expression 'diminished responsibility' has itself been criticised. See paras 3.12-3.13.

[30] An alternative term for 'non-responsibility' would be 'irresponsibility'. In *HM Advocate v Cunningham* 1963 JC 80, the Crown in argument (at 81-82) used the expression the 'special defence of irresponsibility.' We do not favour using this term, which might be regarded as stigmatising. Furthermore in ordinary language 'irresponsibility' suggests a form of recklessness, for which a person can be held responsible. See further paras 2.57-2.63 where we consider the criminal responsibility of persons with psychopathic personality disorder.

[31] We accept that ordinary usage may give rise to a shorter name. However apart from banishing the term 'insanity' there are limits on how far statute can shape linguistic practices in this context.

[32] 2003 Act, s 328(1). Section 328(2) states that a person is not mentally disordered by reason only of any the following factors: (a) sexual orientation; (b) sexual deviancy; (c) transsexualism; (d) transvestism; (e) dependence on, or use of, alcohol or drugs; (f) behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person; (g) acting as no prudent person would act.

[33] 1995 Act, s 307 (as added by 2003 Act, s 331(1) and Sch 4, para 8(16)(d)).

criminal law (attribution of criminal responsibility). Moreover, the presence of mental disorder was simply one part of the defence in criminal law and we envisaged that most of the focus of the defence in operation would be on the other elements rather than on the presence or absence of mental disorder.

2.28 Some consultees agreed with this proposal. Others did not, including, significantly, many of those involved in the practice of mental health and criminal justice. Those consultees made a number of arguments against our original proposal. (1) It was thought to be undesirable to use the same term but with different meanings in the general context of legislation relating to mental health. (2) If the term was not defined for purposes of the defence, mental health experts would tend to use the civil law concept with which they were familiar. (3) There was a danger that if mental disorder was undefined, the defence might seem over-inclusive. Diagnostic categories used by psychiatrists extend to a very wide range of conditions, many of which have no bearing on issues of criminal responsibility. As a result there might be excessive, and wasteful, concentration on what should simply be a threshold matter (ie whether or not the accused had a mental disorder at the time of the offence). (4) If it was thought that the defence should not extend to any particular type of disorder or condition, this could be done by way of specific exclusion.

2.29 We are persuaded by these arguments. It is desirable that, as far as possible in the practical workings of the defence, there should not be extended discussion of the general question whether or not the accused had a mental disorder at the time of the offence. We accept that there would be a danger of this outcome arising if the criminal law contained no definition of mental disorder. We also take the view that using the general definition from the civil law would not exclude any relevant condition which should come within the ambit of the defence, and that any inappropriate condition falling within that definition can be specifically excluded from the defence.[34] The condition which calls for particular consideration for exclusion is psychopathic personality disorder, which we discuss later.[35]

2.30 We recommend that:

> **4. The test for the defence should require that at the time of the alleged offence the accused had a mental disorder. The term 'mental disorder' should be defined as meaning (a) mental illness; (b) personality disorder; or (c) learning disability.**
>
> (Draft bill, sections 1(1); 8)

2.31 **Connecting link (causation).** A second part of the test for the defence deals with an issue which has been controversial in much of the discussion of the insanity defence. This concerns the link between the accused's mental condition and his criminal act. Given that at the time of the offence the accused had a mental disorder, what impact did the disorder have on the accused's conduct in order to remove his criminal responsibility for it? One response is that the presence of mental disorder by itself is sufficient to make an

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[34] As noted earlier (para 2.26) the civil law definition contains various negative indicators (2003 Act, s 328(2)). It is highly unlikely that any of these factors would ever be considered as indicating mental disorder in the context of criminal responsibility. Accordingly we see no need to use such negative indicators in the definition of mental disorder as a component of the defence. The definition of mental disorder in the 1995 Act follows that of s 328(1), but not s 328(2), of the 2003 Act.

[35] See paras 2.57-2.63.

accused lack criminal responsibility. Another (which we favour) is that in order to remove criminal responsibility the mental disorder must have a specific type of effect on the accused's reasoning when he committed the relevant act.

2.32 There are two variants to the approach that the presence of mental disorder is a sufficient basis for the defence. The first takes the defence as a form of 'status' defence. The fact that a person has a mental disorder makes that person unsuitable for the application of the rules of the criminal justice system.[36] The major difficulty about treating the defence simply as a matter of status is that it presupposes that *all* types of mental disorder have the same effect in relation to a person's responsibility. But this view is questionable. A person who committed a criminal act and suffered from an anxiety or compulsive condition would be treated in the same way as someone who had a major delusional or depressive disorder. An accused who exceeded the speed limit because of an obsession with punctuality would be as lacking in responsibility as one who killed because she heard voices telling her to do so. If a status approach is modified, so that only certain sorts of mental disorder have an effect on a person's criminal responsibility, then the question becomes one of identifying the relevant types of disorder. But in this situation the focus is no longer on the status of being mentally disordered but on something more specific. A more direct approach, which we favour, is for the test for the defence itself to indicate the effects of mental disorder which displace criminal responsibility and those which do not.

2.33 A variant of the status approach is to argue that in the vast majority of cases, especially where the mental disorder is severe, it can be assumed that there is an appropriate link between the disorder and the criminal conduct. This was the approach adopted by the Butler Committee who argued that:[37]

> "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."

2.34 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:[38]

> "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."

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[36] 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 L R 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.

[37] Butler Report, para 18.29.

[38] Law Commission: *Criminal Law: Codification of the Criminal Law. Report to the Law Commission* (Law Com No 143, 1985), para 12.6.

2.35 We agree with the conclusion set out in the above passage. Various practical problems 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. More fundamentally this approach fails to bring out exactly how some (but not all) forms of mental disorder operate to affect criminal responsibility. We believe that a person should be treated as responsible where any disorder, mental or physical, has no bearing on his criminal actings. One purpose of the definition of the defence is to allow the law to make a clear statement of the reasons for holding some people who have a mental disorder as not responsible for their conduct.

2.36 In the Discussion Paper we rejected the idea that the mere presence of a mental disorder should be sufficient in establishing the defence. Instead, we proposed that the test for the defence should identify the particular effect of the mental disorder which provides the rationale of the defence.[39] This proposal was accepted by all of the consultees who commented on it.

2.37 Accordingly we recommend that:

> **5. The defence should be defined in terms of a specific effect on the accused's state of mind which has been brought about by his mental disorder.**
>
> (Draft bill, section 1(1))

2.38 **Specific effect of mental disorder on criminal conduct.** The defence based on mental disorder should specify the precise effect of the disorder in order to show why it is the case that a mentally disordered person who engages in criminal conduct is lacking responsibility for it. In the Discussion Paper we noted one approach to this issue, the so-called 'product' test.[40] According to this test the defence is established if it can be shown that the accused's criminal conduct was the 'product' of a mental disorder. This test was at one time used in certain states in the USA but its weaknesses have led to its virtual abandonment. The main difficulty with the product test is that it presupposes a mechanical causal link between mental disorder and action, a view which is out of keeping with modern psychiatric thinking. None of our consultees expressed any support for a test of this nature and we do not consider it further.

2.39 To understand how mental disorder can have an effect on a person's responsibility for conduct, it is necessary to examine the nature of the relationship between mental disorder and action. This link is usually referred to as involving causation, but this term is not completely appropriate, and we prefer to use the expression 'connecting link.' 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

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[39] The question of the appropriate effect of mental disorder is considered next at paras 2.38-2.51.
[40] Discussion Paper, paras 2.32-2.34.

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, as explained by Professor Finbarr McAuley:[41]

> "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 and 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."

2.40 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 actings. In our view it is this particular effect of mental disorder which is at the core of the defence and the legal definition should specify the manner in which the disorder affected the accused's reasoning at the time of the acting. Unless the test for the defence spells out the manner in which the accused's reasons for acting as he did are in some way disordered, it becomes difficult to see the accused's mental state as giving rise to a question of his criminal responsibility.

2.41 Accordingly, our approach to the connecting link issue is that the defence should 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 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.' As already noted, the problem with this expression is its old-fashioned language, especially the word 'alienation.' The phrase is ambiguous between indicating (a) a total lack of the power of reasoning and (b) a form of reasoning which is totally lacking in meaning. The current law does not succeed in locating the connecting link between mental disorder and criminal conduct and the question for us then is to suggest a better formulation of this link.

2.42 *Mental disorder and appreciation of conduct***.** Traditionally, definitions of the defence have focussed on two basic elements as to the effect of the mental disorder suffered by the accused. One is cognitive, that is, concerned with the nature of the accused's knowledge

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[41] McAuley, pp 12-13.

about his actings. The second is volitional, relating to the nature of the accused's control over his conduct. We consider volitional aspects of the defence later.[42]

2.43 In the Discussion Paper we proposed that the reformed test for the defence should use the cognitive concept of appreciation of conduct. We emphasised that this concept was much wider than that of mere knowledge as used in the M'Naghten Rules. The majority of consultees who commented on this proposal agreed with it. Given that the concept is a new one in Scots criminal law, we wish to give a detailed account of the role it should play in the reformed defence.

2.44 The place of a cognitive element in the definition of the defence has not been without controversy. Indeed, the standard criticism of the M'Naghten Rules in English law 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.[43] Instead it is that the law should deploy a concept of cognitive failing more in tune with psychiatric knowledge and with principles concerning 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.

2.45 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 mean 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,[44] 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 is to say that such a woman should be relieved of criminal responsibility for her actions.[45]

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[42] Paras 2.52-2.56.

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

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

[45] See McAuley, p 30: "[I]f 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

2.46 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.[46] This approach has been criticised,[47] 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*,[48] 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."

2.47 In our view the particular value of the concept of appreciation is that it connotes something wider than simple knowledge and includes a level of (rational) understanding. It therefore avoids the narrowness of the M'Naghten Rules, as they have been traditionally interpreted. Moreover, appreciation is an idea which has been used in the insanity defence in other legal systems. For example, the American Law Institute's Model Penal Code states the test as follows:[49]

> "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."

Similarly, the Criminal Code of Canada contains a provision on the defence of mental disorder:[50]

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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." (Emphasis added.)

[46] *R v Windle* [1952] 2 QB 826.

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

[48] (1936) 55 CLR 182 per Dixon J at 189-190.

[49] The American Law Institute, Model Penal Code, Official Draft (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 law."

[50] 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.'

> "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."

In discussing definitions of insanity in those systems 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."[51]

2.48 We would stress that we are not suggesting that Scots law should adopt the M'Naghten Rules, as those Rules exist in English law (or indeed in any other legal system). Although the M'Naghten Rules correctly identify cognitive failing as a central element of the defence, the Rules as commonly 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 Hume[52] 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 or foe."

2.49 A further point for consultation was that if the idea of appreciation of conduct is placed at the heart of the definition of the defence, is there any need to specify further what the failure to appreciate involves? What exactly is it about his conduct that a mentally disordered person fails to appreciate? The M'Naghten Rules link the accused's cognitive failings to the 'nature and quality' of his acts and to doing 'what was wrong.' In the Discussion Paper we expressed our hesitancy about using such phrases in the new test for the defence. In the first place, there was 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. 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, we now consider that a mere reference to lack of 'appreciation of conduct' would leave the test incomplete, and in particular would fail to bring out how the mental disorder has an effect on the accused's conduct. Our consultees agreed that the test required some or other further element but there was substantial disagreement as to what it should be.

2.50 We take the view that the appropriate objects of disordered cognition are the nature of the person's conduct and the wrongfulness of that conduct. We are aware that these ideas have a similarity to those used in the M'Naghten Rules but we again emphasise that the test of failure of appreciation gives them a much wider meaning than that attached to them under the Rules (as traditionally interpreted). For example, a person who fires a gun at someone else under the disordered impression that the victim is the devil incarnate may well understand the mechanical steps involved in discharging a firearm. In so far as his action is

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[51] Gordon, p 433.

[52] Hume I, 37. See also Alison, *Principles of the Criminal Law of Scotland* (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."

purposive and directed towards achieving a goal (destroying evil), firing a gun is exactly what he is aiming to do. But although a person in this situation may 'know' the nature of the physical actings he takes, he cannot be said to have a full or proper appreciation of the nature of his conduct (the taking of innocent life). Similarly, a mentally disordered person may fail to grasp what is wrong about his or her actings, although aware that they breach legal or moral norms.[53] For example, an accused may suffer from delusions that a famous actress is in love with him. In order to attract the actress's attention, the accused decides to kill a politician. The accused knows that killing is both illegal and immoral but his delusional state gives him a reason for overriding the legal and moral prohibitions against taking life. In this situation it cannot be said that the accused (rationally) appreciates the wrongfulness of his conduct.

2.51 Accordingly we recommend that:

> **6. The defence should be defined in terms of the accused's inability at the time of the offence to appreciate either the nature or the wrongfulness of his conduct.**
>
> (Draft bill, section 1(1))

A volitional element

2.52 Volitional aspects of action are concerned with a person's ability to control his conduct. Many legal systems include a volitional component as part of the definition of the insanity defence. The test in the American Law Institute's Model Penal Code includes a clause 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. Hume gives as one instance of an accused's absolute alienation that the disorder "gives him up to the impulse of his own distempered fancy." In *HM Advocate v Kidd*, Lord Strachan stated that:[54]

> "…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."

2.53 Yet it is not entirely clear that a volitional element is part of Scots law, and even if it is, whether it needs to be part of the definition of the defence. 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

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[53] In his direction to the jury in *HM Advocate v Kidd* 1960 JC 61 at 71, Lord Strachan stated: "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."

[54] 1960 JC 61 at 70.

considerations of what are essentially cognitive matters. Legal systems which follow the M'Naghten Rules in their traditional sense have often added a volitional element to avoid the narrowness of the Rules.[55] 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 trying to identify any case where a person who committed criminal conduct would be found criminally responsible on the appreciation test but would be treated as lacking criminal responsibility in respect of a volitional incapacity.[56]

2.54 In the Discussion Paper we were inclined to adopt the position that the test for the defence should not contain a volitional element but we did not reach a concluded view on this point. We presented the issue in the form of a question whether the definition of the defence should contain any reference to volitional incapacities or disabilities. Consultees were divided on this question. However most agreed that the wider cognitive criterion of appreciation would cover any relevant volitional failing. About half of the consultees who responded on this issue accepted that there was no need for any volitional element. Two consultees gave clear support for it. It was of some significance that none of the consultees could provide any example where a person might fail the test for the defence on the appreciation criterion but satisfy it purely on a volitional one. It is also worth noting that the mental health experts whom we met were virtually unanimous in rejecting a category of mental disorder which was purely volitional in nature and which had no impact on cognitive functions.

2.55 Some consultees pointed out that a volitional element exists in the current test for the defence in some legal systems (including possibly Scots law). However the existence of a volitional element in the current law can be explained chiefly by the narrowness of the cognitive criteria used in many of the definitions of the defence. We take the view that if the 'appreciation' criterion is to be understood in a wide sense, as we argue that it should, then there is no need for any volitional element. Indeed, there might be dangers in adding on a volitional part to the defence as doing so might give rise to narrow interpretations of the scope of the appreciation element.

2.56 Accordingly we recommend that:

7. The definition of the defence should not contain any reference to volitional incapacities or disabilities of the accused.

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[55] This point is explored by McAuley, pp 52-61.

[56] See McAuley, p 61: "[T]he 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."

Psychopathic personality disorder

2.57 The concept of psychopathy has for a long time been at the centre of controversy across a variety of disciplines.[57] Much of the difficulty arises because these disciplines have different interests in the condition, and as a result there is no generally accepted definition of the concept or even a settled terminology to describe it.[58] In most general terms the condition is 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]

2.58 It is important to stress that our own interest involves the question of the criminal responsibility of persons with psychopathic personality disorder. We are not concerned with the disposal of such persons within the criminal justice system, far less with issues in the civil law and medical practice about the treatment and care of psychopaths. The immediate question for consideration is the relationship between the defence based on an accused's mental disorder and psychopathy. In the Discussion Paper we took the view that it was unlikely that the proposed test for the new defence could be interpreted as applying to that condition (which we there referred to as 'anti-social personality disorder'). We proposed that, to put the matter beyond doubt, the condition should be specifically excluded from the definition of the defence. There was widespread support for this proposition among our consultees, and it is one which we continue to accept.

2.59 We note in the first place that psychopathy (or some similar condition) is excluded from the scope of the defence in many legal systems. For example, the American Law Institute's Model Penal Code contains a provision that the "terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."[60] In some systems the exclusion of personality disorders from the insanity defence has been brought about by common law development.[61] The Butler Committee in its

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[57] For accounts of the history of the concept see Butler Report, pp 77-83; *Report of the Committee of Inquiry into the Personality Disorder Unit, Ashworth Special Hospital* (Cm 4194-II, 1999), Vol 1, pp 347-361.

[58] See Ashworth Special Hospital Report pp 361-362: "Psychopathic disorder now has three meanings. It is a legal classification as one of the four categories of mental disorder in the [English] Mental Health Act 1983; it is a clinical diagnostic construct or category in some classifications and it is used as a term of abuse in the vernacular."

[59] From the perspective of psychiatry two influential classifications may be noted. *The International Classification of Disease (ICD-10)* (World Health Organisation 1992) lists a category of 'dissocial personality disorder' (F60.2): "[A] personality disorder, usually coming to attention because of a gross disparity between behaviour and the prevailing social norms, and characterised by (a) callous unconcern for the feelings of others; (b) gross and persistent attitude of irresponsibility and disregard for social norms, rules and obligations; (c) incapacity to maintain enduring relationships, though having no difficulty in establishing them; (d) very low tolerance to frustration and a low threshold for discharge of aggression, including violence; (e) incapacity to experience guilt or to profit from experience, particularly punishment; (f) marked proneness to blame others, or to offer plausible rationalisations, for the behaviour that has brought the patient into conflict with society."

Diagnostic and Statistical Manual of Mental Disorders (DSM-IV; 4th ed*).* (American Psychiatric Association (2000)) refers to a category of 'antisocial personality disorder' (301.7): "[A] pervasive pattern of disregard for and violation of the rights of others . . ., as indicated by three (or more) of the following: (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsivity or failure to plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for safety of self or others; (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another."

[60] Section 4.01(2).

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

proposals for the reform of the insanity defence recommended a similar exclusion in a reformed definition of the defence in English law.[62]

2.60 We take the view that the condition of psychopathy does not, and should not, fall within the set of circumstances which we have argued forms the basis of the defence, namely inability to appreciate conduct as a result of mental disorder. We note in the first place that there might well be difficult problems of definition whether psychopathy falls within any of the constituent elements of mental disorder. But even if psychopathy is properly regarded as a form of personality disorder, the condition would not meet the 'appreciation' part of the test for the defence. Psychopathy 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, psychopathic personality disorder has the effect that because of the psychological make-up of the accused he has difficulties, not shared by the ordinary person, in complying with the requirements of the law. But such difficulties do not remove the person completely from responsibility for his actings. He appreciates what he is doing. At most such a person has difficulties in controlling his conduct but it cannot be said that a psychopath is completely lacking in volitional capacity. We have already recommended that the test for the defence should not contain any volitional element. In any event, if a person 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 psychopathy does not have the effect that a person cannot control his conduct. 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.[63]

2.61 We would emphasise that we are not proposing that the law should exclude psychopathy from the category of mental disorder. That is an issue for mental health experts. Instead, we are recommending that there should be a rule of law which makes clear that the defence is not open to someone solely on the basis of his having a psychopathic personality. Of course, an accused person would not be prevented from pleading the defence where in addition to psychopathy he had some other mental disorder which did impact on his appreciation of his conduct.

2.62 There remains the problem of definition. Unlike the position in English law,[64] the term 'psychopathy' is not used in mental health legislation in Scotland. However the condition received recognition, though not referred to in explicit terms, in the Mental Health (Scotland) Act 1960. Similarly section 1 of the 1984 Act defined 'mental impairment' as a condition "associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned."[65] This phrasing may be criticised from a psychiatric perspective as focusing on only some aspects of the disorder. But in a legal context the expression is clearly understood to mean psychopathy,[66] and it is one which is used in the draft bill to

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[62] Butler Report, para 18.30.

[63] We consider whether the condition of psychopathic personality disorder should come within the scope of the plea of diminished responsibility at paras 3.24-3.34.

[64] Mental Health Act 1983, s 1(2): "In this Act . . . 'psychopathic disorder' means a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned."

[65] The 2003 Act does not contain any separate reference to psychopathy. The scheme of the Act is that all types of personality disorder should be dealt with in the same way.

[66] See for example *R v Secretary of State for Scotland* 1999 SC(HL) 17 at 19 (Lord Lloyd of Berwick): "The medical evidence at the trial was to the effect that [the petitioner] was suffering from what was then known in

indicate that the defence does not extend to persons solely by virtue of their having a psychopathic personality disorder.

2.63 We recommend that:

8. The condition of psychopathic personality disorder should be excluded from the scope of the defence.

(Draft bill, section 1(2))

ECHR implications

2.64 We now consider whether our proposals for the reform of the definition of the defence based on 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 set out 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*,[67] where the Court in discussing the expression 'person of unsound mind' said:[68]

> "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 attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more widespread."

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."[69]

2.65 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.[70] This approach is based on the premise that a finding of insanity as a defence does not act as a complete acquittal but

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Scotland as mental deficiency, but is now known as mental handicap. It is common ground (and the sheriff has so found) that he is not mentally handicapped. Instead he is suffering from a 'persistent and permanent mental disorder' characterised by 'abnormally aggressive and seriously irresponsible behaviour.' In other words he is a psychopath." Ibid at 44 (Lord Hutton): "Whilst I recognise that there is medical debate as to the appropriateness of the term 'psychopath' in modern times, it is convenient for the purpose of considering the construction of secs 17 and 64 [of the 1984 Act] to use that term in relation to a person whose mental disorder is 'a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct.' "

[67] (1979) 2 EHRR 387.

[68] Para 37.

[69] Para 39.

[70] See A Ashworth, *Principles of Criminal Law* (3rd edn, 1999), pp 215-217; 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. Concern about the compatibility of the M'Naghten Rules with the ECHR was one of the reasons why the courts in Jersey refused to apply the Rules as part of the definition of insanity in that jurisdiction. For discussion see 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.

allows the court to order the detention of the accused under mental health legislation. Such a disposal is said to be 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 existing 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, which gives the court the power to make various types of order, including a compulsion order coupled with a restriction order.

2.66 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 possible detention of persons who are insane (in the sense of the criminal law) is governed by the disposal provisions in the 1995 Act, and not by 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 the 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 on to the separate stage of disposal.

2.67 It should also be noted that, by virtue of section 57(4) and 57A of the 1995 Act, a court cannot make a compulsion order in respect of an insane accused unless satisfied on the evidence of two medical practitioners (at least one of whom must be a mental health specialist[71]) that appropriate grounds apply at the time of making the order. These grounds require the presence of a mental disorder for which treatment is likely to be effective. Further, the court before making such an order must have regard to various matters, including the nature of the offence and the character and antecedents of the accused, and alternative means of dealing with him. The effect of these provisions is that any medical evidence (or the lack of such evidence) used in establishing the defence has no direct

[71] 1995 Act, s 61(1), (6), (7).

bearing on any order for the detention of the accused which the court may subsequently make.[72]

2.68 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.

[72] Formerly an exception existed in the case of murder. Where a person had been found insane as a defence or a plea in bar of trial on a charge of murder, the court had no discretion but had to make an order for detention subject to special restrictions and without limit of time. This provision was not compatible with the provisions of the Convention and was repealed by the Criminal Justice (Scotland) Act 2003, s 2(b).

Part 3 Diminished responsibility

Introduction

3.1 In this Part we consider the plea of diminished responsibility. 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 types 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 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 ... 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 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. Moreover, although the plea had to be based on some form of mental abnormality, a wide range of conditions could constitute diminished responsibility, and these conditions need not be 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 voluntary consumption of drink or drugs and (ii) psychopathic personality disorder.

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[1] For a full account of the development of diminished responsibility, see Gordon, pp 458-467. (Volume I of this edition of Gordon's book was published before the decision in *Galbraith v HM Advocate* 2002 JC 1 but there is a short discussion of the law since *Galbraith* in volume II, pp 333-334, fn 35.)

[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.

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. The point was made that psychiatrists in particular had difficulties when addressing issues of insanity. 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. It is of particular interest that various practitioners in the fields of psychiatry and clinical psychology have expressed general satisfaction with *Galbraith* and indicated that from their own perspective the new law is workable. Accordingly, the first point which calls for consideration is whether we should be making any recommendations at all for reform of this area of law.

A statutory statement of the test for diminished responsibility?

3.5 In order to appreciate the issues involved it is necessary to bear in mind what the Court decided in *Galbraith*. In essence, the decision reformulated the criteria for establishing the plea. In doing so the Court extended considerably the types of condition which could form the basis of diminished responsibility.[6] However, the Court also expressly excluded the conditions of voluntary intoxication and psychopathic personality disorder from its scope. In the Discussion Paper we set out various arguments for and against stating the test for diminished responsibility in a statutory form. We did not reach a concluded view on this issue but presented for consultees the question whether the definition of the plea should be left to the common law or contained in statute.

3.6 There were noticeable differences of view in the responses of our consultees. Consultees who did not favour a statutory statement of the law in the main stressed the element of flexibility which would continue to exist if the test were left to the common law. The *Galbraith* decision itself showed the potential for the development of the law by the courts. Furthermore, if the proposed statutory statement of the law simply replicated the test in *Galbraith* nothing would be gained by replacing the common law with statute.

3.7 We have given careful consideration to these arguments. Nevertheless it is our view that there should be a statutory formulation of the test for diminished responsibility. We note that the decision in the *Galbraith* case did 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.[7] We accept that the general positive criteria for the plea as laid down in that decision have met with general approval. However the new test also excludes two specific conditions (voluntary intoxication and psychopathic personality disorder) from the scope of the plea, and these exclusions have been controversial. Indeed, the response to our proposals on the exclusions has led us to recommend that the law in relation to them should be clarified or altered. But it would be an undesirable approach to law reform to change part of the *Galbraith* test by statute while leaving the rest in its common

[5] Millan Report, paras 29.51-29.61.
[6] At 2002 JC 1 at 20-21 the Court set out a long list of non-exhaustive examples of conditions which would qualify as diminished responsibility.
[7] 2002 JC 1 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: ibid at 10.

law form. Moreover, as one of our consultees pointed out, the limits to the scope of the plea involve considerations of public policy, which are best addressed by the legislature.[8]

3.8 It is also worth noting that all other legal systems which have introduced a defence or plea of diminished responsibility have done so by statute.[9] A statutory definition does not prevent judicial activism and creativity where that is required for legal development. Indeed, in England the test for diminished responsibility was introduced by section 2 of the Homicide Act 1957, and the English courts have adopted a fairly purposive approach to interpreting the language of that section.

3.9 Accordingly we recommend that:

9. The common law test for the plea of diminished responsibility should be abolished.

(Draft bill, section 5)

Abolition of the plea of diminished responsibility

3.10 There seems little basis for a proposal that the plea of diminished responsibility should be abolished. Certainly none of our consultees argued for abolition. It is important to appreciate that whatever conceptual difficulties attend the phrase 'diminished responsibility' the plea has an important practical function. As Gordon notes:[10] "…the doctrine can be seen for what it is, a special case of the rule that personal factors mitigate sentence." Abolition of diminished responsibility would mean that there would be no mechanism for giving effect to such mitigating conditions for convictions in murder cases but there would be for convictions in all other criminal charges.[11]

3.11 Abolition might be a plausible option if the mandatory sentence for murder was itself to be abolished. This approach was the preference of the Butler Committee.[12] However, there might still be scope for the plea even if the mandatory sentence were abolished but the distinction between murder and culpable homicide were retained. A similar argument could be made if mandatory sentences were to be introduced for other offences.[13] Our terms of reference do not allow us to consider these wider and controversial questions. For the purposes of this Report we are assuming that Scots law recognises two categories of

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[8] In *Galbraith* the Court itself recognised that the limits to the plea were essentially matters of public policy, which were ultimately for the legislature to decide: 2002 JC 1 at 17.

[9] See Discussion Paper, Appendix E.

[10] Gordon, p 452. The Butler Committee stated (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 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."

[11] We consider the issue whether the plea should apply to crimes other than murder at paras 3.43-3.50.

[12] 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).

[13] Section 1 of the Crime and Punishment (Scotland) Act 1997 provided for the introduction of other mandatory sentences into Scots law but this provision was never brought into effect. It was repealed by s 19(3) of the Criminal Justice (Scotland) Act 2003. It may also be noted that the MacLean Committee on Serious Violent and Sexual Offenders 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 (*Report of the Committee on Serious Violent and Sexual Offenders*, chaired by the Hon Lord Maclean (SE/2000/68), paras 4.14-4.23).

unlawful killing, murder and culpable homicide, the first of which carries the mandatory sentence of life imprisonment. On the basis of that assumption we recommend that:

> **10. 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.**
>
> (Draft bill, section 3)

Name of the plea

3.12 In the Discussion Paper we noted that the term 'diminished responsibility' had itself attracted criticism. In *Kirkwood v HM Advocate*,[14] 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." In the Discussion Paper we asked whether the name of the plea should be changed. None of our consultees was in favour of change and we are unable to identify any reason for altering the name of the plea. It may be noted that the expression 'diminished responsibility' is used in English law[15] and other legal systems[16] and there is wide acceptance of what it means.[17]

3.13 Accordingly we recommend that:

> **11. The plea should continue to be known by the name 'diminished responsibility.'**
>
> (Draft bill, section 3)

The substance of the test

3.14 In the *Galbraith* case the Court gave various formulations of the new test for diminished responsibility:[18]

> "In our law diminished responsibility applies in cases where, because the accused's ability to determine and control his actings is impaired as a result of some mental abnormality, his responsibility for any killing can properly be regarded as correspondingly reduced."
>
> "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

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[14] 1939 JC 36 at 40.

[15] The sidenote to section 2 of the Homicide Act 1957 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).

[16] 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* 1983 (Northern Territory), s 37.

[17] As one of our consultees noted, the comments of the Court in *Kirkwood v HM Advocate* relate less to the name of the plea and more to its existence.

[18] 2002 JC 1 at 16, 21, and 22 respectively.

> or control his acts. … 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."
>
> "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 actings was substantially impaired."

3.15 We noted earlier that the general criteria for the plea (as contrasted with the conditions which were expressly exempted from its scope[19]) have been generally approved by practitioners (both legal and medical) and by academic commentators. Those consultees who agreed that the test should be subject to formulation in statute tended to argue that the test should do little more than re-state the *Galbraith* criteria. We agree with this view. The key expressions (abnormality of mind, substantial impairment, ability to determine or control conduct) have in the context of the plea relatively clear meanings, and are generally understood by those persons who are called upon to apply the test. In our opinion this formulation of the test allows the various dicta in *Galbraith* to act as a guide to interpretation and, in addition, gives sufficient scope for judicial development of the test.

3.16 In the Discussion Paper we also suggested that the test for diminished responsibility should explicitly state that its underlying rationale was that the plea acted as a mitigating circumstance so as to reduce a charge of murder to one of culpable homicide.[20] This proposal did not find favour with our consultees, who pointed out that the definitions of other defences in criminal law do not set out their rationales. We accept this point. The rationale of diminished responsibility is well understood and there is no need to include it as part of the test for the plea. Furthermore, there might be a danger of confusing the different roles of expert witnesses and the jury were the test itself to refer to such matters as conditions which justify a conviction on the lesser charge.

3.17 Accordingly we recommend that:

> **12. The test for the plea of diminished responsibility should be that by reason of abnormality of mind the accused's ability to determine or control his conduct was substantially impaired.**
>
> (Draft bill, section 3(1))

The relationship with the special defence based on mental disorder

3.18 In many situations there will be an overlap between the defence based on mental disorder and the plea of diminished responsibility. Many, if not indeed all, cases of the defence will fall within the test for diminished responsibility. However, part of the formula in the *Savage* case was that for diminished responsibility there must be a state of mind "bordering on, though not amounting to, insanity." In *Galbraith* the Court made clear that the

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[19] See para 3.3.

[20] Part of the proposed definition was that 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 for murder." (Discussion Paper, para 3.38.)

first part of this dictum no longer represented the law but it did not consider the second part. At least since the time of the *Savage* decision, if not earlier, it has been accepted that a plea of diminished responsibility could not be raised where at the time of the killing the accused's mental condition fell within the scope of the insanity defence. This position is implicit in *HM Advocate v Harrison*,[21] where the Crown led evidence that the accused was insane at the time to rebut the accused's plea of diminished responsibility.

3.19 In Part 5 of this Report we examine various matters of evidence and procedure in relation to the special defence and the plea of diminished responsibility. One recommendation which we make is that the Crown should have no right to raise the special defence, even in the limited circumstances where the accused has pled diminished responsibility to a charge of murder.[22] It is possible to argue that prior to the Criminal Justice (Scotland) Act 2003 there was a public interest consideration in permitting the Crown in a murder case to contend that a plea of diminished responsibility should not be allowed where the accused's condition was truly one of insanity. An acquittal based on insanity on a charge of murder resulted in the compulsory committal of the accused to a mental hospital. Accordingly it could be maintained that it was in the public interest that a person who killed whilst insane should be detained in a mental hospital rather than receive a determinate sentence for a conviction of culpable homicide. Whatever the strength of this argument it has no basis following the 2003 Act, which requires that an insanity acquittal in a murder case has the same effect as any other charge in relation to the disposal of the case.[23] In other words, the disposal must be one which reflects the accused's mental state at the time of the disposal.

3.20 With the disappearance of any issue of the public interest, we doubt whether there is now any merit in continuing to disallow a plea of diminished responsibility where the accused's condition falls within the scope of the special defence. The choice of which defence or plea to raise is a matter for the accused to decide. In the vast majority of cases where there is evidence proving the defence based on mental disorder, the accused will give notice of that defence. Where the evidence is on the borderline between the defence and the plea, the accused will normally plead both. Under the present law no advance notice has to be given of diminished responsibility. Where in a murder case the accused pleads the special defence, in certain circumstances the jury may be directed to consider the issue of diminished responsibility. In *Galbraith* the Court noted:[24]

> "Provided, however, that the impairment of the functioning of the mind was substantial, that is sufficient. It is neither necessary nor appropriate to stipulate that the accused's mental state should have bordered on insanity.
>
> Of course, where a person's mental state does indeed border on what the law regards as insanity, it is likely that the law will regard his responsibility as diminished. And in the, nowadays, comparatively rare case where the accused lodges a special defence of insanity at the time of the killing, it may well be appropriate to direct the jury that, if they find that the accused was not insane, they should nevertheless go on to consider whether his mental state bordered on insanity - in which event they would convict of culpable homicide."

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[21] High Court of Justiciary, Dundee, October 1967, unreported but see (1968) 32 JCL 119.
[22] Paras 5.29-5.37.
[23] Criminal Justice (Scotland) Act 2003, s 2(b).
[24] 2002 JC 1 at 18.

3.21 In Part 5 we recommend that diminished responsibility should be treated as if it were a special defence for the purpose of lodging advance notice.[25] We see no incompatibility in requiring an accused, in appropriate cases, to lodge advance notice of both the special defence and the plea. These pleas are not directly contradictory in the way, for example, as are pleas of alibi and automatism. Nor do we envisage any problems in practice where the accused, having pled the special defence, wishes to lodge late notice of the plea of diminished responsibility (as may arise after medical evidence has been led).

3.22 A more problematic situation might arise, at least in theory, where the accused gives notice only of the plea but the evidence suggests that his condition amounted to the special defence. Under the existing law diminished responsibility would not be available. Furthermore, a consequence of our recommendation that the Crown cannot raise the special defence would be that if the accused did not give notice of the defence he could not be found to be of diminished responsibility but would instead be found guilty of murder. In order to avoid the paradoxical outcome of an accused being convicted of an offence despite lacking criminal responsibility, the accused would have to avail himself of a defence which he does not want. Although we find it difficult to envisage how this scenario would ever arise in practice, we consider that the law should not allow for its possibility.

3.23 Accordingly we recommend that:

13. The plea of diminished responsibility should not be excluded solely by the fact that the accused's condition at the relevant time fell within the scope of the defence that the accused lacked criminal responsibility because of mental disorder.

(Draft bill, sections 3(1), (2); 8)

The psychopathy exclusion

3.24 In *Galbraith* the Court stated that the condition of psychopathic personality disorder could not be the basis for a plea of diminished responsibility. The Court seemed to recognise that in the absence of an explicit exclusion such a condition would fall within the scope of the new definition of the plea:[26]

> "…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 On this approach the important factor is the policy underlying the exclusion. In *Galbraith* the Court did not articulate what these policy reasons might be. Instead, it stated that it was following the decision in *Carraher v HM Advocate*.[27] In that case an accused claimed to be of diminished responsibility on the basis that he suffered from psychopathic

[25] Paras 5.50-5.53.
[26] 2002 JC 1 at 17.
[27] 1946 JC 108.

personality and had consumed a considerable amount of alcohol at the time of the killing. The Court rejected this claim:[28]

> "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*.[29] I am of opinion that the plea of diminished responsibility, which, as was said in *Kirkwood's* case,[30] is anomalous in our law, should not be extended or given wider scope than has hitherto been accorded to it in the decisions."

3.26 The difficulty is that the decision in *Carraher* is a doubtful source for ascertaining the policy basis for excluding psychopathic personality disorder from the plea. In *Carraher* the Court gave two reasons for the exclusion. The first was the goal of reducing the scope of the plea of diminished responsibility. However this goal is inconsistent with the approach taken in *Galbraith*, which seeks to widen the range of conditions covered by the plea. The second policy reason in *Carraher* was that the weight to be accorded to psychiatric evidence in cases of psychopathy might result in 'trial by psychiatry.'[31] 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 special defence and it remains true of diminished responsibility on the *Galbraith* criteria. Why should psychiatric evidence about psychopathic personality disorder be different from other psychiatric evidence? Moreover, the Court in *Galbraith* placed some stress on the requirement that the relevant condition must be one which can be spoken to by experts in the appropriate science, a position which envisages the necessity for technical evidence.[32]

3.27 In the Discussion Paper we asked whether there were any good reasons for the exclusion of psychopathy from the plea. The majority of consultees who answered this question thought that there were no valid reasons for the exclusion, which should be removed. We agree with this view.

3.28 We discount as a ground for retaining the exclusion any argument based on the public policy of ensuring confidence in the criminal justice system. 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 unlikely by the fact that in English law this condition has been recognised as an appropriate basis for the plea for over 40 years,[33] and as far as we can discover there have been no calls to remove psychopathy from the scope of the plea.

3.29 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

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[28] 1946 JC 108 at 118.
[29] 1944 JC 171.
[30] 1939 JC 36.
[31] "The Court has a duty to see that trial by judge and jury according to law is not subordinated to medical theories." (1946 JC 108 at 117.)
[32] 2002 JC 1 at 21.
[33] *R v Byrne* [1960] 2 QB 396 (a case of sexual psychopathy); *R v Terry* [1961] 2 QB 314.

social constraints on his capacity to control his actings. As this condition does not distort his appreciation of what he is doing, it does not serve as a ground for relieving the person from criminal responsibility.[34] However, although a person's personality will not excuse his conduct, it is proper to make allowance for it in assessing the full extent to which he is to blame for his conduct.[35] Making allowance for conditions which do not provide full excuses is the very rationale of the plea of diminished responsibility.

3.30 In addition, we do not accept that removing the exclusion would adversely affect either the practice, or the public perception, of imposing an appropriate sentence where the disorder forms the basis of the plea. It is clearly not the case that a verdict following a successful plea of diminished responsibility necessarily means that the accused gets 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 determined by the court. The important point is that the sentence will be one which can be tailored to the circumstances of the individual case.

3.31 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. Another disposal might be an order for lifelong restriction which is based on the assessment of the risk which the offender, if set at liberty, would pose to the public at large.[36] Thus where a person has diminished responsibility because of a personality disorder *and* is assessed as high risk, the outcome would not necessarily be a lighter sentence as compared with a conviction for murder.

3.32 On the other hand, not all cases of psychopathic personality disorder are the same. It appears to be the practice in England that although in some cases of diminished responsibility based on psychopathy the condition is treated as an aggravating factor in respect of sentencing, in other cases it is treated as an extenuating factor.[37] The present law in Scotland prevents this sort of flexibility in sentencing.

3.33 We take the view that the exclusion of psychopathic personality disorder from the scope of the plea of diminished responsibility is too sweeping and does not allow for those cases where the disorder is truly a mitigating circumstance. We therefore recommend that the common law exclusion should not be reproduced in the statutory version of the plea. We have earlier recommended that the common law relating to diminished responsibility should be abolished.[38] The removal of the psychopathy exclusion from the scope of the plea would follow from the abolition of the common law. However we consider that to put the whole matter beyond doubt it should be made clear that the exclusion of psychopathy which exists in the common law is not to apply to the statutory test for the plea.

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[34] See para 2.60.
[35] This is a point brought out by McAuley, pp 85-90.
[36] These orders were introduced by the Criminal Justice (Scotland) Act 2003, s 1. They apply inter alia where a person has been convicted of a violent offence (other than murder), which would include a conviction of culpable homicide based on diminished responsibility.
[37] This approach was confirmed by some of the consulted mental health experts from their own professional experience.
[38] Paras 3.5-3.9.

3.34 We therefore recommend that:

14. A plea of diminished responsibility should not be excluded solely by virtue of the fact that at the relevant time the accused had any form of personality disorder.

(Draft bill, sections 3(1), (2); 8)

The intoxication exclusion

3.35 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).[39] The Court gave as its reason for this exclusion that it was applying a rule which had been laid down in *Brennan v HM Advocate*, where the Court said:[40]

> "In the law of Scotland a person who voluntarily and deliberately consumes known intoxicants, including drink or 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."

3.36 In the Discussion Paper we expressed our concern that the scope of this exclusion might be misunderstood and we asked whether the law on the relationship between intoxication and diminished responsibility required clarification in statute. What prompted our concern was the possibility that the exclusion might be read, wrongly in our view, as having the effect that merely because the accused was intoxicated at the time, the plea could not be available to him. Consultees were divided on this issue. Most took the view that the present law was already clear. Some consultees offered a different understanding of the existing law from that expressed in the Discussion Paper. One consultee argued that, whatever the present law, acute intoxication should in some cases be the basis for diminished responsibility. In these circumstances, we consider that the position on intoxication and diminished responsibility should be clarified by statute.

3.37 There are four situations which have to be considered. The first is where the accused suffers from some form of addiction to alcohol or other drugs. Formerly such conditions were sometimes referred to as 'chronic' intoxication but this phrasing is misleading and the conditions are better referred to as alcohol (or drug) dependency. It is clear that states of dependency can give rise to conditions which amount to 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*.[41] These conditions as such do not involve intoxication at the time of the offence and in our view are not intended to be covered by the dictum in *Brennan*.

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[39] 2002 JC 1 at 17.

[40] 1977 JC 38 at 46. 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.

[41] *Alexander 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.

3.38 A second situation is where at the time of the killing the accused suffered from a mental abnormality within the scope of the plea and at the same time was drunk (in the sense of acute intoxication). This set of circumstances is illustrated by a recent decision of the House of Lords involving the English law of diminished responsibility. In *R v Dietschmann*,[42] a defendant had killed his victim whilst suffering from a mental abnormality (an adjustment disorder following the death of a close relative) and was also drunk at the time. The House of Lords held that the issue for determination was whether, despite the presence of the intoxication, the unsoundness of mind had substantially impaired the defendant's 'mental responsibility' for the killing.[43] Re-stating this rule in terms of Scots law, the issue is whether, despite the intoxication, the accused was suffering from an abnormality of mind which substantially impaired his ability to determine or control his conduct. In other words, the presence of intoxication is to be ignored provided the abnormality of mind was a substantial (but not necessarily sole) cause of the killing.[44]

3.39 The next situation is a variant of the second. An accused person suffering from a state of alcohol or drug dependence was at the time of the unlawful killing in an intoxicated state.[45] We consider that in principle the same solution should apply in this case as in any other where there is a combination of a qualifying condition and acute intoxication. In other

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[42] [2003] 1 AC 1209.

[43] Their Lordships approved the following direction for a jury ([2003] 1 AC 1209 at 1227): " 'Assuming that the defence have established that the defendant was suffering from mental abnormality as described in section 2, the important question is: did that abnormality substantially impair his mental responsibility for his acts in doing the killing? You know that before he carried out the killing the defendant had had a lot to drink. Drink cannot be taken into account as something which contributed to his mental abnormality and to any impairment of mental responsibility arising from that abnormality. But you may take the view that both the defendant's mental abnormality and drink played a part in impairing his mental responsibility for the killing and that he might not have killed if he had not taken drink. If you take that view, then the question for you to decide is this: has the defendant satisfied you that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts, or has he failed to satisfy you of that? If he has satisfied you of that, you will find him not guilty of murder but you may find him guilty of manslaughter. If he has not satisfied you of that, the defence of diminished responsibility is not available to him.' "

[44] This approach was adopted in the direction to the jury in *HM Advocate v McLeod* (High Court of Justiciary at Forfar, 24 October 2002). This case involved an accused who suffered from post-traumatic stress disorder consequent upon sexual abuse experienced as a child. At the time of the fatal attack he was intoxicated after voluntarily inhaling butane gas. Relevant passages from the direction to the jury include the following:

"Now, there is, as I have mentioned, a further important rule in this area, and that is the plea of diminished responsibility cannot be based on the fact that the accused has induced mental abnormality himself by taking an intoxicating substance - - alcohol or drugs or butane gas. That is a clear rule of law, and the reasons for it are perhaps obvious." (Transcript, p 29.)

"But on the basis of this area of the evidence you might conclude any one of three things: first of all, that the butane gas was the sole substantial cause of the violence; secondly, that the PTSD inducing the flashback was the sole cause of the violence; or thirdly that both the gas and the PTSD-induced flashback played a part, they were both causes of the attack on [the victim]. If you conclude the first of these, that the inhalation of gas was the sole substantial cause of the violence, then there would be no basis for diminished responsibility. The rule that I have described about taking intoxicating substances would apply, and there is no room for diminished responsibility, so your verdict would have to be murder.

If you find - - if your conclusion is the second of the three I have described, that the PTSD-induced flashback was the sole substantial cause, then that is a very clear basis for diminished responsibility - - in other words, in that case your verdict would necessarily be culpable homicide.

If, on the other hand, you take the view that both causes were operating, the rule is as follows: if you conclude that PTSD was the substantial cause of the violent attack, that is a basis for diminished responsibility, and your verdict should be culpable homicide. The test, in other words, is whether the abnormality of mind, other than intoxication, is a substantial cause of the attack. It needn't be the only cause. It needn't even be the main or predominant cause. It is sufficient that it is a substantial cause." (Ibid, pp 31-32.)

For discussion of this case see J Casey, "Intoxication and Diminished Responsibility" 2003 Jur Rev 331.

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

words, attention is focused on the contribution made to the killing by the underlying condition (the state of dependency). The peculiarity of this situation is that that contribution might lie in the fact that the dependency itself caused the state of intoxication, which in turn led to the killing. In such a situation it could not be said that the accused's intoxication was voluntary. Much would therefore depend on the facts and circumstances of each case to determine whether or not the acute intoxication was brought on by the underlying condition and thus bring diminished responsibility into play.

3.40 The final situation is where at the time of the killing the accused was in a state of acute intoxication but had no mental abnormality in any other sense.[46] It is to this situation which the dictum in *Brennan* is most directly applicable. At first sight it might be thought that the rule is unnecessary, as a transient state of intoxication would not fall within the test for diminished responsibility. However, such an interpretation is not in every sense an obvious one. An intoxicated person is at the time of intoxication suffering from an abnormal state of mind which does affect his ability to determine or control his conduct. Accordingly the basis of the exclusion is not the definition of the plea but the clear policy of the criminal law, as set out in the *Brennan* decision, that voluntary intoxication does not elide criminal responsibility.

3.41 However one of our consultees has argued that the policy in *Brennan* should not have the same effect in respect of diminished responsibility, which is essentially a plea in mitigation. It is not impossible to envisage some circumstances where acute intoxication at the time of an offence is a mitigating factor. (Equally in other situations intoxication might be treated as an aggravating factor.) In the Discussion Paper we took the view that acute intoxication by itself could not found a plea of diminished responsibility. We made no proposal to alter this rule and therefore did not consult on the suggestion that the law should be changed. However we believe that the policy basis for the general rule that acute intoxication does not remove criminal responsibility is equally as forceful in respect of a plea which operates in the context of unlawful killing.[47] We consider it unlikely that there would be much support for the idea that a person who killed in a purely transient state of voluntary intoxication should escape conviction on a charge of murder simply for that reason. Accordingly we do not propose any alteration to the existing law on acute intoxication as the basis for the plea of diminished responsibility.

3.42 We therefore recommend that:

15. A state of acute intoxication at the time of an unlawful killing should not by itself constitute diminished responsibility. However, a state of acute intoxication by itself should not prevent diminished responsibility from being established if the intoxication co-existed with, or was the consequence of, some underlying condition which meets the general criteria for the plea.

(Draft bill, section 3(3))

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[46] In the present context we are considering only cases of voluntary acute intoxication. Where a person commits a crime whilst involuntarily intoxicated the appropriate defence is automatism. See *Ross v HM Advocate* 1991 JC 210.

[47] We discuss the range of offences to be covered by the plea at paras 3.43-3.50.

Diminished responsibility in crimes other than murder

3.43 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.[48] But 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.[49]

3.44 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.'[50] 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. No reference was made in that case to dicta which suggest that diminished responsibility as a plea is restricted to cases of murder. In *HM Advocate v Cunningham*,[51] 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*,[52] 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 point was one which the Court in *Galbraith* expressly declined to consider.[53]

3.45 In the Discussion Paper we proposed that diminished responsibility should not be available in respect of offences other than murder. We took the view that the underlying purpose of the plea was to give courts flexibility in sentencing in appropriate cases of unlawful killing. In other words, the plea is to be explained primarily in terms of the mandatory sentence for murder. The majority of our consultees who commented on this proposal agreed with it. Nevertheless, three consultees thought that the plea should extend to a wider range of offences, or at least to cases of attempted murder.

3.46 We can identify four possible bases for extending the scope of the plea beyond murder cases but we do not find any of these arguments convincing. 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 accused's condition by giving a lesser sentence. This approach only really makes sense in legal systems which have fixed tariffs

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[48] See eg *John M'Lean* (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).
[49] 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. At no point in either case, however, are counsel or judges reported as using this expression, referring instead to a 'mental disorder short of insanity' (1994 SCCR 621 at 624).
[50] *HM Advocate v Blake* 1986 SLT 661 at 663.
[51] 1963 JC 80 at 84.
[52] 1977 JC 38 at 47.
[53] 2002 JC 1 at 18.

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. In Scotland, however, there are no sentencing tariffs and the High Court has on the whole refrained from pronouncing sentencing guidelines.[54] 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.

3.47 A second argument for 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. This approach involves the general difficulty that there must be greater and lesser gradations of the same offence which parallel the murder/culpable homicide distinction. It also requires that the evidence for diminished responsibility is brought out during the trial itself, which might not always be in the interests of the accused.

3.48 A third argument takes issue with the view that the basis of the plea is to allow the courts to give effect to extenuating circumstances in murder cases and to get round the mandatory sentence which follows a conviction for murder. Instead, it is said, diminished responsibility removes the mens rea which is required for murder. A person who kills when in a state of diminished responsibility lacks wicked intention or wicked recklessness and so cannot be convicted of murder. It is not clear how far this analysis can extend the plea beyond cases of murder and attempted murder (which crimes share the same mens rea[55]). In any case, it is far from obvious that the plea should be understood as operating at the level of mens rea. In *Galbraith* there is no mention of this approach, and the rationale of the plea is given in the traditional terms of extenuating circumstances which 'reduce' the offence from murder to culpable homicide.[56] The 'mens rea' approach was taken in *Drury v HM Advocate*,[57] a case dealing with the defence of provocation. There the Court held that a person who kills under provocation is to be convicted of culpable homicide rather than murder because he lacked the mens rea for murder. On this approach there is no need, and indeed it is inaccurate, to say that provocation 'reduces' murder to culpable homicide. Yet in *Galbraith* there is no mention of the *Drury* decision nor of its analysis in terms of the mens rea of murder.[58] Furthermore the reasoning of the Court in *Drury* has been the subject of

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[54] Sections 118(7) and 189(7) of the 1995 Act give 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 so far shown no indication that it will exercise this power.

[55] *Cawthorne v HM Advocate* 1968 JC 32.

[56] 2002 JC 1 at 16: "In our law diminished responsibility applies in cases where, because the accused's ability to determine and control his actings is impaired as a result of some mental abnormality, his responsibility for any killing can properly be regarded as correspondingly reduced." At 18 the Court said: "Because the individual is not fully responsible in law for what he does when his mental state is substantially impaired, the law mitigates the punishment which it deems appropriate for his criminal acts. In the case of murder, however, the sentence has always been fixed by law and cannot be varied by the judge according to the circumstances." Similarly at 19: "The law responds in this way, however, because it recognises that the individual is to be pitied since, at the relevant time, he was not as normal people are. There was unfortunately something far wrong with him, which affected the way he acted."

[57] 2001 SLT 1013.

[58] The decision in *Drury* was given in February 2001. The hearing before the Full Court in *Galbraith* took place in June 2001, and the opinion delivered in July 2001. Two judges, including the Lord Justice General as presiding judge, were members of the Court in both cases.

strong criticism,[59] and there has been no suggestion that the approach in that case should be extended to diminished responsibility.

3.49 A final argument about the scope of offences covered by diminished responsibility relates specifically to attempted murder. In Scots law homicide is split into two separate categories (murder and culpable homicide). Putting aside the matter of the mandatory life sentence, it could be argued that diminished responsibility would still have a role to play in order to avoid convicting of murder persons who kill but do not deserve to be labelled as murderers. By parity of reasoning it might be thought inappropriate to convict persons of attempted murder who, because of their diminished responsibility, would not have been labelled murderers had their crime been completed. The difficulty with this argument is that the analogy between the completed and the inchoate crimes does not hold. If for purposes of fair labelling it is necessary to distinguish between two categories of unlawful killing, then it would equally be necessary to distinguish between two categories of unlawful attempted killing. In practice our law does not recognise the concept of attempted culpable homicide.[60] Instead, diminished responsibility acts to reduce the inchoate offence of attempted murder to the completed one of assault, an offence which attracts a quite different label from that of homicide or attempted homicide.

3.50 We do not find any of the arguments about extending the range of the plea to be convincing and accordingly we propose that:

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

(Draft bill, sections 3(1); 5)

ECHR implications

3.51 We take the view that there are no ECHR implications involved in formulating a definition of diminished responsibility. We argued earlier that article 5 of the Convention has no application to any test for the special defence based on mental disorder but that it does apply to any mental health disposals which might follow on from it.[61] 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.[62]

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[59] J Chalmers, "Collapsing the Structure of Criminal Law" 2001 SLT (News) 241; M G A Christie, "The Coherence of Scots Criminal Law: Some Aspects of *Drury v HM Advocate*" 2002 Jur Rev 273.
[60] Gordon, p 309.
[61] Paras 2.64-2.68.
[62] Paras 5.46-5.48; 5.10-5.26.

Part 4 Insanity as a plea in bar of trial

Introduction

4.1 In this part we consider insanity as a plea in bar of trial. The law on this plea in bar is relatively undeveloped 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 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 cannot intelligibly follow what it is all about."

4.3 Prior to 1995 a 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. Under sections 54-56 of the 1995 Act, where a court[4] 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.[5]

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[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 5.60-5.63.

[2] (1907) 5 Adam 312 at 343.

[3] 1942 JC 75 at 79.

[4] 'Court' is defined for these purposes as the High Court of Justiciary and the sheriff court (1995 Act, s 54(8)). Where in proceedings in the district court it appears that the accused may be suffering from a mental disorder, the court must remit the case to the sheriff court (1995 Act, s 52A).

[5] 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

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.[6]

Options of no change and abolition

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. In the Discussion Paper we argued that these particular issues by themselves justified changes to the law. In addition, we pointed out 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 traditionally been influenced by the law on insanity as a defence. However, 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. We proposed 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. This proposal was accepted by our consultees.

4.6 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 concerning the right to a fair trial.[8]

4.7 We therefore recommend that:

17. The common law test for the plea of insanity in bar of trial should be abolished and should be formulated in statute.

(Draft bill, sections 4; 5)

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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 involuntarinesss could be established on the basis of objective evidence. The Scottish provisions are drafted differently. They require an 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. The courts in England have 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 in relation to the rights of a person accused of a crime (*R v M* [2002] 1 WLR 824 (CA); *R v H* [2003] 1 WLR 411 (HL)).

[6] For discussion see paras 1.12-1.13. 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.

[7] Para 4.12.

[8] Paras 4.24-4.30.

Name of the plea

4.8 In our discussion of the special defence, we recommended the word 'insanity' should no longer be used as its name.[9] The term is no longer used in medical science. Furthermore, it has pejorative and stigmatising overtones. 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). In the Discussion Paper we proposed that the plea in bar should have a more suitable name, which we suggested should be 'disability' in bar of trial. We had also considered the term 'incapacity' but had rejected it on the basis that the word is used in the Adults with Incapacity (Scotland) Act 2000. The 2000 Act is concerned with matters unrelated to criminal trials and we took the view that it would be confusing to use the same word to refer to two different concepts.

4.9 None of our consultees was opposed to changing the name of the plea. Two of them pointed out that our objections to the word 'incapacity' applied equally to the proposed term 'disability', which is defined in the Disability Discrimination Act 1995 in the context of the specific purposes of that Act. We accept this criticism. In the Discussion Paper we noted that in many legal systems, including England, the plea is known as 'unfitness to plead.' This term has attracted criticism but this is mainly focused on the reference to the act of pleading to an indictment.[10] On the other hand, the term 'unfitness' has a clear meaning in ordinary language and is also an accurate description of the general nature of the plea. It certainly avoids the stigmatising overtones of the current name.

4.10 Accordingly, we recommend that:

18. 'Insanity' as a plea in bar of trial should be re-named 'unfitness for trial.'

(Draft bill, section 4 (adding new 1995 Act, section 53F))

Nature of the test

4.11 In the Discussion Paper we noted that 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 ability to stand trial is measured. We believe that there is value in a test which explicitly refers to such skills. In the Discussion Paper we set out a list of skills, based on comparative research, which would be of relevance in determining the accused's fitness for trial.[11] Consultees agreed that the skills in question should appear in the new test. However, in the Discussion Paper we also argued that the plea should not be defined solely by listing these 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

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[9] Paras 2.64-2.68.

[10] Pleading to an indictment had a crucial importance in the development of English criminal law, as 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* (1968), p 220.

[11] The skills we listed concerned the ability of the accused to perform the following tasks: to understand the nature of the charge; to understand the requirement to tender a plea to the charge or the effect of a plea; to understand the purpose of a trial; to follow the course of a trial; to understand the substantial effect of evidence given against him; to communicate adequately with his legal representative; to give adequate instructions to his legal representative.

relevance of matters not on it? Instead, we proposed that the definition should state the general or underlying principle of the plea in bar. This general principle would be followed by a non-exhaustive list of tasks or skills which would provide instances of the how the plea could be established.

4.12 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.[12] The fundamental idea is 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 (sometimes referred to as 'adjudicative competence'). In *Dusky v United States*,[13] 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 factual understanding of the proceedings against him."

4.13 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."[14] In New Zealand the test has been recently reformulated to include the ability of the accused in respect of adequate understanding of the nature and purpose or possible consequences of the proceedings and adequate communication with counsel for the purposes of conducting a defence.[15]

4.14 In the Discussion Paper we further noted that the case law under the European Convention on Human Rights used a general principle in terms of the accused's 'effective participation' in the criminal process. 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 argued that it was preferable to use the formulation derived from ECHR cases, as it would allow Scots law more easily to adapt to developments in the Convention jurisprudence.[16]

4.15 On the whole consultees agreed with our broad approach of a definition which set out a general rationale of the plea of unfitness and a non-exhaustive list of activities which illustrated unfitness. In addition there was general support for the rationale being expressed

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[12] "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." (*Russell v HM Advocate* 1946 JC 37 per Lord Justice Clerk Cooper at 46.)

[13] 362 US 402, 406 (1960). See Richard J Bonnie, "The Competence of Criminal Defendants: Beyond *Dusky* and *Drope*" (1993) 47 University of Miami Law Review 539. Professor Bonnie was one of the speakers at the seminar which we held at the beginning of the project. At the seminar he reformulated the test for adjudicative competence 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 the disposition of the case."

[14] *R v Friend* [1997] 1 WLR 1433 at 1441.

[15] Criminal Procedure (Mentally Impaired Persons) Act 2003, s 4.

[16] In *Attorney General v O'Driscoll* (Royal Court of Jersey (Samedi Division), 9 July 2003) Sir Philip Bailhache, Bailiff, formulated a test for the law of Jersey on unfitness to plead in terms of the principle of effective participation. One of the sources considered by Sir Philip was our Discussion Paper.

in terms of effective participation. But the responses from consultees identified two particular concerns which we now address.

4.16 One potential problem about our proposed test for the plea in bar is that it is too wide and would extend the plea to persons who should not be covered by it. It could be argued 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. It would not be sufficient response to say 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. Nevertheless, we believe that our proposed test does avoid over-inclusiveness. The test requires 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. The nature and effects of such a condition would call for expert evidence, which would focus on the precise manner in which the condition prevented the accused from engaging in any proper process of communication. The plea would therefore include not only cases of mental illness but also severe learning disabilities which affect the accused's ability to understand and participate in criminal proceedings. Requiring the presence of some medically recognised condition has the effect that a plea of unfitness in bar of trial would not be available simply on the basis of poor education or inadequate socialisation (which do not in themselves result in lack of capacity to participate) or being a child.[17]

4.17 The second concern relates to the inclusion of physical conditions within the scope of the plea. The present law already allows for this possibility,[18] but it might be thought that a plea in bar of trial is neither necessary nor desirable in respect of physical conditions. On one view there is no need for a plea in bar in respect of physical conditions as the court and prosecution should be prepared to make adaptations to proceedings to facilitate participation by persons with particular sorts of conditions (such as supplying an interpreter for someone with deaf-mutism). However, this view does not meet the objection that where such adaptations cannot be made, persons with some physical disabilities cannot effectively participate in court proceedings.

4.18 A further difficulty might be the consequences of upholding a plea based on a purely physical condition. The finding of unfitness in bar would lead to an examination of facts. If that procedure established that the accused committed the acts with which he is charged, the court must then make a disposal in terms of section 57(2) of the Criminal Procedure (Scotland) Act 1995 Act. This provision sets out six types of disposal. Five of these are concerned with mental health disposals, which would be inappropriate for persons with physical conditions. The remaining disposal is for the court to make no order, which in effect would be the disposal used in cases of a physical disorder. We do not consider that this situation discloses any mischief requiring a remedy. It should be noted that neither a finding after an examination of facts nor an order under section 57(2) prevents a subsequent trial of

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[17] 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 Sc Law & Prac Qu 157.

[18] *HM Advocate v Wilson* 1942 JC 75 (a case of deaf-mutism).

the accused. It may also be noted that the effect of any other plea in bar is that the accused is free from any proceedings against him for the crime charged.

4.19 Accordingly, we do not accept that our proposed test is either over-inclusive or gives rise to problems in respect of physical conditions. We therefore recommend that:

> **19. The test for the plea of unfitness 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 lacks the capacity to participate effectively in the proceedings against him. The test should include a non-exhaustive list of activities which would indicate such lack of capacity.**

(Draft bill, section 4 (adding new 1995 Act, section 53F(1), (2)); schedule, paragraph 4(b))

Exclusion of amnesia

4.20 In *Russell v HM Advocate*[19] 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*,[20] Lord Dunedin had referred to a person as within the plea in bar who could not "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." But in *Russell* the Court then 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:[21]

> "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*,[22] 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 unfitness to plead is the same in England.[23]

4.22 In the Discussion Paper we proposed that the law should remain unchanged. Our consultees accepted this proposal. By itself, the accused's amnesia of events at the time of the offence does not prevent effective participation in proceedings against him, even if it may impose limitations on possible defences which the accused can raise (eg provocation or self-defence).[24] However, we wish to make clear that the situation is different in respect of

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[19] 1946 JC 37.
[20] (1907) 5 Adam 312 at 344. Lord Dunedin also referred (at 346) to a person who "can tell his counsel, with the certainty of not being deceived, what he was really doing at the time."
[21] 1946 JC 37 at 47.
[22] 2002 JC 23.
[23] *R v Podola* [1960] 1 QB 325.
[24] Or indeed the defence of insanity at the time: see *HM Advocate v Kidd* 1960 JC 61 at 64, 69 and 73.

clinically-recognised conditions of amnesia or memory lapses which the accused experiences at the time of the trial itself (as, for example, the onset of Alzheimer's disease). Such conditions might prevent the accused from a proper appreciation of the proceedings and, if so, would fall within the scope of the plea in bar.

4.23 Accordingly, we recommend that:

20. The fact that the accused experiences loss of memory of the events forming the basis of the charge against him does not by itself constitute unfitness in bar of trial.

(Draft bill, section 4 (adding new 1995 Act, section 53F(3)))

ECHR implications

4.24 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 the special defence.[25] 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.

4.25 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 article 6(3) sets out various minimum rights for anyone charged with a criminal offence.[26] 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*,[27] 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

[25] See paras 2.64-2.66.
[26] 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.
[27] Application No 14453/88, decided 12 February 1990.

not alleged that he had not been able to instruct his defence counsel in order to be defended in an adequate manner.

4.26 Of more assistance is a decision of the European Court of Human Rights in *Stanford v United Kingdom*.[28] The applicant complained that he had not received a fair trial as he was unable to hear the proceedings. He had heard the indictment when it was read out and had 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 had been made to the trial court. 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. It was 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.[29] 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.

4.27 The principle in *Stanford* was further developed in the joint cases of *T v United Kingdom* and *V v United Kingdom*.[30] 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 of the applicants' complaint was that 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.

4.28 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

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[28] *Stanford v United Kingdom* (Series A282-A).
[29] 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.
[30] (2000) 30 EHRR 121.

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.

4.29 We would summarise the Convention case law as follows. The general principle is whether the accused can 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.

4.30 It is submitted that 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 test for the plea in bar 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 test we have also included all of these skills as part of the non-exhaustive list of activities which indicate unfitness in bar of trial.

Part 5 Evidence and procedure

5.1 In this Part we deal with various issues of evidence and procedure in respect of the special defence based on mental disorder, the plea of diminished responsibility and unfitness as a plea in bar of trial.

A. The defence based on the accused's mental disorder

5.2 **Burden of proof**. First, we consider issues concerning the burden of proof in relation to the defence that an accused lacks criminal responsibility by reason of the effects of mental disorder. There are two situations to consider, namely where the defence is raised by the accused and secondly where it is raised by the Crown.

5.3 Defence raised by the accused. At common law where insanity as a defence is raised by the accused, he bears the onus of proving the defence on the balance of probabilities.[1] In the Discussion Paper we proposed that this rule should be changed. We suggested that where the defence is in issue the Crown should have the ultimate burden of disproving it beyond reasonable doubt.

5.4 A crucial factor in our proposal is a distinction between two conceptions of a burden of proof.[2] 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 of the standards of proof.[3] 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. In short our proposal was that the accused should bear an evidential burden to make the defence an issue, and the Crown should bear a legal burden of disproving the defence. However, after considering the points made to us during consultation we have changed our mind. We now favour retaining the substance of the common law rules, subject to re-stating those rules in statute.

5.5 In the Discussion Paper we advanced two main justifications for our proposal. The first was that there was no need to treat a mental disorder defence differently from any other defence; the second was the requirements of the ECHR.

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[1] *HM Advocate v Mitchell* 1951 JC 53; *HM Advocate v Kidd* 1960 JC 61 at 68-69.
[2] See further *Stair Memorial Encyclopaedia*, vol 10, paras 747-748.
[3] Viz, proof beyond reasonable doubt and proof on the balance of probabilities. These standards of proof are the only two recognised in the Scots law (ibid, para 758).

5.6 *Burden of proof in relation to defences.* At common law the general rule is that the accused bears only an evidential burden in relation to defences and the Crown have a legal burden of disproving them. The only exceptions are insanity and diminished responsibility where the accused bears a legal burden of proof (which is satisfied by proof on the balance of probabilities). The older authorities justify the rule in respect of insanity by reference to a 'presumption' of sanity, which has the effect that the burden of proving insanity is on the party averring it.[4] 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.

5.7 An important decision is *Lambie v HM Advocate*.[5] 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."[6]

5.8 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. A presumption of sanity is one of fact, which can be rebutted by evidence to the contrary. This evidence could as easily be the result of a requirement of an evidential burden of proof.[7] 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.

5.9 We did not envisage that our proposal would make it too easy to establish the defence, or too difficult for the Crown to disprove it. Although *Lambie* states that the only function of a special defence is that of giving advance notice to the Crown,[8] this does not remove a 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.[9] Our view was

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[4] Dickson, *A Treatise on the Law of Evidence in Scotland* (3rd edn, 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.

[5] 1973 JC 53.

[6] Ibid at 57.

[7] As is the case in respect of automatism: *Ross v HM Advocate* 1991 JC 210 at 226-227.

[8] 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)).

[9] This point is clearly illustrated in the case of automatism. In *Sorley v HM Advocate* 1992 JC 102 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 v HM Advocate* 1991 JC 210 at 232 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*." (Emphasis added.)

that this burden would not necessarily be easily discharged.[10] Where an accused wished to make the mental disorder defence an issue for the court or jury to consider, it would be necessary to adduce expert medical evidence in support of it.[11] 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.

5.10 *The implications of the ECHR.* The second basis for our proposal lay in 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:[12]

> "Presumptions of fact or of 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."

5.11 In an application to the European Commission of Human Rights,[13] it was argued that a legal burden on the accused to prove insanity was in breach of article 6(2). The 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.[14] In the Discussion Paper we placed considerable emphasis on the decision of the House of Lords in *R v Lambert*.[15] 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,[16] 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.[17] The second stage concerns the proportionality of the reverse onus provision in dealing with the mischief.

5.12 Their Lordships in *Lambert* noted that imposing a legal burden on the accused was a much more drastic interference with the presumption of innocence than imposing an evidential burden.[18] The majority of the House 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

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[10] See Lord Hope of Craighead in *R v Lambert* [2002] 2 AC 545 at 588-589, cited at para 5.24.
[11] A point made about the defence of automatism in *Ross* and *Sorley*.
[12] *Salabiaku v France* (1988) 13 EHRR 379, 388, para 28.
[13] *H v United Kingdom*, Application 15023/89, decided 4 April 1990.
[14] T H Jones, "Insanity, Automatism and the Burden of Proof on the Accused" (1995) 111 LQR 475, 490-491.
[15] [2002] 2 AC 545.
[16] Sometimes a 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 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."
[17] For example the supply of controlled drugs in the *Lambert* case itself.
[18] [2002] 2 AC 545 at 572 (Lord Steyn).

section 3 of the Human Rights Act 1998,[19] 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.[20]

5.13 In the Discussion Paper we argued that a similar approach could be applied to the burden of proof in relation to the insanity defence. The general justifying aim of the defence is to give effect to a basic principle of criminal responsibility, namely that it is inappropriate to impose a criminal conviction on a person who suffered from the effects of 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. The question then is what is a proportionate response in dealing with this mischief as far as concerns the burden of proving the defence.

5.14 We took the view that if the accused had to bear a legal burden of proof then he might be convicted even if there was doubt about his sanity at the time of the offence. This situation would arise where the accused had adduced some evidence indicating the existence of mental disorder but that evidence did not meet the standard of balance of probabilities. In this scenario it could not be said that the prosecution had shown that the accused was an appropriate person to be found guilty of a criminal offence. Where the mental condition of the accused is in issue, it accorded with principle that the Crown should provide evidence that the accused is such an appropriate person by proving that he lacks the defence.

5.15 This proposal produced a variety of responses. Some consultees expressed either full or qualified agreement. However, we have found very persuasive the views expressed by two consultees,[21] who strongly disagreed with our proposal. As a result we have changed our view on this issue.

5.16 There are several reasons for our decision to recommend retention of the rule that the legal burden in respect of the mental disorder defence should remain on the accused. In the first place we note that this is the position which is adopted in many other legal systems.[22]

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[19] "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).)

[20] [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 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.

[21] The Crown Office, and Mr James Chalmers of Aberdeen University (see his paper, "Reforming the Pleas of Insanity and Diminished Responsibility: Some Aspects of the Scottish Law Commission's Discussion Paper" (2003) 8 Sc Law & Pract Qu 79).

[22] Mr Chalmers notes that "the reverse burden applies in England, Canada, the majority of the US states, all Australian states, New Zealand and South Africa." (Ibid 81.)

5.17 More significantly, our original proposals were to some extent incomplete as regards the burden to be placed on the Crown. We suggested that the legal burden of disproving the defence should lie with the Crown. But the issue arises of how the Crown can obtain the information which it would require in order to prove beyond a reasonable doubt what the accused's mental condition was at the time of the offence. The Crown might be able to point to weakness in the accused's own evidence of his mental disorder, but in order to discharge its own burden of proof the Crown would normally have to lead evidence showing that the accused was, in a sense, mentally 'normal.' It should be further borne in mind that the relevant issue is not the accused's present mental state but his state at the earlier time of the offence. How is the Crown to obtain this evidence? In some of the legal systems where the burden is on the prosecution, the accused must agree to undergo medical examination or otherwise be held to have waived his rights to produce evidence in support of his defence. Under current Scots law the accused cannot be called as a Crown witness nor can he be compelled to undergo medical examination. It is no doubt possible to alter this situation. For example, where the accused gives notice of the defence based on mental disorder, the Crown could be placed in the position of compelling him to attend for psychiatric examination. This was not a matter we explored in the Discussion Paper. Moreover we envisage that serious difficulties might arise were the accused to refuse to co-operate during any psychiatric examination (eg by refusing to answer any questions). A further response would be to allow the court or jury to draw adverse inferences from refusal of an accused person to participate in an examination. Again this is not an option that we put to consultees and in any case it is not one we find attractive.

5.18 A further factor concerns the requirements of the ECHR. In the Discussion Paper considerable emphasis was given to the argument that a legal burden of proving insanity on the accused may fall foul of the requirements of the ECHR. This view was premised mainly on the case of *R v Lambert*.[23] In that decision, especially in the speech of Lord Hope, the House of Lords 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.[24] However it has subsequently been recognised that the decision in *Lambert* did not lay down a general rule on the compatibility of reverse burdens with the ECHR. Certainly the courts in England have accepted that not every legal burden placed on the defence is disproportionate, and that it is not inevitable that every such burden will give rise to a finding of incompatibility with article 6(2) of the Convention.[25]

5.19 Accordingly the question remains open whether a legal burden of proof on the accused to establish the defence is consistent with Convention rights. Mr Chalmers has pointed to a useful source for considering this question, namely the decision of the Supreme Court of Canada in *R v Chaulk*.[26] This decision is of importance because the issues which

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[23] [2002] 2 AC 545.

[24] The text of Renton & Brown (para 24-01) which immediately followed the *Lambert* case stated that the "decision has been accepted in practice by the Crown, and would appear to be applicable to other statutory defences in similar terms." However in the most recent text this statement is qualified by the view that "[w]hether or not a particular provision placing a burden of proof on the accused should be 'read down' in terms of s. 3 of the Human Rights Act 1998 will depend therefore on factors peculiar to that provision."

[25] See *R v Drummond* [2002] EWCA Crim 527; *L v DPP* [2002] 3 WLR 863; *R v Matthews* [2003] EWCA Crim 813 (*The Times* 28 April 2003); *R v Benjafield* (HL) [2003] 1 AC 1099 (CA) and 1133 (HL); *Sliney v Havering LBC* [2002] EWCA 2558 (CA); *R v Johnstone* [2003] UKHL 28 (HL).

[26] [1990] 3 SCR 1303.

the Supreme Court had to consider have strong parallels to those involved in the compatibility of the rule in Scots law with the ECHR.[27]

5.20 The Supreme Court held that a legal burden on the accused of proving insanity did not infringe the Canadian Charter of Rights and Freedoms. The majority of justices held that the reverse burden did breach the Code's protection of the presumption of innocence and the right to a fair trial,[28] but that the burden was a justifiable restriction of the right in question:[29]

> "Section 16(4) represents an accommodation of three important societal interests: avoiding a virtually impossible burden on the Crown; convicting the guilty; and acquitting those who truly lack the capacity for criminal intent. The result of this compromise is that some guilty people will be acquitted and will be dealt with via the [mental health disposal system], and some insane (and therefore not guilty) people will be convicted and will be stigmatized and punished as criminals. Of course, this would still be the case if the burden on the accused were lowered so as to require him or her to raise a reasonable doubt as to insanity;…This result is the inevitable consequence of the uncertainty of our scientific knowledge and of our commitment (as expressed in s. 11(d)) not to convict those who were insane at the time of the offence. The alternatives to this compromise raise their own Charter problems and give no guarantee as to whether they will achieve the objective. As I have mentioned above, the Charter does not require Parliament to 'roll the dice' in its effort to achieve 'pressing and substantial' objectives in order to adopt the absolutely *least* intrusive legislative provision.
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> While the effect of s. 16(4) on the presumption of innocence is clearly detrimental, given the importance of the objective that the Crown not be encumbered with an unworkable burden and given that I have concluded above that s. 16(4) limits s. 11(d) as little as is reasonably possible, it is my view that there is proportionality between the effects of the measure and the objective."

5.21 Although this decision is based on the provisions of the Canadian Charter, it nonetheless suggests how the issue of the burden of proof of the defence might be assessed in terms of the ECHR. We are of the view that the Convention does not *require* that any burden on the accused should be an evidential one only. Placing a legal burden of proving the defence can be a proportionate qualification to the rights of an accused person under article 6 provided that there are clear reasons for doing so.[30] In our view there are at least four such reasons.

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[27] Section 16(4) of the Canadian Criminal Code of 1985 states that "[e]very one shall, until the contrary is proved, be presumed to be and to have been sane." The Canadian Charter of Rights and Freedoms provides (article 11(d)) that " any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Article 1 of the Charter guarantees the rights set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This provision has been interpreted in terms of the tests of proportionality and balance of competing interests akin to those used in respect of the European Convention.

[28] A plurality of justices argued that a burden on the accused to prove insanity did not engage the presumption of innocence at all. Their approach was based on characterising the insanity defence as concerned with legal capacity in a broad sense and not with mens rea. They argued that the presumption of innocence is concerned with the onus on the Crown to prove actus reus and mens rea, and as such does not involve any question of proof of insanity.

[29] [1990] 3 SCR 1303 at 1344-1345 (per Lamer CJ).

[30] We are proceeding on the assumption that the presumption of innocence requires proof of the accused's general criminal responsibility and not simply of the actus reus and mens rea of the offence. This assumption was challenged by some of the justices in *R v Chaulk*.

5.22 In the first place there is the problem of the task facing the Crown in disproving a state of mental disorder beyond reasonable doubt. As pointed out earlier, this burden could rarely be discharged merely by rebutting evidence led by the accused.[31] Yet under the current law there is no mechanism for forcing the accused to present himself for medical examination by the Crown and we do not propose the introduction of such a procedure.

5.23 Secondly, there is a distinction to be drawn between defences based solely on the accused's mental state (such as the common law defences of insanity and diminished responsibility) and other defences. This distinction is sometimes made in terms of a presumption of sanity but, as already noted, such a presumption begs the question of burden of proof. Instead, the point of difference lies in the requirement of proving some external factor and not simply a state of mind as such. In most defences the accused's state of mind is proved by evidence of his actions and reactions to external events, these actions and reactions being closely related to the actus reus. For example, alibi is proved (or disproved) by evidence as to the accused's physical whereabouts; self-defence and provocation by the nature of the events leading up to the assault on the victim; automatism by the external factor which brought about the loss of reasoning; and so on. A legal burden of proof on the Crown in relation to these defences does not involve a disproportionate task. Once the Crown has notice of a defence it can seek out evidence of the appropriate external facts to disprove it. The situation is markedly different in respect of the defence based on the accused's mental disorder. In many cases there is nothing inherent in the external behaviour of an insane person which indicates the presence of mental disorder. Evidence that Daniel M'Naghten fired a gun at Sir Robert Peel's private secretary does not prove that M'Naghten had insane reasons for doing so. More crucially for the issue of allocating the burden of proof, such evidence if led by the Crown does not establish that M'Naghten was *not* insane.

5.24 Thirdly, it is generally accepted that at the very least the accused would bear an evidential burden to establish the mental disorder defence. In Scots law there is virtually no authority on the nature of such a burden of proof. If the distinction between evidential and legal burdens is to be of use in this context, there must be some guidance on the level of proof required for discharging an evidential burden. Clearly something more is required than lodging notice of the defence, but what more? The special defence requires proof of very specific aspects of mental disorder, and would normally not be put in issue without expert psychiatric evidence. It may be that in this context there is little difference in practice between a legal burden on the standard of balance of probabilities and an evidential burden of proof. In *R v Lambert* Lord Hope of Craighead stated that:[32]

> "[A]n 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."

But if the evidential burden on the accused to establish the defence is a high one, there might be very little practical difference between such a burden and a legal burden at the

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[31] Para 5.17.
[32] [2002] 2 AC 545 at 588-589.

standard of balance of probabilities.

5.25 A final factor concerns the risk of false claims of mental disorder. A possible argument in support of placing the legal burden on the Crown is that, because of the disposal consequences of the defence, accused persons are unlikely to fake conditions which constitute mental disorder. This is especially so of legal systems (including Scotland prior to the 1995 Act) where the disposal is the mandatory and indefinite detention of the accused in a mental hospital. However under the 1995 Act (and article 5(1)(e) of the ECHR) a mental health disposal can be made following an insanity verdict only where it is necessary in terms of the accused's *current* state of mental health. Where a person who has been acquitted on a mental disorder defence is mentally healthy at the disposal stage, the court cannot impose any penal measure at all *nor* can it make any mental health disposal. Accordingly there might be a risk that if the Crown faced a very high burden in disproving the defence, some accused persons would try to fake mental disorder at the time of the offence in order to avoid a criminal sentence.

5.26 To sum up our views on burden of proof of the special defence. We accept, in accordance with the principle enunciated in *Lambie v HM Advocate*,[33] that for most types of defence the Crown should bear the ultimate burden of disproving the defence. This position follows from the Crown's task of proving the guilt of the accused beyond reasonable doubt by evidence of the accused's actus reus and mens rea. However in the case of the defence based on the accused's mental disorder, there are major practical difficulties in placing on the Crown the legal burden of disproving the defence, especially if the standard of proof on the Crown is beyond reasonable doubt. Furthermore there is a difference in principle between most defences (which involve external factors) and the mental disorder defence (for which evidence may be primarily or even solely based on the accused's mental condition at the time of the offence). We take the view that a provision similar to the existing common law rule is a proportionate way of dealing with the problems of false claims for acquittal based on mental disorder, and would withstand any challenge in terms of compatibility with the ECHR.

5.27 We have earlier recommended that the common law in relation to insanity as a defence should be replaced by a statutory test for the special defence based on the accused's mental disorder at the time of the offence. Although we favour a rule on the burden of proof of the statutory defence which is not substantively different from that at common law, to avoid any doubt it is advisable to state the rule on burden of proof in statute.

5.28 Accordingly we recommend that:

21. The common law rule on the burden of proof of the insanity defence should be replaced by a statutory rule that where the accused raises the defence that he lacked criminal responsibility because of mental disorder, he has to prove the defence on the balance of probabilities.

(Draft bill, sections 1(4); 5)

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[33] 1973 JC 53.

5.29 Insanity raised by the prosecution. We next consider the situation where the defence is raised by the Crown. In the Discussion Paper we noted that although insanity is normally characterised as a defence, it appears that it may be raised by the Crown. In *HM Advocate v Harrison*,[34] 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 the standard of proof was the balance of probabilities. It is not clear if the Crown can raise the issue of the 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.[35]

5.30 The position in English law is that the Crown can raise the issue of the accused's insanity, at least in certain circumstances. Although the extent of the Crown's right to prove insanity is not clear, it is settled that the Crown can lead evidence that the accused was insane where the accused has put his mental state as an issue in the case by having raised the plea of diminished responsibility (and possibly also automatism).[36]

5.31 In the Discussion Paper we did not make a definite proposal on this issue but asked whether the Crown should have the right to raise the defence and, if so, in what circumstances. We pointed out that as we were dealing with the special defence and not the plea in bar of trial, the focus was on the accused's mental state at the time of the offence and not at the time of trial. This point is important, for the issue is not concerned with whether the accused now needs a 'mental health' disposal which focuses on the accused's current state. 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 the special defence.[37]

5.32 We also noted 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. We suggested that in some (probably most) cases this problem would not arise, as the Crown would decide not to prosecute. However there might 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 was uncertainty as to who committed an

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

[35] 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.

[36] *Bratty v Attorney-General for Northern Ireland* [1963] AC 386; *R v Dickie* [1984] 3 All ER 173. 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. In this situation the Crown must prove the accused's insanity beyond reasonable doubt (*R v Grant* [1960] Crim L Rev 424). 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.

[37] The majority of mental health disposals made by the courts follow the conviction of the accused rather than acquittal on the ground of the special defence: see Derek Chiswick, "Mental Disorder and Criminal Justice" in P Duff and N Hutton, *Criminal Justice in Scotland* (1999) 278 at pp 274-280.

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.

5.33 On the other hand, the effect of the Crown seeking the special verdict based on mental disorder would be that the accused, who is ex hypothesi competent to stand trial, would be compelled into a defence which he does not wish. An accused, especially where the charges are minor, may decide that he would rather run the risk of being convicted than use the special defence, 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 this defence.

5.34 Some consultees argued that the Crown should have a right to assert and prove that the accused was mentally disordered at the time of the offence. The main reason given for this view was the Crown's duty to present all relevant evidence. However we are not persuaded by this argument. It is no doubt the case that the Crown should be able to adduce evidence of the accused's mental state at the time of the offence when that is relevant to an issue before the court, for example where the accused has raised a plea of diminished responsibility. But it does not follow that the Crown should be allowed to go further than presenting relevant evidence by insisting upon a defence which the accused has not himself raised.[38]

5.35 Consultees who took the view that the Crown should have no right to raise the special defence relied on the principle that where there are no considerations of public safety, the decision whether to raise a defence to a criminal charge is a matter for the accused. Significantly the Crown Office itself adopted this position. The Crown Office submitted that it would not be in the public interest for the Crown to pursue a defence of insanity where the issue was not raised by the accused. It further pointed out that there would be practical difficulties in the Crown obtaining the necessary evidence to prove insanity where the accused himself was not wishing to raise the defence.[39]

5.36 We agree. No issues of public safety are involved in leaving the decision whether or not to raise the mental disorder defence with the accused. Furthermore it is wrong as a matter of principle for the Crown to force a defence on an accused person where that person does not wish to avail himself of it.

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[38] Consultees did not favour the argument that in some cases it might be necessary to proceed with a criminal trial in order to identify the perpetrator of a crime. See eg Chalmers (2003) 8 Sc Law & Prac Qu 79 at 85: "The difficulty with this approach is that a criminal trial is not a fact-finding inquiry as such, but is a vehicle for determining whether a specified individual is criminally liable for the offence with which he is charged. If a criminal trial could be used for the purpose which the Commission suggests, it is difficult to see why it could not similarly be used to resolve uncertainty over who committed an offence where the individual suspected is (for example) under the age of criminal responsibility, dead or outwith the jurisdiction of the court."

[39] The Crown Office suggested that the law should go no further than allowing the Crown to agree to an acquittal where insanity is raised by the accused. See paras 5.40-5.43.

5.37 Accordingly we recommend that:

22. The defence that an accused person lacked criminal responsibility because of mental disorder at the time of the offence can be raised only by the accused.

(Draft bill, section 1(4))

5.38 **Procedural nature of the defence**. The common law defence of insanity is a special defence.[40] In modern practice the main effect of a defence having this label is that the accused must lodge notice of any special defence, which is also read to the jury at the start of the trial.[41] We see no reason why the defence based on mental disorder should not have the same characteristics.

5.39 Accordingly we recommend that:

23. The defence that the accused lacked criminal responsibility because of mental disorder should be a special defence.

(Draft bill, section 1(3))

5.40 **Verdict following the defence**. The existing defence of insanity if successfully raised leads to a verdict of acquittal. However the verdict is not a general acquittal but must specify that it is based on the accused's insanity at the time of the offence. This form of verdict is important because it brings into play the special disposal consequences under Part VI of the 1995 Act.[42] For this reason section 54(6) of the 1995 Act requires the court in summary cases and the jury in solemn cases to state whether an acquittal is on the basis of insanity at the time of the offence.

5.41 We have identified two points concerning section 54(6) which we consider call for reform. First, we noted in the Discussion Paper a procedural oddity where insanity is raised as a defence in proceedings on indictment. Where there is evidence relating to the special defence, section 54(6) requires there to be a verdict on the matter by a jury. What the section does not allow for is a procedure whereby the Crown can accept a tender of a plea of insanity 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. We cited as an illustration the case of *HM Advocate v McAskill*.[43] Here the accused had 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

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[40] Historically special defences were so-named because, unlike a general plea of not guilty, they specified the basis for the accused's lack of guilt (Hume II, 283). The main consequence of the characterisation was that the accused had to give advance notice of the defence to the Crown and special defences are frequently, though inaccurately, defined in terms of the requirement to give notice. Under the present law there are no notice requirements for special defences in summary cases but it is still correct to refer to 'special defences' in this type of proceedings (see eg *Howman v Ross* (1891) 29 Sc L Rep 281; *Adam v MacNeill* 1972 JC 1). A recent review of summary criminal procedure has recommended that special defences in summary cases should be intimated prior to the trial diet. (See *The Summary Justice Review Committee. Report to Ministers* (2004), para 20.21.)

[41] 1995 Act, ss 78; 89.

[42] See *Ross v HM Advocate* 1991 JC 210 at 218 (Lord Justice General Hope) and 227 (Lord McCluskey).

[43] High Court of Justiciary, Edinburgh, 28 October 1998.

agreement, under section 256 of the 1995 Act,[44] 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.

5.42 In the Discussion Paper we argued that this situation was unsatisfactory. The role of the jury in this sort of case is purely formal.[45] We could not identify any policy objective for the rule requiring 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. We proposed that section 54(6) of the 1995 Act should be amended to allow the court to return a verdict of acquittal on the basis of the special defence where there has been agreement to this effect by the Crown and the accused. There was no opposition to this proposal from our consultees.

5.43 Accordingly we recommend that:

24. It should be possible for the court in solemn proceedings to return a verdict of acquittal by reason of the defence that the accused lacked criminal responsibility because of mental disorder, where there has been agreement to that effect by the Crown and the accused.

(Draft bill, section 2 (adding new 1995 Act, section 53E(1)))

5.44 Secondly, section 54(8) defines the term 'court' for purposes of the section as meaning the High Court and sheriff court, but not the district court. This definition seems to be aimed at the procedure for insanity as a plea in bar of trial,[46] but as read with section 54(6) its effect is that the procedure for recording an acquittal verdict based on insanity is not regulated by the statute. We consider that this effect is an unintended consequence of the way in which the 1995 Act was consolidated. It would be avoided if section 54(6) were to be removed from the other provisions of that section, all of which deal with the plea in bar of trial.

5.45 Accordingly we recommend that:

25. The procedure in summary cases for returning a verdict of acquittal by reason of the defence that the accused lacked criminal responsibility because of mental disorder should be the same in the sheriff court and the district court.

(Draft bill, section 2 (adding new 1995 Act, section 53E(1), (2)); schedule, paragraph 4(d))

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[44] 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)).

[45] In the case of insanity in bar of trial, the issue can be decided by the court alone, even in solemn proceedings (1995 Act, s 54(1)). In *Stewart v HM Advocate* 1997 JC 183 the Court envisaged 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.

[46] Where an issue of insanity in bar of trial arises in a case in the district court that court has to remit the case to the sheriff court (1995 Act, s 52A).

B. Diminished responsibility

5.46 **Burden of proof**. 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:[47]

> "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.[48]

5.47 In the Discussion Paper we proposed that the accused should bear only an evidential burden in respect of the plea and that the Crown should have a legal burden of disproving diminished responsibility beyond reasonable doubt. We accepted that, especially since the decision in *Galbraith v HM Advocate*,[49] there were noticeable differences between the special defence and the plea (for example, as regards their effects if established and in the range of relevant mental conditions). Nonetheless we argued that there was a broad analogy between the two in the context of allocating the burden of proof. This analogy was accepted by our consultees whose responses to our proposal paralleled those made in relation to the defence. We continue to hold the view that the issues involved in the burden of proving diminished responsibility are essentially the same as those for the special defence based on mental disorder. In the light of our recommendations for the defence, we now take the view that the accused should bear the burden of proving diminished responsibility on the balance of probabilities.[50]

5.48 Accordingly we recommend that:

> **26. The common law rule on the burden of proof of the plea of diminished responsibility should be replaced by a statutory rule that the accused bears the burden of proving the plea on the balance of probabilities.**
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> (Draft bill, sections 3(4); 5)

5.49 In the Discussion Paper we considered whether the Crown should be allowed to raise the issue of diminished responsibility where no such plea had been made by the accused. We noted that 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.[51] However, we reached the conclusion that there was no need for any 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

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[47] 1945 JC 55 at 58. An identical direction to the jury was given in *HM Advocate v Blake* 1986 SLT 661.
[48] 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).
[49] 2002 JC 1.
[50] In *R v Lambert; R v Ali; R v Jordan* [2002] QB 1112 the Court of Appeal in England held that the similar rule in English law does not breach the requirements of article 6(2) of the Convention. A decision to the same effect had earlier been made by the European Commission of Human Rights (*Robinson v United Kingdom*, App No 20858/92 (Unreported, 5 May 1993)).
[51] Criminal Procedure (Insanity) Act 1964, s 6.

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. Our conclusion that there was no need for statutory provision was accepted by consultees.

5.50 **Notice of the plea**. Under the existing law there is no requirement that the accused gives notice that he intends to raise the plea of diminished responsibility. In the Discussion Paper we recommended that the plea should be subject to the same rules for giving notice as apply to special, and various other, defences.[52]

5.51 We noted that the Thomson Committee on Criminal Procedure had made a recommendation that all defences, including diminished responsibility, should be subject to a notice procedure.[53] 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, we pointed out that, 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. Accordingly we proposed that no disclosure should be made to the jury that notice of the plea had been lodged by the accused. Section 78 of the 1995 Act deals with the procedure for the accused giving advance notice of special defences. Subsection (2) of that provision states that various other defences are to be treated 'as if' special defences for the purpose of giving notice.[54] These defences are not treated as if special defences for any other purpose and do not therefore require to be read to the jury at the start of a trial, as required under section 89 in respect of special defences. What we are proposing is, in effect, to add the plea of diminished responsibility to the list contained in section 78(2).

5.52 It may also be noted that the existing rules on advance notice allow the court, on cause shown, to admit evidence to establish a special defence in the absence of notice. This rule would 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. Our proposal for treating the plea as if it were a special defence for the purpose of giving notice was accepted by our consultees, one of whom pointed out that in practice defence counsel already provide such advance notice if they know prior to the trial that the plea is to be raised.

5.53 Accordingly we recommend that:

27. 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 of the plea should be made to the jury under section 89 of the 1995 Act.

(Draft bill, section 6; schedule, paragraph 11)

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[52] 1995 Act, s 78(1), (2).
[53] Report on *Criminal Procedure in Scotland (Second Report)* by a Committee chaired by the Hon Lord Thomson (Cmnd 6218, 1975), para 37.11.
[54] Namely automatism, coercion and consent in relation to certain sexual offences.

C. Unfitness as a plea in bar of trial

5.54 **Right to raise issue of unfitness in bar of trial**. In the Discussion Paper we noted that authority is sparse on the issue of the burden of proof in respect of insanity as a plea in bar. However it seems to be accepted that the issue can be raised by the accused, by the Crown and by the court itself.[55] 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.

5.55 In the Discussion Paper we proposed that where the accused raises the issue of unfitness in bar of trial the effect would be that the Crown should bear the legal burden of establishing fitness beyond reasonable doubt. To some extent our proposal was based upon existing English law,[56] but our main reason was that the situation was analogous to proof of the defence of mental disorder. We argued that the question whether an 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, and on that basis the ultimate burden should rest on the Crown.

5.56 On the whole consultees did not agree with this proposal. Many of the problems connected with our original proposals in respect of the burden of proving the special defence would also arise in relation to the plea in bar. In addition some consultees argued that the analogy between the defence and the plea was not exact. As the issue of unfitness concerned the appropriateness of using the criminal process against an accused person, the right to raise the plea should not be confined to any one party. In some cases the accused's failure to raise the issue 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. We have come to the conclusion that the law should continue to be that the issue of unfitness in bar of trial may be raised by the accused or by the Crown or by the court of its own accord. The question then remains of who bears the ultimate burden of non-persuasion once the issue of the accused's fitness has been raised. We take the view that the normal principle should apply that a party who raises an issue has the burden of adducing sufficient evidence to establish that issue to the satisfaction of the court. As noted, the Crown is under a duty to present any evidence it may have concerning the accused's mental health. The practical effect of the rule on burden of proof is that, once the issue has been raised by a party or by the court, the question of the accused's fitness for trial is to be decided by the court on the basis of all the evidence before it.

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[55] *HM Advocate v Brown* (1907) 5 Adam 312 at 315-316; Renton & Brown, para 26-08.

[56] In England, 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 (*R v Podola* [1960] 1 QB 325). Where the prosecution alleges insanity as the basis of unfitness to plead, the onus is on the Crown to prove it beyond reasonable doubt (*R v Robertson* [1968] 3 All ER 557 at 560).

5.57 Accordingly we recommend that:

28. There should be no change to the existing law whereby the issue of the accused being unfit for trial may be raised by the accused, the Crown or by the court.

5.58 **Standard of proof**. Section 54 of the 1995 Act refers to the situation where the court is 'satisfied' that an accused person is insane in bar of trial but no guidance is given as to the level of proof required to meet this criterion. In *Jessop v Robertson*,[57] 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 the required standard of proof was balance of probabilities.[58] Scots law recognises two standards of proof: beyond reasonable doubt and on the balance of probabilities. As the issue of the accused's fitness for trial does not directly concern proof of guilt,[59] we see no need for the higher standard of proof to be used in establishing the plea in bar. The lower standard of proof is sufficient no matter who raised the issue of fitness for trial.

5.59 Accordingly we recommend that:

29. Where the issue of the accused being unfit for trial has been raised, the court should find the accused unfit if so satisfied on the balance of probabilities.

(Draft bill, section 4 (adding new 1995 Act, section 53F(1)))

5.60 **Evidential requirements in relation to unfitness as a plea in bar of trial**. 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)(a) of the Act to the effect that at least one of the medical practitioners must have been approved under the Mental Health (Care and Treatment) (Scotland) Act 2003 as having special experience in the diagnosis or treatment 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*,[60] 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.

5.61 In the Discussion Paper we stated that we found the requirements of section 54(1), as read with section 61(1)(a), 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

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[57] 1989 SCCR 600.
[58] The sheriff also held that in this situation the burden of proof lay on the Crown.
[59] A finding that the accused is unfit for trial leads to an examination of facts. Here the accused's position is protected by the requirement that proof that he committed the act charged against him must be established beyond reasonable doubt (1995 Act, s 55(1)).
[60] 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).

with conditions other than mental illness. Furthermore, the other contexts in which the requirement of an 'approved' medical practitioner applies, all concern the making of various types of mental health disposals,[61] again a matter which clearly calls for 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 the original version of section 54(1) derived.[62]

5.62 In the Discussion Paper we proposed the abolition of the requirement that a finding of insanity in bar of trial must be based on the evidence of two medical practitioners, one of whom must be an 'approved' medical practitioner. We could not identify any clear policy reason for the introduction of this requirement into the 1995 Act.[63] 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. We expressed our view that there should be no restrictions, other than the usual basis of relevancy, on the type of evidence which can be admitted to establish the plea in bar of trial. Some of our consultees interpreted our proposal as raising issues of corroboration or standard of evidence. We wish to emphasise that our concerns are with the narrower question of the qualifications of expert witnesses, and not with wider matters relating to proof of conditions constituting unfitness for trial. Those consultees who read our proposal in this sense agreed with it.

5.63 Accordingly we recommend that:

30. There should be no requirement that proof of unfitness as a plea in bar of trial must include evidence from two medical practitioners, one of whom must be an 'approved medical practitioner' within the meaning of section 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

(Draft bill, schedule, paragraphs 4(a)(i); 8(a), (b))

5.64 **Notice of the plea in summary proceedings**. Section 54(7) of the 1995 Act provides that an accused cannot found on a plea of insanity in bar of trial unless prior to the swearing in of the first prosecution witness he gives notice to the prosecutor of the plea and of the witnesses he proposes to support it. We doubt whether this provision is necessary or desirable. It may raise problems of compatibility with the ECHR. The effect of the provision is that if notice is not given, the plea cannot be raised by the accused (though it can still be raised by the Crown or by the court) once the trial has started. No such restriction exists in relation to indictment cases. In solemn proceedings, an accused must lodge prior notice of his intention to submit a plea in bar of trial, but in the absence of notice the court may still allow the matter to be considered on cause shown.[64] In addition, more general provision exists for intimation of pleas in bar in summary cases. Intimation of these pleas must be made at the first diet. However, it is possible for a plea to be considered at any later diet

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[61] See 1995 Act, s 61(6) referring to orders under sections 52M(2)(a), 53(2)(a), 54(1)(c), 57A(2)(a), 58(1A)(a), 59A(2)(a) and 60C(2)(a) of the 1995 Act.

[62] Criminal Procedure (Scotland) Act 1975, s 174(1); Mental Health (Scotland) Act 1960, s 63(1); Lunacy (Scotland) Act 1857, s 87.

[63] 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.

[64] 1995 Act, s 79 as read with ss 71 and 72.

(including during the trial) on cause shown.[65] We see no reason why unfitness for trial should have different requirements for advance notice from those applying to other pleas in bar.

5.65 Accordingly we recommend that:

31. Section 54(7) of the Criminal Procedure (Scotland) Act 1995 should be repealed.

(Draft bill, schedule, paragraph 4(d))

D. Transitional provisions

5.66 **The special defence based on mental disorder; diminished responsibility**. A fundamental principle of the criminal law, and also a requirement of the ECHR,[66] is that conduct which is not criminal at the time it is committed cannot be made criminal retrospectively. However the changes which we recommend to the special defence of insanity and the plea of diminished responsibility do not have the effect of imposing criminal liability when none existed before but of potentially removing or reducing such liability. The European Court of Human Rights has held that the Convention is not necessarily breached by a retrospective change in the criminal law which operates in the accused's favour.[67] Accordingly the date for the application of the new law on the defence and the plea need not be that of the commission of the offence. The Homicide Act 1957 introduced the defence of diminished responsibility into English law and also re-cast the defence of provocation. Section 16 of the 1957 Act stated that its provisions were to apply to all cases where proceedings had not started prior to the Act coming into force, no matter the date on which the offence was committed.[68] We consider that a similar approach should be taken for the application of the new statutory defence of lack of criminal responsibility based on mental disorder and the plea of diminished responsibility, namely that the new law should apply to all cases where proceedings are commenced after the relevant provisions come into force.

5.67 Solemn proceedings normally commence on the date of whichever happens first: the grant of a petition warrant to arrest and commit the accused, the intimation of a petition, or the service of an indictment.[69] To simplify matters, the appropriate date for application of the new law should be the date of service of the indictment. In summary cases the new law should apply in cases where the complaint is served after the commencement of the relevant statutory provisions.[70] The same rule applies where in an examination of facts under section 55 of the 1995 Act, the issue arises whether the accused could have been acquitted on the basis of the special defence. In this situation the new statutory defence will apply where the

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[65] 1995 Act, s 144.
[66] Article 7(1).
[67] *Kokkinakis v Greece* (1993) 17 EHRR 397; *G v France* (1995) 21 EHRR 288.
[68] Section 16 was repealed by the Statute Law (Repeals) Act 1977, as being a spent provision.
[69] Renton & Brown, para 12-04; *Hamilton v H M Advocate* 1996 SCCR 744.
[70] An accused who is brought before a court from custody is given a copy of the complaint beforehand (A N Brown, *Criminal evidence and procedure: an introduction* (1996), p 95). In non-custody cases proceedings commence when the citation and service copy complaint are posted to the accused (Renton & Brown, *Criminal Procedure Legislation*, para A4-291).

service of the indictment or the complaint occurs after the statutory provisions have been brought into force.

5.68 Accordingly we recommend that:

32. The provisions relating to the special defence and to diminished responsibility should apply to any proceedings commenced after those provisions have been brought into force.

(Draft bill, section 7(1)-(3))

5.69 **Unfitness in bar of trial**. As this plea in bar of trial relates to the fitness of the accused in respect of criminal proceedings, the obvious starting-point for the application of the statutory based plea is when a court has to determine the accused's fitness for trial. Accordingly where a hearing had started before the relevant provisions have been brought into force, the court will have to apply the statutory test if no determination had been made by that date. In addition a finding that an accused is unfit for trial triggers further court procedure.[71] Where a court, under section 54(1)(b) of the 1995 Act, orders that an examination of facts is to be held but the diet for the examination has not started by the time the provisions on the plea have been brought into force, the court's order should be treated as if made under section 54 as amended by the new provisions.

5.70 Accordingly we recommend that:

33. The provisions relating to the accused's unfitness for trial should apply in any diet where the issue of unfitness has not been determined at the time those provisions have been brought into force.

(Draft bill, section 7(4), (5))

[71] 1995 Act, s 54(1) provides that where the court makes a finding that an accused is insane in bar of trial it must make further orders, including discharging the trial diet, ordering an examination of facts, remanding the accused in custody or on bail, or, where appropriate, making a temporary compulsion order.

Part 6 List of recommendations

1. The common law test for insanity as a defence should be abolished.

(Paragraph 2.14)

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

(Paragraph 2.18)

3. The defence dealing with the criminal responsibility of persons with mental disorder should no longer be known as the 'insanity' defence.

(Paragraph 2.24)

4. The test for the defence should require that at the time of the alleged offence the accused had a mental disorder. The term 'mental disorder' should be defined as meaning (a) mental illness; (b) personality disorder; or (c) learning disability.

(Paragraph 2.30)

5. The defence should be defined in terms of a specific effect on the accused's state of mind which has been brought about by his mental disorder.

(Paragraph 2.37)

6. The defence should be defined in terms of the accused's inability at the time of the offence to appreciate either the nature or the wrongfulness of his conduct.

(Paragraph 2.51)

7. The definition of the defence should not contain any reference to volitional incapacities or disabilities of the accused.

(Paragraph 2.56)

8. The condition of psychopathic personality disorder should be excluded from the scope of the defence.

(Paragraph 2.63)

9. The common law test for the plea of diminished responsibility should be abolished.

(Paragraph 3.9)

10. 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 3.11)

11. The plea should continue to be known by the name 'diminished responsibility.'

(Paragraph 3.13)

12. The test for the plea of diminished responsibility should be that by reason of abnormality of mind the accused's ability to determine or control his conduct was substantially impaired.

(Paragraph 3.17)

13. The plea of diminished responsibility should not be excluded solely by the fact that the accused's condition at the relevant time fell within the scope of the defence that the accused lacked criminal responsibility because of mental disorder.

(Paragraph 3.23)

14. A plea of diminished responsibility should not be excluded solely by virtue of the fact that at the relevant time the accused had any form of personality disorder.

(Paragraph 3.34)

15. A state of acute intoxication at the time of an unlawful killing should not by itself constitute diminished responsibility. However, a state of acute intoxication by itself should not prevent diminished responsibility from being established if the intoxication co-existed with, or was the consequence of, some underlying condition which meets the general criteria for the plea.

(Paragraph 3.42)

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

(Paragraph 3.50)

17. The common law test for the plea of insanity in bar of trial should be abolished and should be formulated in statute.

(Paragraph 4.7)

18. 'Insanity' as a plea in bar of trial should be re-named 'unfitness for trial.'

(Paragraph 4.10)

19. The test for the plea of unfitness 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 lacks the capacity to participate effectively in the proceedings against him. The test should include a non-exhaustive list of activities which would indicate such lack of capacity.

(Paragraph 4.19)

20. The fact that the accused experiences loss of memory of the events forming the basis of the charge against him does not by itself constitute unfitness in bar of trial.

(Paragraph 4.23)

21. The common law rule on the burden of proof of the insanity defence should be replaced by a statutory rule that where the accused raises the defence that he lacked criminal responsibility because of mental disorder, he has to prove the defence on the balance of probabilities.

(Paragraph 5.28)

22. The defence that an accused person lacked criminal responsibility because of mental disorder at the time of the offence can be raised only by the accused.

(Paragraph 5.37)

23. The defence that the accused lacked criminal responsibility because of mental disorder should be a special defence.

(Paragraph 5.39)

24. It should be possible for the court in solemn proceedings to return a verdict of acquittal by reason of the defence that the accused lacked criminal responsibility because of mental disorder, where there has been agreement to that effect by the Crown and the accused.

(Paragraph 5.43)

25. The procedure in summary cases for returning a verdict of acquittal by reason of the defence that the accused lacked criminal responsibility because of mental disorder should be the same in the sheriff court and the district court.

(Paragraph 5.45)

26. The common law rule on the burden of proof of the plea of diminished responsibility should be replaced by a statutory rule that the accused bears the burden of proving the plea on the balance of probabilities.

(Paragraph 5.48)

27. 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 of the plea should be made to the jury under section 89 of the 1995 Act.

(Paragraph 5.53)

28. There should be no change to the existing law whereby the issue of the accused being unfit for trial may be raised by the accused, the Crown or by the court.

(Paragraph 5.57)

29. Where the issue of the accused being unfit for trial has been raised, the court should find the accused unfit if so satisfied on the balance of probabilities.

(Paragraph 5.59)

30. There should be no requirement that proof of unfitness as a plea in bar of trial must include evidence from two medical practitioners, one of whom must be an 'approved medical practitioner' within the meaning of section 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

(Paragraph 5.63)

31. Section 54(7) of the Criminal Procedure (Scotland) Act 1995 should be repealed.

(Paragraph 5.65)

32. The provisions relating to the special defence and to diminished responsibility should apply to any proceedings commenced after those provisions have been brought into force.

(Paragraph 5.68)

33. The provisions relating to the accused's unfitness for trial should apply in any diet where the issue of unfitness has not been determined at the time those provisions have been brought into force.

(Paragraph 5.70)

Appendix A

Criminal Responsibility and Unfitness for Trial (Scotland) Bill

[DRAFT]

CONTENTS

Section

Criminal Responsibility and Unfitness for Trial (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to replace the common law so far as providing that certain persons are not to be responsible, or are to have diminished responsibility, for criminal conduct; to amend the law as regards the capability of certain persons to be tried for crimes; and for connected purposes.

1 Criminal responsibility of persons with mental disorder

(1) A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

(2) But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.

(3) The defence set out in subsection (1) (as read with subsection (2)) is a special defence.

(4) The special defence may be stated only by the person charged with the offence and it is for that person to establish it on the balance of probabilities.

NOTE

Section 1 introduces a new statutory defence to replace the common law defence of insanity (recommendations 2 and 3). It provides for a special defence in respect of persons who lack criminal responsibility by reason of their mental disorder at the time of the offence with which they are charged.

Subsection (1) implements recommendations 3, 4, 5 and 6. It sets out the test for the new statutory defence. It provides that there are two elements to the test. The first is the presence of a mental disorder suffered by the accused at the time of the conduct constituting the offence. Mental disorder is defined in section 8. Secondly, the mental disorder must have a specific effect on the accused for the defence to be available. This effect is the inability of the accused to appreciate either the nature or wrongfulness of the conduct constituting the offence. 'Nature' and 'wrongfulness' are alternative concepts and the defence may be established by proving lack of appreciation in respect of only one of them. The concept of appreciation is wider than that of mere knowledge. Failure to appreciate the nature of conduct would not therefore be precluded by knowledge of the physical attributes of the conduct. Similarly the defence may be available to an accused who knew that his conduct was in breach of legal or moral norms but who had reasons for believing that he was nonetheless right to do

what he did.

Subsection (2) implements recommendation 8. It provides that the special defence does not apply to a person who at the time of the conduct constituting the offence had a mental disorder which consisted of a psychopathic personality disorder alone. The exclusion in this subsection applies only to psychopathic personality disorder. Other forms of personality disorder may give rise to the defence provided that the effect on the accused satisfies the test in subsection (1) above. The defence would also be available where psychopathic personality disorder co-existed with another mental disorder (including other personality disorders) provided that the effect of the other mental disorder falls within the test in subsection (1).

Subsection (3) implements recommendation 23. Under the common law insanity is classified as a special defence. This subsection provides for a similar rule in relation to the new statutory defence based on mental disorder. The main effect of the characterisation of a defence as a special defence is in relation to various procedural requirements under the Criminal Procedure (Scotland) Act 1995 (eg section 78(1) (giving of notice), section 89 (reading of the defence to the jury)).

Subsection (4) implements recommendations 21 and 22. It deals with who can raise the defence and with the relevant standard of proof. It provides that the special defence can be raised only by the person charged with the offence. It cannot be raised by the Crown or by the court of its own accord. This provision is in contrast to the common law defence, which can be raised by the Crown (*HM Advocate v Harrison* October 1967, unreported). The subsection also provides that the standard of proof on an accused person who states the defence is the balance of probabilities. This rule corresponds with that for the common law defence of insanity (*HM Advocate v Mitchell* 1951 JC 53).

2 Acquittal involving mental disorder: procedure

Before section 54 of the 1995 Act insert—

"*Acquittal involving mental disorder*

53E Acquittal involving mental disorder

(1) Where the prosecutor accepts a plea by the person charged with the commission of an offence of the special defence set out in section 1 of the 2004 Act, the court shall declare that the person is acquitted by reason of the special defence.

(2) Subsection (3) below applies where—

(a) the prosecutor does not accept such a plea; and

(b) evidence tending to establish the special defence set out in section 1 of the 2004 Act is brought before the court.

(3) Where this subsection applies the court shall—

(a) in proceedings on indictment, direct the jury to find whether the special defence has been established and, if they find that it has, to declare whether the person is acquitted on that ground,

(b) in summary proceedings, state whether the special defence has been established and, if it states that it has, declare whether the person is acquitted on that ground."

NOTE

Section 2 inserts a new section 53E into the Criminal Procedure (Scotland) Act 1995. The new section deals with the procedure where an accused is acquitted by reason of mental disorder.

New section 53E(1): This subsection implements recommendation 24. Under section 54(6) of the 1995 Act (before its repeal by this Bill), where the defence of insanity is raised in a solemn case, there must be a verdict returned by the jury. A consequence of section 54(6) is that a jury requires to be empanelled and directed to return a verdict even where the Crown accepts a plea of insanity. This subsection provides for a different procedure for the statutory defence based on mental disorder. Where the Crown accepts a plea by the accused based on the defence, the court is to declare that the accused has been acquitted by reason of the special defence. This provision assimilates the procedure for solemn and summary cases. A declaration setting out the special nature of the acquittal is necessary in order to trigger the provisions in Part VI of the 1995 Act which deal with disposals.

New section 53E(2), (3): These subsections implement recommendations 24 and 25. They provide for the situation where the Crown has not accepted a plea by the accused of the defence based on mental disorder. The defence does not become an issue for the court or jury to consider unless there has been evidence to support it. If the defence falls to be considered, in solemn cases the court must direct the jury to make a finding whether or not they accept that the defence has been established. Where the jury find that the defence has been established they must also declare whether their verdict of acquittal is based on the defence. A similar procedure applies in summary cases, where the court must state whether it finds that the defence has been established. If it has, the court must also declare whether the accused has been acquitted on that ground. The purpose of the declaration, in both solemn and summary cases, is to deal with the possibility that a jury might acquit the accused on some other ground. In this situation, even if the defence has been proved, the acquittal is not a special one triggering the disposal provisions of Part VI of the 1995 Act.

See also note on paragraph 4(d) of the schedule.

3 Diminished responsibility

(1) A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.

(2) For the avoidance of doubt, the reference in subsection (1) to abnormality of mind includes mental disorder.

(3) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—

(a) constitute abnormality of mind for the purposes of subsection (1), or

(b) prevent it from being established for those purposes.

(4) It is for the person charged with murder to establish, on the balance of probabilities, that the condition set out in subsection (1) is satisfied.

NOTE

Section 3 introduces a statutory version of the plea of diminished responsibility in place of the common law plea. However subject to some variations noted below the test for the statutory plea is modelled on that in the common law as set out in *Galbraith v HM Advocate* 2002 JC 1 (recommendations 9, 10 and 11).

Subsection (1) implements recommendations 12 and 16. It provides that a plea of diminished responsibility is applicable in cases of murder but not in respect of any other crime or offence. The effect of the plea is that a person who would otherwise be convicted of murder is to be convicted instead of culpable homicide. The main difference between the two outcomes is that the court has a discretion in sentencing a person convicted of culpable homicide which it lacks in a murder case. (A person convicted of murder must be given a sentence of life imprisonment: 1995 Act, s 205(1).) The test for the plea is based on that laid down in *Galbraith v HM Advocate*, namely at the time of the killing the accused must have been suffering from an abnormality of mind which substantially impaired his ability to determine or control his conduct. Comments by the Court in the *Galbraith* case on this part of the common law test will be of use in interpreting the statutory test.

Subsection (2) implements recommendations 13 and 14. It makes two significant changes to the law on the plea of diminished responsibility. At common law the plea is not available where the relevant abnormality of mind falls within the scope of the insanity defence. The position is different under the Bill where the accused's condition at the time of an unlawful killing falls within the definitions of the both the defence based on mental disorder and diminished responsibility. In this situation, the accused has the option of advancing either the defence or the plea. Secondly the subsection allows for diminished responsibility to be based on the condition of psychopathic personality disorder. At common law this condition cannot be used as a basis for the plea (*Carraher v HM Advocate* 1946 JC 108). The subsection makes clear that this exclusion does not apply to the statutory test for diminished responsibility.

Subsection (3) implements recommendation 15. It clarifies the effect which a state of intoxication has on the availability of diminished responsibility. In the first place, the provision re-states the rule laid down in *Brennan v HM Advocate* 1977 JC 38 that a person who kills whilst in state of intoxication cannot found a plea of diminished responsibility on that condition. Secondly, it states that the presence of intoxication does not preclude diminished responsibility provided that there is a basis for

the plea independently of the intoxication.

Subsection (4) implements recommendation 26. It deals with the burden and standard of proof in relation to a plea of diminished responsibility. The subsection follows the same approach as that for the defence based on mental disorder. Only the accused can raise the plea, and if raised the accused has to prove diminished responsibility on the balance of probabilities. The rule is in substance the same as the common law rule (*HM Advocate v Braithwaite* 1945 JC 55).

Note should be made of paragraph 11 of the schedule which makes provision for the giving of advance notice of the plea of diminished responsibility.

4 Unfitness for trial

After the section inserted in the 1995 Act by section 2 of this Act insert—

"*Unfitness for trial*

53F Unfitness for trial

(1) A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in a trial.

(2) In determining whether a person is unfit for trial the court shall have regard to—

(a) the ability of the person to—

(i) understand the nature of the charge;

(ii) understand the requirement to tender a plea to the charge and the effect of such a plea;

(iii) understand the purpose of, and follow the course of, the trial;

(iv) understand the evidence that may be given against the person;

(v) instruct and otherwise communicate with the person's legal representative; and

(b) any other factor which the court considers relevant.

(3) The court shall not find that a person is unfit for trial by reason only of the person being unable to recall whether the event which forms the basis of the charge occurred in the manner described in the charge.

(4) 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."

NOTE

Section 4 inserts a new section 53F into the Criminal Procedure (Scotland) Act 1995. The new section replaces the existing common law rule on insanity as a plea in bar of trial, with a new statutory plea of unfitness based on the mental or physical condition of the accused (recommendations 17 and 18).

New section 53F(1) implements recommendations 19 and 29. It sets out a general test for the new statutory plea of unfitness for trial. The effect of the provision is that a person is unfit for trial if he cannot effectively participate in the proceedings because of his mental or physical condition.

The Bill does not change the common law rule that the issue of an accused's fitness for trial may be raised by the accused, the Crown, or by the court. However, it makes clear that the appropriate standard of proof for a finding of unfitness for trial is on the balance of probabilities.

New section 53F(2) implements recommendation 19. It lists various inabilities which if proved in respect of the accused indicate his unfitness for trial. The list in paragraph (a) is illustrative, and not exhaustive, of the types of inabilities which constitute lack of ability to participate effective in proceedings. Paragraph (b) provides that other factors may be relevant to making a determination.

New section 53F(3) implements recommendation 20. It applies to the statutory plea a common rule laid down in *Russell v HM Advocate* 1946 JC 37. It makes clear that a person is not unfit for trial simply because he cannot remember what happened at the time of the offence with which he is charged. However the rule does not apply where the accused is suffering from problems affecting memory of events at the time of the trial itself.

New section 53F(4) defines the meaning of "court" for the purposes of the new section 53F. It follows the provisions of section 54(8) of the 1995 Act. "Court" means the High Court or the sheriff court (where the accused has been charged on indictment) and the sheriff court (where the accused has been charged summarily). No provision is made in respect of the district court. Where the issue of the accused's mental state arises in proceedings in the district court, that court must remit the case to the sheriff court (1995 Act, s 52A).

5 Abolition of common law rules: insanity and diminished responsibility

Any rule of law providing for the special defence of insanity, the plea of diminished responsibility or insanity to stand in bar of trial ceases to have effect.

NOTE

Section 5 implements recommendations 1, 9, 17, 21, and 26. Its effect is to abolish any existing common law rules regarding the special defence of insanity, the plea of diminished responsibility and the plea of insanity in bar of trial.

6 Minor and consequential amendments and repeals

The schedule sets out—

(a) minor amendments, and

(b) amendments and repeals consequential upon the provisions of this Act.

NOTE

Section 6 gives effect to the amendments and repeals listed in the schedule to the Bill.

7 Transitional arrangements

(1) The provisions set out in subsection (3) do not have effect in relation to proceedings for an offence instituted against a person before they come into force.

(2) Proceedings for an offence are instituted against a person when an indictment or complaint is served on the person.

(3) Those provisions are—

(a) sections 1, 2 and 3 and section 5 (in so far as it relates to the special defence of insanity and the plea of diminished responsibility), and

(b) paragraphs 3, 4(d), 5 to 7, 9 to 13, 14(a) and 16 of the schedule.

(4) An order made under section 54(1)(b) of the 1995 Act before section 4 of, and paragraph 4(a)(ii) of the schedule to, this Act come into force is, after those provisions of this Act come into force, to be treated for the purposes of the 1995 Act as having been made under that section of the 1995 Act as amended by those provisions of this Act.

(5) Where section 4 of, and paragraph 4(a)(ii) of the schedule to, this Act come into force—

(a) after notice has been given under section 54(7) of the 1995 Act of a plea of insanity standing in bar of trial, but

(b) before the court makes a finding under section 54(1) of the 1995 as to the insanity of the person stating the plea,

the plea is to be treated as a plea of unfitness in bar of trial.

NOTE

Section 7 implements recommendations 32 and 33. It provides for transitional arrangements.

Subsections (1)–(3): The provisions of the Bill dealing with the defence based on mental disorder and

diminished responsibility apply to proceedings started after those provisions come into force. For this purpose proceedings start at the date when an indictment or complaint is served on the accused. The effect of these provisions is that the statutory forms of the defence and the plea will apply in such proceedings irrespective of the date of the act forming the basis of the charge against the accused.

Subsection (4): Where a court finds that a person is insane in bar of trial, it must make an order for an examination of facts (1995 Act, s 54(1)). This subsection deals with the situation where, prior to the commencement of the provisions on unfitness for trial, the court makes such an order but no examination of facts has been held. In this situation the order is to be treated as if made under the provisions of the 1995 Act as amended by the Bill.

Subsection (5): The application of the statutory plea of unfitness for trial follows the normal rule for commencement of statutory provisions. Accordingly the plea applies in any determination of the issue which occurs after the commencement of the relevant provisions of the Bill. Where before commencement, an accused has given notice of a plea of insanity in bar of trial (under the 1995 Act, s 54(7)) but no finding has been made by a court whether the accused is insane, the court is to treat the issue as one of unfitness for trial.

8 Interpretation

In this Act—

"the 1995 Act" means the Criminal Procedure (Scotland) Act 1995 (c.46),

"conduct" includes acts and omissions,

"mental disorder" means any—

(a) mental illness,

(b) personality disorder, or

(c) learning disability,

however caused or manifested.

NOTE

Section 8 gives the meaning of certain terms in the Bill. "Mental disorder" is defined in the same manner as in section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (recommendation 4). However, the definition in the Bill does not incorporate the factors set out in section 328(2) of the 2003 Act.

9 Short title and commencement

(1) This Act may be cited as the Criminal Responsibility and Unfitness for Trial (Scotland) Act 2004.

(2) This Act comes into force on such day as the Scottish Ministers may by order made by statutory instrument appoint.

(3) Different dates may be so appointed for different purposes.

NOTE

Section 9 sets out how the Bill is to be cited. It also provides for commencement of the Bill by way of commencement order.

SCHEDULE

MINOR AND CONSEQUENTIAL AMENDMENTS AND REPEALS

(introduced by section 6)

Legal Aid (Scotland) Act 1986 (c.47)

1 In section 22(1)(dc) (availability of criminal legal aid) of the Legal Aid (Scotland) Act 1986, for "in case involving insanity" substitute "where accused found not criminally responsible or unfit for trial".

Criminal Procedure (Scotland) Act 1995 (c.46)

2 The 1995 Act is amended as follows.

3 In section 19A (samples etc. from persons convicted of sexual and violent offences), in subsection (6), in paragraph (a) of the definition of "conviction", for the words from ", by" to the end substitute "by reason of the special defence set out in section 1 of the 2004 Act".

4 The title of section 54 (insanity in bar of trial) is replaced by "Unfitness for trial: further provision", the cross-heading which precedes it is omitted and the section is amended as follows—

(a) in subsection (1)—

(i) the words ", on the written or oral evidence of two medical practitioners," are repealed,

(ii) for "insane" substitute "unfit for trial",

(b) in subsection (3)—

(i) for "the insanity of a person" substitute "whether a person is unfit for trial", and

(ii) after "mental" insert "or physical",

(c) in subsection (5), for "insane" substitute "unfit for trial",

(d) subsections (6) and (7) are repealed.

5 In section 55(4) (acquittal at examination of facts)—

(a) for the words from "insane" to "omission" substitute "not, because of section 1 of the 2004 Act, criminally responsible for the conduct",

(b) for "on the ground of such insanity" substitute "by reason of the special defence set out in that section".

6 The title of section 57 (disposal where accused found insane) is amended by substituting "not criminally responsible or unfit for trial" for "insane", the cross-heading which precedes it is amended by substituting "*where accused found not criminally responsible*" for "*in case of insanity*" and subsection (1) of that section is amended as follows—

(a) in paragraph (a), for the words from ", by" to "omission" substitute "acquitted by reason of the special defence set out in section 1 of the 2004 Act",

(b) in paragraph (b), after "55" insert "of this Act".

7 In section 60C(7) (disapplication of provision where person acquitted on ground of insanity)—

(a) after "apply" insert "in a case where the person is acquitted by reason of the special defence set out in section 1 of the 2004 Act.",

(b) paragraphs (a) and (b) are repealed.

8 In section 61 (requirements as to medical evidence)—

(a) in subsection (1), the words "under section 54(1)(a) of this Act or" are repealed,

(b) in subsection (3), the words "or 54(1)(a)" are repealed,

(c) in subsection (5), for "the said section 54(1)" substitute "section 54(1)(c) of this Act".

9 The title of section 62 (appeal by accused in case involving insanity) is amended by substituting "not criminally responsible or unfit for trial" for "in case involving insanity" and the section is amended as follows—

(a) in subsection (1)(a), for "insane" substitute "unfit for trial",

(b) in subsection (2)(b)(iii), for the words from "virtue" to "omission" substitute "reason of the special defence set out in section 1 of the 2004 Act",

(c) in subsection (2)(b)(iv), after "55(2)" insert "of this Act".

10 The title of section 63 (appeal by prosecutor in case involving insanity) is amended by substituting "where accused found not criminally responsible or unfit for trial" for "in case involving insanity" and subsection (1) of that section is amended as follows—

(a) in paragraph (a), for "insane" substitute "unfit for trial",

(b) for paragraph (b) substitute—

"(b) an acquittal by reason of the special defence set out in section 1 of the 2004 Act;",

(c) in paragraph (c), for the words from "on" to "omission" substitute "by reason of the special defence set out in section 1 of the 2004 Act".

11 In section 78(2) (which attracts the procedure for notifying special defences in relation to certain other defences), after "apply" insert "to a plea of diminished responsibility or".

12 In section 118(5) (disposal of appeal from solemn proceedings where High Court considers appellant to have been insane)—

(a) for "insane when he did so" substitute "not, because of section 1 of the 2004 Act, criminally responsible for it",

(b) for "on the ground of insanity" substitute "by reason of the special defence set out in section 1 of the 2004 Act".

13 The title of section 190 (disposal of appeal from summary proceedings where High Court considers appellant to have been insane) is amended by substituting "not criminally responsible" for "insane" and subsection (1) of that section is amended as follows—

(a) for "insane when he did so" substitute "not, because of section 1 of the 2004 Act, criminally responsible for it",

(b) for "on the ground of insanity" substitute "by reason of the special defence set out in section 1 of the 2004 Act".

14 In section 307 (interpretation)—

(a) before the definition of "appropriate court" insert—

""the 2004 Act" means the Criminal Responsibility and Unfitness for Trial (Scotland) Act 2004 (asp 00);",

(b) after the definition of "treatment order" insert—

""unfit for trial" has the meaning given by section 53F of this Act;".

Crime and Punishment (Scotland) Act 1997 (c.48)

15 In section 9(1)(a) (power to specify hospital unit) of the Crime and Punishment (Scotland) Act 1997, for "insane" substitute "is not criminally responsible or unfit for trial".

Protection of Children (Scotland) Act 2003 (asp 5)

16 In section 10(11) (referral of individuals acquitted of offence against a child on ground of insanity), for "on the ground of insanity" substitute "by reason of the special defence set out in section 1 of the Criminal Responsibility and Unfitness for Trial (Scotland) Act 2004 (asp 00)".

NOTE

The schedule sets out the minor amendments and repeals to existing legislation as a consequence of the substantive provisions of the Bill.

Paragraph 1 amends section 22 of the Legal Aid (Scotland) Act 1986 which deals with the availability of criminal legal aid so as to substitute reference to the new defence and plea of unfitness for trial in place of the references to cases involving 'insanity.'

Paragraph 2 introduces the amendments to the Criminal Procedure (Scotland) Act 1995.

Paragraphs 3 to 13, 15 and 16 of the schedule amend the Criminal Procedure (Scotland) Act 1995 to reflect the names for the new defence and plea in bar of trial. References in the 1995 Act to insanity as a defence are changed to refer to the defence as set out in section 1 of the Bill and references to insanity as a plea in bar are changed to refer to unfitness for trial.

Paragraphs 4(a)(i) and 8 amend sections 54 and 61 of the 1995 Act (recommendation 30). The 1995 Act contains a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in mental health. The effect of these amendments is that this requirement does not apply to a finding by a court that a person is unfit for trial.

Paragraph 4(d) repeals subsection (6) of section 54 of the 1995 Act. That provision dealt with procedure on insanity as a defence. The repeal follows on from the introduction by section 2 of the Bill of the new statutory defence based on the accused's mental disorder. By placing the defence in provisions separate from section 54, the definition of "court" in section 54(8) no longer applies to the procedure relating to the defence. The effect is to make clear that the provisions for recording an acquittal based on the defence apply to proceedings in the district court (recommendation 25).

Paragraph 4(d) also repeals subsection (7) of section 54 of the 1995 Act. It gives effect to recommendation 31. The effect is that the procedure in summary cases for the giving of notice of a plea of unfitness for trial is governed by the general rules for intimation of pleas in bar (see 1995 Act, s 144).

Paragraph 11 gives effect to recommendation 27. It amends section 78(2) of the 1995 Act so as to provide that diminished responsibility is treated as if it were a special defence for the purpose of giving advance notice (see 1995 Act, s 78(1)). The plea is not treated as if it were a special defence for any other purpose (eg disclosure to the jury under section 89(1)).

Paragraph 14 amends section 307 of the 1995 Act (which defines certain terms for the purposes of the 1995 Act) so as to provide that references in the 1995 Act to "the 2004 Act" are references to the Criminal Responsibility and Unfitness for Trial (Scotland) Act 2004. It also provides that the meaning of "unfit for trial" is given in the new section 53F.

Paragraph 15 amends section 9 the Crime and Punishment (Scotland) Act 1997. Section 9 of the 1997 Act refers to "section 57(2)(a) of the 1995 Act (disposal where accused insane)." The effect of paragraph 15 is to substitute references to the new statutory defence and plea in bar of trial, in place of the reference to "insane."

Paragraph 16 amends section 10 of the Protection of Children (Scotland) Act 2003 so as to substitute reference to the special defence set out in section 1 of the Bill in place of the reference to on the insanity.

Appendix B

List of consultees who submitted written comments on Discussion Paper No 122

Association of Chief Police Officers in Scotland (ACPOS)

Professor Richard J Bonnie, University of Virginia School of Law

James Chalmers, The School of Law, University of Aberdeen

The Crown Office and Procurator Fiscal Service

Dr Rajan Darjee, Lecturer in Forensic Psychiatry, University of Edinburgh

Professor Antony Duff, Department of Philosophy, University of Stirling

Faculty of Advocates

Helen Howard, School of Law, University of Teesside

Law Society of Scotland

Professor R D Mackay, The Law School, De Montfort University

Mental Welfare Commission for Scotland

Scottish Association for Mental Health

Scottish Law Agents' Society

Professor Christopher Slobogin, Levin College of Law, University of Florida

The Discussion Paper also elicited one confidential response.

Appendix C

Mental health experts who assisted with the project

Dr Melanie Baker, Specialist Registrar Forensic Psychiatry, Royal Edinburgh Hospital

Dr Natasha Billcliff, locum Consultant in Forensic Psychiatry, State Hospital

Dr Isobel Campbell, Consultant Forensic Psychiatrist, State Hospital

Dr Anne Carpenter, Consultant Clinical Forensic Psychologist, Douglas Inch Centre

Dr Rajan Darjee, Lecturer in Forensic Psychiatry, University of Edinburgh

Dr Derek Chiswick, Consultant Forensic Psychiatrist, Royal Edinburgh Hospital

Professor David Cooke, Professor of Forensic Psychology, Douglas Inch Centre

Dr John Crichton, Consultant Forensic Psychiatrist, Royal Edinburgh Hospital

Dr Andrew Wells, Consultant Forensic Psychiatrist, Royal Edinburgh Hospital

Dr Steven C Young, Consultant Psychiatrist, State Hospital

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