



**Law
Commission**
Reforming the law

**Criminal Liability:
Insanity and Automatism
A Discussion Paper – Summary for non-specialists**

23 July 2013

Law Commission

**CRIMINAL LIABILITY:
INSANITY AND AUTOMATISM**

DISCUSSION PAPER

Summary for non-specialists

This document is a summary of our discussion paper on insanity and automatism. It is designed for people who have limited knowledge or experience of the law. We explain how the law works currently, the problems with the law, and how the law could be changed.

We cannot provide as much detail in this summary as we do in the discussion paper, nor all of the references to sources that we have used for our information and arguments.

If you would like to find out more about this project, there is further information on our website, including the full discussion paper and other related papers at <http://lawcommission.justice.gov.uk/areas/insanity.htm>

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Information provided to the Law Commission

We are not inviting responses to the discussion paper, but if you provide any information to us in response to it, we may publish it. This includes personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission. The Law Commission will process your personal data in accordance with the Data Protection Act 1998.

INTRODUCTION

- 1 English law allows a person accused of a crime not to be convicted, in very restricted circumstances, on the ground that he or she was “insane”. This “defence” dates from the 19th century.
- 2 To criminal lawyers it is known as the “insanity defence”. We acknowledge that the use of the word “insanity” might be off-putting or even offensive to many people, but for this paper we have to use the familiar label. One of the issues we discuss is the question of the appropriate label for a defence of this kind.
- 3 The defence is rarely used. Statistics suggest that there are only a very small number of successful insanity pleas each year in the Crown Court (around 30). Possible reasons for this low figure include the stigma of the word “insanity” and also the outcomes that follow from a successful insanity defence. There are no statistics on insanity pleas in the magistrates’ courts.
- 4 There is a closely related defence for a person who totally lacked control of his or her actions at the time of the alleged offence (this is called automatism). This is generally thought of as a defence which could apply where someone was in an “automaton” state. That defence is also rarely used. There are no statistics on how often an automatism defence is pleaded or succeeds.
- 5 The question at the heart of this project is whether these two defences contain the right tests to distinguish between those who should be held criminally responsible for what they have done, and those who should not, because of their condition. More generally, what kind of disorder – whether mental or physical – justifies not holding a person criminally responsible?

The history of this project

- 6 In our Tenth Programme of Law Reform (2008) Law Com No 311 we stated our intention to examine the law governing (i) the test for unfitness to plead and to stand trial and (ii) the defence of insanity.
- 7 The law regulating “unfitness to plead” seeks to prevent people being put on trial who have been accused of a crime but who cannot participate effectively in the legal proceedings. The reason for this is that it is unfair to try someone who cannot defend themselves. If the judge decides that the defendant is unfit to plead then the trial stops and a fact-finding hearing takes place instead. At the end of that hearing, if the jury decides that the person did what they are charged with, the person is not convicted and therefore they cannot be sentenced. The court can, however, deal with the person, in ways that we describe at paragraph 28 below.
- 8 Unfitness to plead is concerned with the question of an accused’s mental state at the time of trial, whereas the defences of insanity and automatism concern the mental state of the accused at the time of the offence. A person accused of a crime might have a mental disorder which affected them at the time they allegedly committed the offence and which still affects them when the case comes to court, but this will not always be so. A person can be unfit to plead without the defence of insanity being relevant at all, or vice versa. The issues of

insanity and unfitness overlap but they concern different questions about the accused's mental capacity relevant at different stages of the criminal process.

- 9 Both the test for unfitness to plead and the insanity defence are founded on nineteenth century legal concepts. Neither of them has kept pace with developments in medicine, psychiatry and psychology.

Our work on unfitness to plead

- 10 We started our work on these linked issues by publishing Consultation Paper No 197 in 2010. That paper contained provisional proposals for reform of unfitness to plead. We published our analysis of the responses to that paper and the responses themselves in April 2013. We are now in the process of refining our proposals for reform on unfitness in light of the responses, and we plan to publish a report in 2014.

Our work on the defences of insanity and automatism

- 11 We are convinced, on the basis of our research, the vast amount of academic literature and the proposals for reform made by others, that there are significant problems with the law on insanity and automatism in theory. There is, however, less evidence that the defences cause significant difficulties in practice and very little published research into the operation of the defences. We therefore published a Scoping Paper in July 2012 in which we asked 76 questions to discover how the defences of insanity and automatism are working in the criminal law of England and Wales, if at all. Alongside the Scoping Paper we published supplementary material in which we examined the law in detail, including findings from existing research into the insanity defence in practice. We set out the problems with the existing law briefly in the Scoping Paper, and at length in the supplementary material. Twenty-one responses were received. Most of them were sent on behalf of an organisation or represented the views of many people.
- 12 We have considered issuing a similar paper to gain evidence of the problems that the law relating to unfitness to plead generates in practice, but found that the responses we received to our Scoping Paper on insanity provided that information.

The way forward

- 13 The responses to the Scoping Paper produced little evidence of a practical problem in the operation of the insanity and automatism defences. Legal and medical practitioners said that, while criticisms of the defences are justified, they have to focus on the eventual outcome for the accused person and they work round the legal technicalities of the defences. They said that there are other aspects of the criminal justice system dealing with mentally disordered offenders which need to be changed ahead of the insanity and automatism defences. In particular, many respondents told us that reform relating to unfitness to plead is more pressing than reform of the insanity defence.
- 14 In light of these responses to the Scoping Paper, we have decided to prioritise our work on reforming unfitness to plead. There are two other reasons for this.

- 15 First, it is more logical to reach conclusions about reform of the test of unfitness to plead ahead of changes to the defences of insanity and automatism because of the filtering function that the test of unfitness to plead performs, as we now explain.
- 16 The question of whether a person is unfit to plead and to stand trial will arise when the accused is entering a plea to the charge, of guilty or not guilty, if not before. In order to be fit to plead and to stand trial, an accused must be able to do certain things (such as instruct a lawyer or follow the evidence presented at trial). However, the legal test which is used to assess whether an accused is unfit to plead does not, in our view, cover all the right abilities.¹ At worst, it sets the threshold for unfitness too high. In the magistrates' courts there is not even a procedure available for assessing an accused's unfitness to stand trial. The net effect of the current law is to limit the number of people who are found unfit to plead. This could mean that many people are tried when they should not be because of their mental state.
- 17 If the legal test for unfitness to plead were reformed, then there would probably be an increase in the number of people with serious mental disorder who are found unfit to stand trial. The number of mentally disordered offenders who face a trial would therefore decrease. Consequently, the number of people who might want to rely on a reformed insanity defence at trial would be even smaller than it already is. Reforms to unfitness to plead therefore have a direct effect on the impact of reforms to the defences of insanity and automatism.
- 18 Second, we anticipate that there will be greater governmental support for reform where we can show that there is a practical need for it. 'We therefore have to prioritise that area of reform where we can have most beneficial impact on the criminal justice system.
- 19 As regards the insanity and automatism defences, this paper is a summary of our discussion paper, for the non-specialist audience. The discussion paper contains our latest thinking about reform of the defence of insanity and the linked defence of automatism. The discussion paper sets out provisional proposals for reform, but it does not invite responses because we are not in a position, at this stage, to conduct a consultation on the proposals. In publishing these provisional proposals we aim to contribute to the broader public debate on the reform of the criminal law as it relates to mentally disordered defendants. We would like to return to the reform of insanity and automatism following progress on our work reforming unfitness to plead.
- 20 In this summary, we explain what the insanity defence is at paragraphs 23 to 29, what the automatism defence is at paragraphs 30 to 32, and the connection with

¹ See Unfitness to Plead (2010) Law Commission Consultation Paper No 197, http://lawcommission.justice.gov.uk/docs/cp197_Unfitness_to_Plead_consultation.pdf

the legal issue of intoxication at paragraphs 33 to 37. We then set out the main problems with the current law at paragraphs 38 to 64. The main concept which underpins both the insanity defence and the automatism defence is the accused's lack of capacity and we refer to this idea in our provisional proposals (at paragraphs 69 to 126).

- 21 The issue of whether a person can be blamed for bringing about his or her own lack of capacity (known as "prior fault") is an important one, and directly relevant to our proposals. It can be particularly relevant when the accused was under the influence of alcohol or drugs at the time of the offence. We discuss how our proposals would fit with the law on this issue at paragraphs 121 to 126.
- 22 Finally, a person's lack of capacity might be caused by his or her developmental immaturity. We see this as an issue which is related to our proposals, and we explore that relationship at paragraphs 137 to 140.

THE INSANITY DEFENCE

- 23 In order to be convicted of a crime, the prosecution must prove that the accused did what is alleged in the charge and, in most cases, that he or she did so with a particular mental element, such as intention or recklessness. If a person pleads the insanity defence, the main thrust of the defence is that they should not be held responsible in criminal law at all.
- 24 It follows that in some cases the accused might be trying to show that because of her mental disorder she was incapable of forming the mental element, and in other cases, the accused might be trying to show that although he or she did have the mental element as alleged in the charge, the reason they had it was because of their mental disorder. For example, if D stabbed V to death because D suffered from the delusion that V was the devil in disguise, the prosecution may well be able to prove that D had the intention required for a charge of murder, but D had that intention because of her delusional state of mind. D could therefore plead the insanity defence.
- 25 The insanity defence is set out in the "M'Naghten Rules" as laid down by the House of Lords in 1843:²

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 *M'Naghten's Case* (1843) 10 Clark and Finnely 200, 210, (1843) 8 ER 718, [1843-60] All ER Rep 229.

- 26 It is for the defendant to prove, on the balance of probabilities (that it is more likely than not) that he or she is insane within that test. If the test is met, in the Crown Court the defendant is found “not guilty by reason of insanity” which is known as the “special verdict”.³
- 27 There is no procedure for a special verdict of “not guilty by reason of insanity” in the magistrates’ courts. The result is that where the defence succeeds, the defendant is acquitted. The magistrates’ courts have special powers to deal with a defendant without convicting him or her. If the issue of insanity is raised, the magistrates may make a hospital order or a guardianship order under section 37(3) of the Mental Health Act 1983 without trying the defendant. An order under section 37(3) does not depend on a finding of insanity or unfitness. It does depend upon a finding of mental illness or severe mental impairment.

Possible “disposals” after a verdict of “not guilty by reason of insanity”

- 28 A person found not guilty by reason of insanity has not been convicted of any crime so he or she cannot be sentenced. The term “disposal” is therefore used to describe the powers that a court has to deal with such a person. Following a special verdict, the Crown Court has the power to make an absolute discharge (in other words, that there will be no further action), a supervision order,⁴ or to order that the person be detained in hospital (a “hospital order”), possibly with the restriction that he or she is not to be released until permission is given by the Secretary of State (a “restriction order”). Permission for release will depend on the person’s mental health and the risk to the public that he or she poses.
- 29 The issue of disposal is important, but it is distinct from the question of who should be exempted from criminal liability in the first place.

THE DEFENCE OF (SANE) AUTOMATISM

- 30 If a person totally lacked control of his or her body at the time of the offence, and that lack of control was not his or her fault, then he or she may plead not guilty and may be acquitted. This is referred to as the defence of automatism. It is a common law defence and it is available for all crimes. For example, where a person is driving along and a swarm of bees enters the car, causing the driver to swerve and hit a pedestrian, the defence of (sane) automatism would apply.
- 31 Once the accused has called enough evidence to make automatism an issue which is in dispute between the prosecution and defence, the prosecution must disprove the defence; if they fail to do so the defendant will be acquitted.

³ Section 2(1) of the Trial of Lunatics Act 1883.

⁴ A supervision order is an order that requires the person to be under the supervision of a social worker or an officer of a local probation board for a maximum of two years. It is a community order and the person is not detained in hospital.

- 32 In the cases where they have considered the defences of insanity and automatism the courts have grappled with the distinction between the defences. They are evidently so closely related that reform of one entails reform of the other.

THE CONNECTION WITH INTOXICATION AND PRIOR FAULT

- 33 Those who work in the criminal justice system will know that offenders with mental disorder will often also have a background of alcohol or drug abuse, and either or both of those factors may have affected the accused's body or mind at the time of the offence. There is therefore a practical connection between the law governing the criminal responsibility of defendants who are intoxicated and the defences of insanity and automatism. There are also legal and policy reasons which tie the defences to the law on intoxication.
- 34 "Intoxication" in this context is a concept which is not limited to the effects of alcohol, but extends to effects brought about by any ingested substance, including prescribed drugs as well as illegal drugs.
- 35 In legal terms, if the accused has consumed any substance causing him or her to become "intoxicated", this would be treated by the court as an external factor and the defence of insanity would not apply. We explain this at paragraphs 39 to 48 below.
- 36 In policy terms, it is clearly relevant to a defence founded on a person's condition to ask whether a person has culpably brought about that condition themselves. For example, the law on intoxication takes account of whether a person has brought their condition on themselves. In criminal law, if the defendant had voluntarily taken drugs not prescribed for him and then committed a crime, that would amount to a defence if it completely prevented him from forming the knowledge, intention or dishonesty needed for the crime to be proved. It would not, however, be a defence to offences with any other mental element (such as recklessness, belief, negligence or strict liability).
- 37 For all these reasons, in the course of considering the defences of insanity and automatism, we have found it essential to consider the relationship of those defences to the separate issue of intoxication. The Court of Appeal has recently stated that it welcomes our examination of the related issues of insanity, automatism and intoxication.⁵

THE MAIN PROBLEMS WITH THE CURRENT LAW

- 38 We turn now to an examination of the main problems with the present law. Some of the problems are what might be called academic, in the sense that they are defects which are evident from an analysis of the law but do not loom large in

⁵ C [2013] EWCA Crim 223 at [61].

practice. Other aspects of the defence can cause difficulties in practice, for individuals, their lawyers, and courts.

(1) “Disease of the mind”

- 39 The M’Naghten test requires the accused to be suffering from a “defect of reason from disease of the mind” (see paragraph 25). Judges give the phrase a more modern interpretation in practice: in the guidance given to judges on how to direct the jury, “disease of the mind” is described as “an impairment of mental functioning caused by a medical condition”.⁶ The kind of disorder that is relevant is not necessarily a disease in the ordinary sense of that word, and the word “mind” is not interpreted to mean “brain”.
- 40 Some conditions (such as schizophrenia) are clearly going to be regarded as diseases of the mind. However, one consequence of the courts’ broad interpretation of “disease of the mind” is that people with conditions that would not generally be described as mental disorders have been held to come within the M’Naghten understanding of insanity. These include, for example, sleepwalkers, and people with epilepsy or diabetes.⁷
- 41 This has come about because the law, in the interpretation of M’Naghten, has not limited the idea of “disease of the mind” to mental disorders. Instead, it has adopted a distinction between whether the cause of the accused’s lack of control was due to an “internal factor” (ie some malfunctioning of the person’s body) or an “external factor” (such as a blow to the head). Involuntary conduct caused by an “internal factor” is classed as insanity and that leads to the special verdict. Involuntary conduct caused by an “external factor” is classed as (sane) automatism, leading to a simple acquittal.
- 42 “External factor” is not limited to things like a blow to the head. The Court of Appeal has held that there will be no “disease of the mind” under the M’Naghten Rules where a malfunction was “caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences”. This leads to illogical and strange results.
- 43 The application of the law to diabetics demonstrates this most starkly. Diabetics may suffer excessively high blood sugar (hyperglycaemia) or excessively low blood sugar (hypoglycaemia), and both states may be caused by “external factors” (alcohol or insulin) or “internal factors” (lack of food or insufficient insulin).

⁶ Judicial Studies Board, *Crown Court Bench Book* (March 2010) p 327.

⁷ About 600,000 people in the United Kingdom have been diagnosed as having epilepsy: Epilepsy Action, <http://www.epilepsy.org.uk/info/basics/living-with-epilepsy> (last visited 24 Apr 2013). More than 2.7 million people in England and Wales have diabetes: <http://www.diabetes.org.uk/Professionals/Publications-reports-and-resources/Reports-statistics-and-case-studies/Reports/Diabetes-prevalence-2012-March-2013/> (last visited 24 Apr 2013).

- 44 The upshot is that a diabetic who, without fault, fails to take insulin and then commits an allegedly criminal act would be treated as insane. In contrast, a diabetic who took insulin in accordance with a medical prescription would be acquitted if they were an automaton at the time of committing an allegedly criminal act.
- 45 The way that the law draws a line between automatism and insanity means that there is another anomaly. There will be cases in which a defendant continues to exercise some degree of control over his or her movements but will nevertheless be entitled to rely on a defence of insanity but with that same lack of capacity he or she would not be entitled to rely on a plea of sane automatism.⁸
- 46 A further difficulty with this boundary between internal (insanity) and external (automatism) has arisen in so-called “psychological blow” cases where the accused enters into a dissociative state following a traumatic event. A dissociative state is one where a person is unaware of what they are doing. This might occur where a person is experiencing Post-Traumatic Stress Disorder as a result of something that happened to them. The cases are not consistent as to whether the insanity defence or the automatism defence applies.
- 47 It would be easy to imagine circumstances in which psychological trauma was caused by the impact of witnessing something that happened to someone else, and again, the internal/external distinction does not make it easy for courts to reach coherent and just results.
- 48 A further basis for criticism is that with some conditions, both internal and external factors may operate simultaneously. For example, with regards to sleepwalking, some people are more susceptible to sleep disorders, but then there may be an external trigger (an interruption to sleep) which also plays a part in loss of capacity. Lord Justice Davis commented in his response to the Scoping Paper that the distinction between internal and external conditions is “illogical, little short of a disgrace and should be abolished”.
- 49 The policy behind the case law has been the court’s concern to reduce the risk of likely recurrence of the behaviour and thereby reduce the likelihood of harm being caused in the future. So the likelihood of recurrence has been a factor in determining whether a condition is a “disease of the mind”. It remains the case, however, that if the defence falls on the automatism side of the line an accused person is simply acquitted and there may then be a risk of further harm. This could be a particular concern where, for example, a person is acquitted of a serious offence on the basis of a sleep disorder. Respondents to the Scoping

⁸ A diabetic who had not taken insulin and slipped into a hyperglycaemic coma would be allowed to plead insanity despite retaining some control; a diabetic who took insulin and went into a hypoglycaemic state would not be able to plead sane automatism unless totally incapacitated.

Paper thought that this was indeed a gap, although there is no evidence this is occurring frequently.

(2) Other defects in the M’Naghten test

50 The M’Naghten test, as interpreted in the case law, has also been criticised

- (1) for being restricted to difficulties with the mental faculties of knowledge and understanding but ignoring other sorts of problems which affect those faculties, such as emotional problems;
- (2) for disregarding the inability to control one’s emotions or resist compulsions; and
- (3) for an unusually narrow interpretation of what “wrong” means, with the result that if the accused knew that what they were doing was against the law, then the insanity defence is not available.

(3) The law is out of step with medical understanding

51 Terms like “insanity” and “disease of the mind” are not medical terms, but outdated legal terms. There have been calls for the M’Naghten Rules to be brought into line with modern medical knowledge for at least 60 years, and those calls were echoed by the responses to the Scoping Paper. As Dr James Reed (a consultant forensic psychiatrist) wrote in response to the Scoping Paper: “the present test does not really relate in any meaningful way to the practice of psychiatry. Therefore diversions into discussions about the M’Naghten rules are not very helpful in conveying an understanding of the clinical situation to the court”. Many other jurisdictions have met these concerns by recently reforming their insanity test by legislation (Scotland in 2010, Ireland in 2006) or at common law (Canada, Australia).⁹

(4) The label “insanity” is stigmatising and inaccurate

52 The very name of the defence is off-putting to many people, and this was something that respondents to the Scoping Paper commented on. Legal representatives sometimes do not want to suggest to their clients that the insanity defence might be relevant to their case. Even worse, as we explain above, the broad interpretation of the term “disease of the mind” results in people with epilepsy, diabetes, and others with conditions that would not be generally described as mental disorders being classified as “insane”. Those people might understandably be reluctant to plead the defence.

53 However, there is an argument that with mental illness, whatever label is chosen, stigma will persist. Some argue that the stigma that attaches to “the insane”,

⁹ Though a recent review of the law in New Zealand concluded that, although there are faults with the law, no change was the best option. See New Zealand Law Commission, *Mental Impairment Decision-Making and the Insanity Defence*, R120 (2010).

though real and regrettable, attaches more to mental disorder in general rather than to the specific word. Professor Cheryl Thomas is currently undertaking work for us on the jury and on public attitudes to mental disorder and to crime and dangerousness so we hope to learn more about public attitudes in this respect.

(5) The difficulty of knowing what has to be proved

- 54 In the Crown Court, for the special verdict (see paragraph 26 above) to be given, the prosecution must prove that the accused “did the act or made the omission”.¹⁰ It is not always easy to identify precisely what counts as “the act”, and so neither the prosecution nor the defence will be sure what needs to be proved in a case. For example, if the alleged offence is possession of an item, it is not clear whether the prosecution has to prove only that the accused had it, or also that they were aware that they had it. The case law does not resolve this difficulty, even though it could apply to many offences. This was mentioned as a practical problem by respondents to the Scoping Paper.

(6) The defence is not available in the magistrates’ courts if there is no mental element to the offence

- 55 The defence of insanity can be pleaded in the magistrates’ courts, but, according to one interpretation of the law, only if there is a mental element in the offence. For example, a charge of assault under section 47 of the Offences Against the Person Act 1861 involves a physical element (that the accused caused actual bodily harm to the alleged victim) but also that the accused had a particular state of mind when that happened. For other offences (those known as “strict liability” offences), there is no mental element.
- 56 This interpretation of the law has been persuasively criticised by leading academics, and we think it is mistaken. It leads to the anomaly that if a person is charged with an offence where there is no mental element, then he or she can plead the insanity defence if the case is tried in the Crown Court but not if it is tried in the magistrates’ courts. It did not seem, from responses to our Scoping Paper, that this is a significant problem in practice.

(7) The burden of proof lies on the accused if the insanity defence is raised

- 57 The general approach to the burden of proof in English law is that it is always the duty of the prosecution to prove the case against the accused beyond a reasonable doubt. The defence of insanity is, however, an exception to this general rule. The effect of this exception is that where an accused pleads insanity, the burden of proof lies not on the prosecution but on the defence. This means that the accused has to prove all the elements of the defence on the balance of probabilities.

¹⁰ Section 2(1) of the Trial of Lunatics Act 1883.

- 58 The result is that where a jury believes that it is more likely than not, on the balance of probabilities, that the defendant is sane, the defence of insanity will fail and the accused will be convicted. This means that somebody may be convicted of an offence where the jury finds that it is 51% likely that he or she is sane. In such a case, the jury has more than a reasonable doubt that the defendant is sane. It is questionable whether a person should be found criminally responsible on this basis. Respondents to the Scoping Paper did not identify this as a practical problem.

(8) The risk of breach of the European Convention on Human Rights

Victims' rights

- 59 The law regulating pleas of insanity and the disposal powers of courts must ensure that individuals are managed in such a way as to address the risk of harm, including the possibility of detention in prison or hospital. States have duties to prevent breaches of a person's right to life (article 2 of the European Convention on Human Rights), the right not to be subjected to inhuman and degrading treatment (article 3) and the right to a private life (article 8).
- 60 Supervision or detention in hospital could in some cases contribute to the fulfilment of the state's duties if treatment makes it less likely that the individual will reoffend: reoffending rates are seemingly lower for those released from secure hospital than from prison, though we are not aware of any firm data on this point.
- 61 In particular, the state should have adequate powers in relation to offences which are summary only – meaning that they can only be tried in the magistrates' courts – as well as in relation to offences which can be tried in the Crown Court.

Example: limited powers of the magistrates' courts to protect a potential victim

D pursues a campaign of harassment against V. D is charged with an offence contrary to section 2 of the Protection from Harassment Act 1997, which can only be tried in a magistrates' court. D pleads not guilty by reason of insanity and is acquitted: no special verdict is available. The court does not have the power to make a hospital order or a supervision order. The potential victim could be left without adequate protection against harm and violation of his or her article 8 right.

Defendants' rights

- 62 As we stated in the Scoping Paper, it seems that the defence does not fairly identify those who ought not to be held criminally responsible as a result of their mental condition, and so some of those vulnerable people remain in the penal system, to their detriment, and to the detriment of society at large. In consequence, they are at greater risk of suicide and self-harm in prison. Children

who are detained in custody are, of course, exceptionally vulnerable. Experienced defence solicitors commented that “prison healthcare facilities are still wholly inadequate” for those with mental illnesses. The state, which owes duties to those held in custody and especially to those held in custody who suffer from mental illness, risks violations of their right to life (article 2).¹¹ The same argument applies in relation to the right not to be subjected to inhuman and degrading treatment (article 3) because someone who is held in custody may suffer harm short of death.¹²

(9) Equality and discrimination

- 63 The law should protect mentally disordered offenders from arbitrary detention as it protects any other kind of offender. We think that, because of the current interpretation of the M’Naghten test, a person with a disability (which may include a person with a mental illness and/or learning difficulties) may be put at a disadvantage, as compared with a person without a disability. This can affect a large number of people because the proportion of people in custody with learning difficulties is higher than the proportion of people in the general population with learning difficulties.¹³
- 64 It seems to us that the way the insanity defence is currently framed, and the available disposals, mean that it is particularly ill-suited to children with mental health problems and/or learning difficulties. Children and young people who come into contact with the criminal justice system may have impaired mental faculties of knowledge and understanding, but they will often not have been diagnosed with a condition which falls within the M’Naghten test. Even if they have been, the ability of the youth court to deal with them appropriately is limited. A hospital order may not be appropriate or possible but the court would not have the power to make a supervision order. At paragraph 111 below we propose an alternative disposal which we think would give a court a wider range of suitable ways of dealing with children and young people who commit offences.

¹¹ See Equality and Human Rights Commission, *Human Rights Review 2012* p 26.

¹² The European Court of Human Rights has recently affirmed that “the assessment of whether the particular conditions of detention are incompatible with the standards of article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment. The feeling of inferiority and powerlessness which is typical of persons who suffer from a mental disorder calls for increased vigilance in reviewing whether the Convention has (or will be) complied with.” *Aswat v UK* App No 17299/12 at [50].

¹³ A study of three prisons found that just under 7% of the prison population were assessed as learning disabled and over one quarter as borderline learning disabled: K Edgar and D Rickford, *Too Little Too Late* (Prison Reform Trust, 2009) p 29. The proportion of people in the general population with learning disabilities can be assumed to be around 2%: study commissioned by the Department of Health cited by E Emerson and C Hatton, *People with Learning Disabilities in England* (Centre for Disability Research Report, 2008) p i. See also the report of the Children’s Commissioner *Nobody made the connection: the prevalence of neurodisability in young people who offend* (2012).

THE CASE FOR CHANGE

- 65 We said at the beginning of this summary that the central question is whether the law has the right test to distinguish between those who should be held criminally responsible for what they have done, and those who should not, because of their condition. As we hope we have shown, it does not.
- 66 There are a number of problems with the defences of insanity and automatism. English law is out of step with the law in other jurisdictions and with the medical professions. English criminal law is also out of step with the policy direction endorsed by the Bradley report.¹⁴ Lord Bradley has said that the criminal justice system should aim to have “the right people in prison for the right reasons”. Getting the test right of who should not be criminally responsible because of their mental condition can be part of this.
- 67 So what should be done? Some commentators argue that there is no need for a separate mental disorder defence at all. They argue that if the prosecution *cannot* prove all the elements of an offence against an accused then he or she should be acquitted, even if that is because of the mental illness that the accused was suffering at the time; and that if all the elements of the offence *can* be proved then the accused should be convicted no matter how mentally disordered he or she was. We think ignoring the effects of a mental condition leads to injustice, and we reject this argument.
- 68 We think instead that the law should be reformed, to provide an appropriate defence, based on lack of capacity.

OVERVIEW OF THE PROVISIONAL PROPOSALS

A lack of capacity defence

- 69 The concept of capacity is very familiar to civil lawyers and those who work in mental health law. In a civil case the relevant legal question might be whether someone has the capacity to consent to treatment, or the capacity to instruct a lawyer. The actual capacities which are relevant in a criminal defence are, of course, somewhat different from in a civil case but the underlying approach is the same.
- 70 We think that people should be exempted from criminal responsibility for an offence if they lacked all criminal capacity, which means that they could not have avoided committing the crime they are charged with because of a mental disorder or a physical disorder. In other words, people who totally lacked capacity not to commit the crime charged, because of a medical condition and through no fault of their own, should have a defence.

¹⁴ Lord Bradley’s review of people with mental health problems or learning disabilities in the criminal justice system (April 2009).

- 71 The defence would only be available where the accused *totally* lacked capacity, rather than where he or she partially lacked capacity or lacked effective capacity.
- 72 The requirement that the accused must not be at fault for their lack of capacity restricts the scope of the defence. For example, where an accused is totally incapacitated as a result of becoming voluntarily very drunk, the defence would not apply because the lack of capacity can be directly traced back to the accused's choice to drink. This can be distinguished, for example, from alcohol dependence syndrome, where the accused would be pleading the new defence based on the medical condition.¹⁵
- 73 We can see no good reason to restrict a defence of non-responsibility to mental conditions; on the contrary, if a physical condition leads to a total loss of capacity, it too should be the basis of a defence of non-responsibility.
- 74 One benefit of this approach is that, since the defence is available for people with diverse types of condition, some of which carry stigma and some of which do not, then it might go some way to removing the stigma associated with the present "insanity" defence, and with mental illness in general. The defence will be capable of applying to physical, psychological or psychiatric conditions, including disorders such as epilepsy, a condition leading to a stroke, Alzheimer's disease, schizophrenia, bipolar disorder, obstructive sleep apnoea¹⁶ and clinical depression.

A new defence of "not criminally responsible by reason of recognised medical condition"

- 75 We therefore provisionally propose that the common law defence of insanity should be abolished. We propose that where, as a result of a recognised medical condition, an accused completely lacked the ability not to do what is alleged, he or she should not be held criminally responsible for his or her actions.

A new special verdict

- 76 Under the current law, a successful plea of insanity leads to a special verdict of not guilty by reason of insanity, to which particular disposal powers attach (see paragraph 28 above). The proposed new defence would lead to a new special verdict – not criminally responsible by reason of a recognised medical condition – with special disposal powers.

The relevant criminal capacities

- 77 The essence of a lack of capacity defence is that, at the time of the alleged offence, the accused could not have done otherwise. There are, in our view, three aspects to this, and so we spell out three relevant criminal capacities.

¹⁵ That defence requires a total loss of capacity, as explained at para 88 below.

(I) TO MAKE A JUDGMENT RATIONALLY

- 78 The first is the lack of capacity rationally to form a judgment about the relevant conduct or circumstances. This is about *how* a person makes a decision.
- 79 This criterion would deal, for example, with a case where the accused killed someone he believed to be the reincarnation of Napoleon. The accused might realise that it is morally and legally wrong to take the law into his own hands by killing, and yet be unable to think rationally about what he was doing so that he should not be held criminally responsible.
- 80 Another example might be the case of a mother who was clinically depressed to the point of being suicidal, and who jumped off a motorway bridge with her child. The child died, but the mother survived and is prosecuted for murder. If the jury was satisfied that her depression deprived her of the capacity rationally to make a judgment about taking the steps which resulted in the child's death, then the appropriate verdict would be not criminally responsible by reason of recognised medical condition. The court would then have a range of disposal powers, including the power to detain her in hospital for suitable treatment (see paragraph 108 and following below).
- 81 That case may be contrasted with that of the mother who is depressed and kills her child as a vindictive act against the child's father. It might be that the fact of being depressed distorts her thinking, but it seems to us that where the jury perceives that she acted out of vindictiveness (say, because of the degree and nature of planning), it would not be satisfied that her depression prevented her making a judgment in a rational way.

(II) TO UNDERSTAND THAT YOU ARE DOING SOMETHING WRONG

- 82 The second relevant capacity relates to the ability to understand that what one is doing is "wrong". One of the criticisms made of the M'Naghten Rules has been that a defendant who knows that what they are doing is against the law cannot plead the insanity defence even if, because of their mental disorder, they cannot understand that what they are doing is morally wrong. (See paragraph 50(3) above.) We think that if a person could not understand that they ought not to do what they are doing, then that person should not be held criminally responsible. Therefore, another relevant capacity should be the capacity to understand the wrongfulness of the act, and that wrongfulness should not be limited to illegality.

Example: lack of capacity to understand the wrongfulness of the act

D suffered from a mental illness. He had paranoid beliefs, including that his child was possessed by evil spirits. Because of his illness, he could see no wrong in an "exorcism" which entailed assaults on the child.

¹⁶ Obstructive sleep apnoea is a medical condition that causes interrupted breathing during sleep. It can make the person very tired, and prone to fall asleep in the daytime.

(III) CONTROL OF YOUR BODY

- 83 The third relevant capacity relates to bodily control. In paragraph 50(2) we refer to one of the criticisms that some have made of the M’Naghten test, namely that it does not encompass mental disorders which affect a person’s ability to control him or herself. This issue is not about abnormal desires; it is about a genuine loss of capacity for physical control arising out of a recognised medical condition.
- 84 Some recognised medical conditions are capable of depriving a person of control of his or her bodily actions. They produce, in that sense, involuntary actions. We accept that as a matter of practice, it can be difficult, particularly in the case of mental disorders, to tell when a person has genuinely lost the power to control his or her physical acts (such as may be the case for a person with a sleep disorder). We nevertheless think that in some cases it is possible for a medical condition to deprive a person of the power to control his or her actions, and that it is right in principle for the law to allow a defence in such cases.
- 85 To sum up, the three relevant criminal capacities in the proposed defence are therefore the capacities:
- (i) rationally to form a judgment about the relevant conduct or circumstances;
 - (ii) to understand the wrongfulness of what he or she is charged with having done; or
 - (iii) to control his or her physical acts in relation to the relevant conduct or circumstances
- where the incapacity is a result of a qualifying recognised medical condition.
- 86 “Capacity” here is issue and time specific. The question is whether the accused lacked a specified capacity – to form a judgment rationally, for example – *in relation to the charge* that the accused is facing.
- 87 As it is the accused’s capacity at the time of the alleged offence which is pertinent, so there is no automatic exemption from criminal liability that comes with a diagnosis of, for example, a mental illness or learning disability.

Example: no automatic exemption from criminal liability

D has a learning disability, but knows what stealing is and that she should not steal. She takes an item from a shop and leaves without paying. A plea of “not criminally responsible by reason of recognised medical condition” on the grounds of her learning disability will fail because there will be no evidence that she wholly lacked one of the relevant capacities at the time of the alleged theft.

Total lack of criminal capacity

- 88 The defendant's lack of capacity is at the heart of our proposals. It is not a defence of reduced responsibility but of *no* responsibility. Basing the defence on lack of capacity will confine it to those who could not reason rationally or control their actions, not those who could have but did not.

Due to a recognised medical condition

- 89 Lack of capacity which is caused by something other than a recognised medical condition does not fall within the proposed new defence. For example, lack of capacity due to a reflex action such as swerving by a driver when a stone smashes through the windscreen is not a result of a recognised medical condition. The accused in such a case might plead automatism and be acquitted outright. (See paragraph 116 below for the reformed defence of automatism.)

"Recognised medical condition"

- 90 As we say above, our proposed defence is for cases where the total lack of a relevant capacity arises from the accused's physical or mental condition. We think it is helpful to put this in terms of a "recognised medical condition". An extreme mental or physical state would not necessarily qualify for this new defence: there would have to be a diagnosis of a recognised medical condition.
- 91 An advantage of basing the defence on "recognised medical condition" is that the law would be better equipped to remain in step with developments in medical understanding.
- 92 The concept of a "recognised medical condition" is a wide one, but that is merely one element of the defence. The defence itself will be a narrow one because of the requirement for *total* lack of capacity, and because not all medical conditions will qualify as "recognised medical conditions" for the purposes of this defence.

RECOGNISED PROFESSIONALLY

- 93 The medical condition must be one that is recognised by professionals in the relevant field. This limitation would avoid supposed medical conditions which are not generally accepted; it would go some way to deterring fake defences; and it would define an issue on which expert evidence could be admitted, in terms which the courts and medical experts can apply. On the other hand, medical knowledge evolves and so if a condition has been accepted by other experts in the field, it may count as a recognised medical condition even though not yet a standard condition.
- 94 Whether a condition is a recognised medical condition is to be a question of law for the judge to determine. Medical reference texts and expert opinion will guide the judge, but they will not be conclusive as to whether a condition is a "recognised medical condition" as a matter of law. The kind of expert evidence will depend on the kind of recognised medical condition which is in issue, so the relevant expert might be a psychiatrist, a medical practitioner, a psychologist, or a person with another expertise.
- 95 All cases that are currently categorised as insanity would be likely to fall within the new defence of recognised medical condition. The new defence would also

include cases of automatic conduct resulting from medical conditions (including some which could currently be classified as sane automatism, such as Post-Traumatic Stress Disorder).

Example: conduct resulting from a medical condition

D suffered from Post-Traumatic Stress Disorder as a result of having been raped a short time before. V does something which triggers a panic reaction and assaults V. D could plead not guilty by reason of recognised medical condition.

NON-QUALIFYING CONDITIONS

- 96 Whether a particular condition is a “recognised medical condition” and whether the accused suffered from it at the material time is not the end of the story: the condition must be a *qualifying* condition. As we have said, whether a medical condition is a “recognised medical condition” for the purposes of the defence will be a question of law. A diagnosis for a medical purpose will not necessarily be pertinent to a question of culpability, and in reaching a conclusion on that question of law, a court will take account of the principle underlying the defence. The essence of the defence is that a person is not to be held criminally responsible where he or she lacked capacity not to commit the alleged offence, and was not culpably responsible for that lack of capacity. It therefore follows that conditions which necessarily conflict with that underlying principle will not qualify as “recognised medical conditions”. We now mention two conditions in this category.

Acute intoxication exclusion

- 97 We provisionally propose that acute intoxication would not be a condition which would qualify for the defence. This is because although “acute intoxication” may be a medical condition for diagnostic purposes, it is not the kind of condition which justifies a defendant not being held responsible for what they do where he or she was voluntarily intoxicated.

Anti-social personality disorders

- 98 Anti-social personality disorder may count as a medical condition in some contexts. However, if an accused person relies only on anti-social personality disorder to excuse what would ordinarily be regarded as serious criminal behaviour, then it seems to us that on policy grounds, such a condition should not qualify for the defence.¹⁷ We therefore provisionally propose that recognised

¹⁷ The Scottish Law Commission summed up this kind of personality disorder as follows:

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.

Report on Insanity and Diminished Responsibility (2004) Scot Law Com 195, para 2.57.

medical conditions which are manifested solely or principally by abnormally aggressive or seriously irresponsible behaviour should also not qualify for the defence. Several other jurisdictions exclude this kind of personality disorder from the scope of their “insanity” defences.¹⁸

Applicable to all offences

- 99 The rationale for the new defence does not depend on the kind of offence that the defendant is charged with, and therefore the new defence would be available in relation to any kind of offence. This would represent a change from the position under the current law whereby, in the magistrates’ courts, a defence of insanity is not, on one view, available for offences of strict liability.
- 100 The new defence would not depend on the seriousness of the offence that the defendant is charged with, and so the new defence and special verdict would be available in the magistrates’ courts as well as in the Crown Court.

Retaining the possibility of a simple acquittal

- 101 The new defence that we propose would not lead to a simple acquittal but to a special verdict with associated disposal powers for the court. Evidently, therefore, the special verdict is not appropriate for a person who ought to be acquitted even if he or she had had the condition at the time of the alleged offence.

Example: case could not be proved against the accused in any event

D is charged with arson but has a sound alibi for the time of the arson which the prosecution cannot disprove. The prosecution should fail, whether D suffered from a medical condition at the time of the alleged arson or not.

Burden of proof

- 102 As we mention at paragraph 57 above, in criminal law, the prosecution has to prove the charge beyond a reasonable doubt, but if the defendant pleads the defence of insanity, then the burden of proving that defence lies on the accused. This means that the accused has to prove all the elements of the defence on the balance of probabilities.
- 103 We think that it is inappropriate to place the burden of proving the elements of the insanity defence on the accused. Instead, only an *evidential* burden should rest on the accused. This means it would be for the accused to produce evidence from two expert witnesses relating to the elements of the defence. Once the defendant has done this it would be for the prosecution to *disprove* (beyond

¹⁸ Eg, the Scottish Law Commission thought it should be explicitly excluded from the scope of the defence, and this is reflected in the legislation: Criminal Procedure (Scotland) Act 1995, s 51A(2).

reasonable doubt) that the accused is not criminally responsible by reason of recognised medical condition.

The role of expert evidence

- 104 The expert evidence would not determine the verdict. The ultimate issue of criminal responsibility remains one for the jury or magistrates even if the experts are agreed as to the presence of a recognised medical condition and total loss of capacity.¹⁹ Juries and magistrates are not bound to follow expert opinion, provided there is some contradictory evidence.

Naming the new defence

- 105 We need a label that is accurate, comprehensible, and non-stigmatising (insofar as that is possible). We think it is better for the verdict to be “not criminally responsible by reason of ...” instead of “not guilty by reason of ...” because the whole point is that the defendant claims not to be criminally responsible. In this respect we would be following the Canadian Criminal Code and recent legislative reform in Scotland.
- 106 We do not think that it would be helpful to label the defence the “lack of capacity” defence. “Capacity” is used in the civil law to refer to a different test of capacity, and we think that to use the same label for a verdict in respect of a different set of abilities would be confusing. It would not be appropriate to call it the “mental disorder defence” because it is potentially applicable to physical and mental conditions.
- 107 We propose that the new defence be called the “recognised medical condition defence”. The accused would plead “not criminally responsible by reason of a recognised medical condition”, and the new special verdict would be in those terms.

Disposals following the new special verdict

IN THE CROWN COURT

- 108 Those powers of disposal which a court has when a defendant is found not guilty by reason of insanity would apply following the new special verdict (namely to make a hospital order with or without a restriction, a supervision order or an absolute discharge as described in paragraph 28 above).
- 109 Our proposals would enable the court to make use of such orders without having to label people inappropriately as “insane”. For example, if a person is prone to sleepwalking, and is found to have committed criminal damage while sleepwalking, a simple acquittal with no power to require the accused to take any action to prevent any repetition would be unsatisfactory. A supervision order with

¹⁹ The only possible exception would be in the circumstances described at paras 114 and 115 below, where no purpose is served by leaving the case to the jury.

a treatment requirement could oblige the accused to submit to a medical assessment so it can be established whether any risk of repetition is more than negligible and whether any treatment would be effective. There would be no criminal penalty because there is no criminal culpability, but steps could be taken to protect the public from future harm.

- 110 We do not propose any change to the court's powers of disposal as regards adults, but we do think this is an issue which merits further investigation. It might be, for example, that the power of the courts to make supervision orders following a special verdict could usefully be extended to allow such orders to last more than two years. This is an aspect of supervision orders we would like to consider in the context of our work on unfitness to plead.
- 111 As regards children and young people, we think that the court should also have the option of making a non-penal Youth Supervision Order. A court could attach non-punitive requirements, such as a mental health treatment requirement, or a medical requirement, where the court thought it would be beneficial.
- 112 If the defendant breached a supervision order or a non-penal Youth Supervision Order made following the new special verdict, the question arises whether there should be the possibility of imposing a punishment for doing so in criminal proceedings. On the one hand, it can be argued that it should be possible for an order of the court to be enforced. On the other hand, it is questionable whether a person should receive a criminal punishment for breaching an order made in circumstances where the individual was found not to be responsible for his or her actions. Compliance with a treatment plan may well be part of a supervision or non-penal Youth Supervision Order, and the possibility of a criminal sanction for non-compliance could amount to a disproportionate interference with the autonomy of the individual. We address these difficult questions in the discussion paper.

IN THE MAGISTRATES' COURTS

- 113 We conclude that the same disposals should be available in the magistrates' courts as in the Crown Court, except that magistrates should not have the power to make a restriction order.²⁰ We provisionally propose that, if it seems to magistrates that a restriction order is likely to be necessary, they should be able to commit to the Crown Court for that court to impose a restriction order. We also provisionally propose that, following a verdict of "not criminally responsible by reason of recognised medical condition", magistrates should be able to make a supervision order or a non-penal Youth Supervision Order if appropriate.

²⁰ A restriction order can be attached to a hospital order under s 41 of the Mental Health Act 1983 where the court considers it necessary to protect the public from serious harm. The effect is to restrict a person's discharge from hospital. Magistrates do not have the power to make a restriction order under the current law.

Is it necessary and desirable for the verdict to be returned by the jury or magistrates?

114 In the criminal law generally, the prosecution may accept a plea by the defendant, and a trial is then avoided. This is not the case for a plea of not guilty by reason of insanity: the verdict must be delivered by the jury or, in the magistrates' court, by the magistrates. An obvious question is whether this is always necessary and desirable. We conclude that, in specified, limited circumstances, it is not.

115 In some Crown Court cases the prosecution might be willing to accept the defendant's plea that he or she was not criminally responsible and no purpose would be served by putting evidence before a jury. In such a case, we provisionally propose that the court should be permitted to record the special verdict without the need for it to be returned by a jury, provided that:

the defendant is fit to plead and is legally represented,

the judge is satisfied that no reasonable jury would return any other verdict, and

the judge records his or her reasons for accepting the plea.

A reformed defence of automatism

116 At present the relationship between insane and sane automatism gives rise to difficulties, as described in paragraphs 41 to 49 above. With the introduction of the new defence of "not criminally responsible by reason of recognised medical condition", the relationship between it and the defence of automatism will inevitably be different. Some conditions which, under the current law, would lead to a defence of automatism will be "recognised medical conditions" and therefore lead to that defence under our provisional proposals. The scope of the automatism plea would therefore be narrower than under the current law.

117 We provisionally propose abolishing the common law defence of automatism and replacing it as follows.

118 The reformed defence of automatism would be available only where there is a total loss of capacity to control one's actions which is not caused by a recognised medical condition and for which the accused was not culpably responsible. A person who successfully pleaded automatism would be simply acquitted.

119 As under the current law, once the accused has called enough evidence to make automatism an issue in dispute in the trial, the prosecution must disprove the defence; if they fail to do so the defendant will be acquitted.

120 The defence of automatism would lead to a simple acquittal in cases of automatic conduct caused by something other than a recognised medical condition. It would apply in the case of a person acting in response to a reflex, but, for example, would not be available to people with diabetes, epilepsy or a sleep disorder. Defendants with such conditions would fall within the defence of "not criminally responsible by reason of recognised medical condition".

Relationship with the law on prior fault and intoxication

- 121 We think that there should be consistency across all situations in which the defendant was at fault in inducing his or her lack of capacity and relies on that lack of capacity to deny criminal responsibility (see paragraph 36 above). We have framed the provisional new defence of “not criminally responsible by reason of recognised medical condition” and the reformed automatism defence accordingly.

Example: no defence where D is at fault

D suffers from obstructive sleep apnoea, a condition which causes interrupted breathing during sleep. D often feels tired as a result and regularly falls asleep during the day. While driving one day, D begins to experience warning signs that she is about to fall asleep. Instead of pulling over, she continues to drive, and causes an accident when she falls asleep at the wheel. D would not be able to rely on the reformed special defence because of her prior fault in failing to stop driving when she knew she was at risk of falling asleep.

- 122 Our provisional proposals will also fit well with the intoxication rules as they appear in the current law. Under our provisional proposals, where an accused relies on his or her *voluntary* intoxication as an excuse for his or her conduct, the common law rules will continue to apply.

- 123 The rules on *involuntary* intoxication, on the other hand, would need to be adjusted in order to avoid generating an anomaly. Involuntary intoxication can occur where the defendant’s drink or food has been spiked and also where the defendant becomes intoxicated through taking drugs in accordance with a medical prescription and, through no fault of his own, suffers a reaction which causes a loss of capacity. The current law creates an anomaly in relation to such a situation:

C, who has become involuntarily intoxicated by properly taking medication for a condition, would be found not guilty if he lacked capacity for the alleged crime, but

E with the same medical condition who did *not* take medication at the relevant time but had a reasonable excuse for not doing so, and whose condition led to a loss of capacity, would be found insane.

- 124 As the underlying reason for the alleged crime is the medical condition, we think the rules should be changed as follows.

- 125 We provisionally propose that a person “D” shall be treated as pleading the recognised medical condition defence and not involuntary intoxication where:

D suffered from a recognised medical condition, and

D took a properly authorised or licensed medicine or drug for the treatment of that condition, and

D took the medicine or drug in accordance with a prescription, with advice given by a suitably qualified person, or in accordance with the instructions accompanying the medicine or drug in the case of over-the-counter medicines, or, if D did not take it in accordance with instructions, it was nevertheless reasonable for D to take it in the way he or she did in the circumstances, and

D had no reason to believe that he or she would have an adverse reaction to that medicine which would cause him or her to act in that way, and

the taking of that medicine or drug caused D totally to lack the relevant criminal capacity.

- 126 The consequence of the provisional proposal in paragraph 125 is that whereas the accused would be acquitted under the present law, under our proposals he or she would be found not criminally responsible by reason of a recognised medical condition, and would be subject to the disposal powers discussed above.

Example: our provisional proposals where the “intoxication” is linked to an underlying medical condition

D is a diabetic who took insulin in accordance with a medical prescription, but had an unexpected reaction to it through no fault of her own, and assaulted V. The basis of her plea is that, because of her reaction to the insulin, she wholly lacked capacity to control her actions and that was why she hit V. D would be “not criminally responsible by reason of a recognised medical condition”.

HOW OUR PROVISIONAL PROPOSALS WOULD IMPROVE THE LAW

- 127 The overarching aim of our proposals is to balance protection of the public with fair treatment of mentally disordered offenders.
- 128 A major advantage of the new defence is the absence of any division between physical and mental disorders. That division is artificial in many situations, and misses the essential point, which is to focus on whether the accused had the relevant criminal capacity.
- 129 Our new defence avoids the stigmatising label of “insanity”.
- 130 Instead of a test defined in nineteenth century language and concepts, we would have a defence crafted in modern terms with the flexibility to accommodate developing medical knowledge.
- 131 Our proposals achieve the right balance between, on the one hand, expert opinion as to a person’s medical condition and, on the other hand, judgment by

the jury and magistrates as to whether it is fair to hold him or her criminally responsible.

- 132 Our proposals would make the law a great deal clearer than it is now. It is apparent from conversations with legal practitioners and responses to the Scoping Paper that the defences of insanity and automatism, and how they interact with the principle of prior fault and the rules on intoxication, are ill-understood.
- 133 That is not to suggest that the current law makes sense even if it is understood. As we say above, whether a person may plead insanity or automatism depends in part on whether there was an internal or external cause. Our proposals avoid this unhelpful distinction.
- 134 Our proposals will also allow the law to make orders for the protection of the public in circumstances where it is not currently possible or does not happen. For example, a person who operates machinery and who suffers from obstructive sleep apnoea may cause harm to someone. Under the current law, if he or she succeeds in a defence of automatism, then a simple acquittal will follow, with no preventive measures being imposed by the court. Under our proposals, he or she would rely on the new defence and plead “not criminally responsible by reason of recognised medical condition”. If that plea succeeded, the court could require him or her to obtain the necessary medical treatment or supervision for obstructive sleep apnoea by making a supervision order. The individual would not have a criminal record, but there would be a court order to ensure that preventive measures were taken, and it would be less likely that the risk would recur and that someone else would be harmed.
- 135 Getting the defence right supports government objectives of diverting people from the penal system appropriately, and of reducing reoffending.
- 136 Our proposals put the burden of disproving both defences on to the prosecution once the accused has called enough evidence, and we think this would put the burden of proof in the right place.

RELATIONSHIP OF THE “RECOGNISED MEDICAL CONDITION DEFENCE” WITH DEVELOPMENTAL IMMATURITY

- 137 The “recognised medical condition defence” is based on lack of the capacities of understanding and self-control. A person may lack these kinds of capacity not because he or she has any medical condition, but because he or she has not developed them. It is obvious that a child does not have the same capacities of understanding and self-control as an adult.
- 138 It seems to us that there is a discussion to be had about a defence for those who lacked the capacity to avoid committing the crime in question due to their *developmental immaturity*. By this, we mean that some individuals will have a level of developmental maturity that is much lower than the norm for a person of their age, but not so extreme as to constitute a recognised medical condition.
- 139 In light of this, it is arguable that a person should not bear criminal responsibility for what would otherwise be an offence when he or she wholly lacked the

relevant capacities by virtue of developmental immaturity. This is a distinct issue from a defence based on a medical condition.

- 140 This possible defence has clear connections with the defences we are proposing in this paper, but it has different ramifications from those defences. In order to explore the various aspects of the possible defence, we would have to cover a range of issues which are not relevant to the rest of this paper, particularly various aspects of the youth justice system. There are many aspects to this discussion – legal, psychological, social policy – and it is part of a far wider debate about how our society deals with children and young people who break the law. We do not think we can do the possible defence justice in this paper, but we do think that it merits separate, full, treatment.