Y13 Homework research and consideration:

Using your understanding of the law, and a range of the resources (articles and/or links) below, or other sources you choose to use, produce a considered answer to the following question:

“The current law on insanity and automatism is too mad to continue”

You can argue what you will, but it must be at least one side long, refer to at least the Law Commission proposals Butler Commission and one other source. In addition, you should make reference to at least two cases in making your argument.

All sources you use, must be cited at the end of your response.

Law Commission Discussion Paper
The full paper, summary for non-specialist (p.14 onwards) and easy read versions are all available here:
http://lawcommission.justice.gov.uk/areas/insanity.htm

A Summary is below...

Insanity and Automatism
Status: We published a discussion paper on 23 July 2013

When should a person not be criminally liable because of their mental condition at the time they committed an alleged offence? This is the question posed by what is called the defence of “insanity”.

Similarly, a person might not be criminally liable because they lacked conscious control of their actions at the time of committing the alleged offence for a reason other than their mental condition. This might amount to a defence of "sane automatism" under the current law.

The current rules that govern the insanity defence (also referred to as "insane automatism") date from 1843. They have been widely criticised for a number of reasons:

- it is not clear whether the defence of insanity is even available in all cases;
- the law lags behind psychiatric understanding, and this partly explains why, in practice, the defence is underused and medical professionals do not apply the correct legal test;
- the label of “insane” is outdated as a description of those with mental illness, and simply wrong as regards those who have learning disabilities or learning difficulties, or those with epilepsy;
- the case law on insane and non-insane automatism is incoherent and produces results that run counter to common-sense.

The empirical data suggest that there are only a very small number of successful insanity pleas each year (typically under 30). We published a scoping paper in July 2012 in which we asked questions to discover whether the current law causes problems in practice, and if so, the extent of those problems. The responses to that paper have informed the Discussion Paper.

In the Discussion Paper we set out provisional proposals for reform of the defences of insanity and automatism, based on lack of capacity. We explain how they would work with the law on intoxication. We also say why we think the related issue of children’s developmental immaturity merits separate investigation.
Some Possible online sources:

A simple set of links to recent insomnia cases in the law:
http://www.innertemplelibrary.com/category/sleepwalking/

An undergraduate essay considering the issues from Plymouth:

American ‘Durham’ alternative
http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html

What have the Scots done? These proposals have formed the basis of their recent change to the law
Scots Law Commission Proposals 2003

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

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

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

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

In summary our proposals on ‘insanity’ as a defence are as follows:
The defence should be known as ‘mental disorder.’ Where it is successfully raised, the accused would receive a verdict of ‘not guilty by reason of mental disorder.’

The defence should require the presence of a mental disorder suffered by the accused at the time of the alleged offence. The term ‘mental disorder’ should not be defined in statute. The existence (or non-existence) of a mental disorder in a particular case would be a matter for expert, psychiatric evidence.

The core element of the defence is that by reason of a mental disorder at the relevant time the accused was unable to appreciate the nature of the conduct forming the basis of the charge.

Rather than make a positive proposal, we ask the question whether the definition of the defence should contain any reference to the accused’s volitional incapacities or disabilities.
Sleepwalking: You wouldn’t credit what you can do while you're meant to be at rest

This condition is increasingly being used as a defence in court. So what are we really capable of doing as we slumber?

Simon Crompton

In September last year Donna Sheppard-Saunders, a 33-year-old from West Sussex, held a pillow over her sleeping mother’s face for 30 seconds before stopping as her mother struggled and called out for help. In June she was acquitted of attempted murder because the court accepted that she was sleepwalking and was thus unaware of her actions.

This is not an isolated case. The British courts are faced with an upsurge of “I did it in my sleep” defences for crimes from dangerous driving to murder. The problem that this presents for lawyers and sleep experts is the subject of a conference this week at the Royal Society of Medicine.

To the outsider, such cases prompt scepticism. But the sleep specialists who provide expert testimony at these cases know that many people are capable of carrying out very uncharacteristic actions while asleep as a result of sleep disorders. Between 2 per cent and 4 per cent of adults sleepwalk, and there is plenty of evidence that strange somnambulistic actions such as walking through hotels naked or urinating in cupboards are extremely common. Does that mean, then, that many of us are capable of committing crimes in our sleep?

Sleepwalking is caused by a “wiring error” in the brain. If a sleeping person is disturbed, the primitive, instinctive parts of the brain spring into life but the conscious controlling part does not. It’s more likely to happen if we have a family history of sleepwalking, or are tired or stressed or have been drinking.

Dr Chris Idzikowski, Director of the Edinburgh Sleep Centre, who will be chairing the Royal Society of Medicine conference, has given evidence in about 30 court cases involving sleepwalking. “I do think it is being used more often as a defence, possibly because the media has made people more aware of it,” he says. “For some people there’s no doubt it’s a concoction, but for others there’s enough in the patterns of behaviour, and past history of sleepwalking, to suggest there’s something there.”

The reason for the upsurge could partly be because of a quirk in English law. The barrister William Wilson, Professor of Criminal Law at the University of London and a speaker at the conference, says that in English law only people who have made a conscious decision to commit a crime can be punished for it. Sleepwalking, therefore, makes a good defence, particularly since it is hard to disprove. A person who has convinced a court that he or she committed a crime while sleepwalking may, under English law, be found “not guilty by reason of insanity” (even though this has nothing to do with the medical idea of insanity). Until recently, this almost inevitably resulted in being detained in a psychiatric institution.

New legislation, however, has meant that someone the court finds “insane” is much less likely to be detained. “It’s an incredibly difficult area for the law,” Wilson says.

To try to clarify this grey area, an American professor, Michel Cramer-Borneman, has developed the first sleep-forensics unit, at the Minnesota Regional Sleep Disorders Centre, as an expert resource for the legal profession. Having reviewed all legal cases in the UK and the United States involving sleepwalking, he has come to the conclusion that the majority (unlike the cases cited in this article) are “bogus”.

He says that the genuine cases of people committing violence while sleepwalking are exceedingly rare, but people behaving sexually in their sleep — or sexsomnia, as it is known — is quite common. And all of us have the capacity to do something out of character while asleep, he believes. “Sleep disorders are part of the human condition,” he says. “Their peak prevalence is in childhood, when they are quite benign, and after that they diminish because, as the brain develops, so do the neuronal networks that repress these kinds of behaviours.”

So, should we be worried about the harm that we or those close to us might do while asleep? Not according to the consultant neurophysiologist and sleep researcher Dr Peter Fenwick, who believes the greatest risk of harm is to sleepwalkers themselves. He, unlike Professor Cramer-Borneman, insists that sleepwalking occurs only if you have a genetic susceptibility. “Sleepwalkers do kill themselves by walking out of windows, and I get many of these cases referred to me by the coroner,” he says.

There are three rules, he says, if you or a member of your family sleepwalk: one, lock the windows; two, lock the door; three, don’t sleep in the nude.

Curious case of...

- Ken Parks, acquitted in Canada in 1987 of bludgeoning his mother-in-law to death with a tyre lever, and attempting to murder his father-in-law, having driven 15 miles to their home. He had a history of sleepwalking and said that his actions took place after he nodded off in front of the television.
- James Bilton, 22, from York, cleared in 1995 of raping a woman in his flat, having said that he suffered from sleepwalking since age 13
- A German teenager, 17, who stepped out of a fourth-storey window and fell 10m to the ground, where he continued to sleep until he was awoken by police despite suffering a broken arm and leg. He had not been drinking or taking drugs.
A potential reform to sexual sonambulism

End sleepwalk rape defence - MP

A Labour MP is seeking to outlaw the defence of sleepwalking in rape cases, arguing that acquittals on such grounds are "political correctness gone mad".

Harry Cohen has introduced legislation, which is unlikely to be passed, to prevent anyone being able to claim they were sleepwalking in rape cases.

Recent cases of acquittal on this basis "defied common sense", he said.

Ministers said such cases were "rare" but getting a conviction must depend on proof that an act was "intentional".

'Not right'

Campaigners believe a handful of cases in recent years where men were acquitted of rape after arguing they had been sleepwalking, and not in control of their actions, exposed a damaging loophole in existing rape laws.

Introducing a ten-minute rule bill, Mr Cohen - MP for Leyton and Wanstead - said sleepwalking as a defence against rape should be removed from the 2003 Sexual Offences Act.

"Sleepwalking is not a reasonable excuse for an acquittal," he said.

"It is not right that the rapist walks free. If a rape has been committed, a guilty verdict should be delivered."

Prosecutors are finding it difficult to secure rape convictions when the defence of sleepwalking is used, he said, meaning that fewer cases were likely to be brought to court in future.

Mr Cohen said it had become too common for rape suspects to claim they were asleep while having sex as mitigation for their actions.

Those committing rape while asleep were still "a danger to the public" and acquitting them increased the trauma for their victims.

"I am concerned about the current precedent," he said. "Anyone up in court on a rape charge could get a few friends and family to claim they sleepwalk and they almost certainly will get off."

Intent

Under the MP's Bill, judges would be able to take the fact that someone was sleepwalking into account when passing sentence but not to acquit them.

In a statement, the Ministry of Justice said proving someone's conduct was intentional and voluntary must remain the crucial test in securing a conviction.

"The government recognises incidents like this cause emotional and physical harm to the victim," it said.

"There must be clear evidence to substantiate the claim that the conduct was involuntary and unintentional."

Experts have argued that a small percentage of adult sleepwalkers do engage in sexual behaviour.

Although it passed unopposed on its first reading, Mr Cohen's Bill is unlikely to become law because of a lack of parliamentary time.
Insanity and Automatism

There are a number of points to consider about the defences:

The shift of the Burden of Proof

There is a different standard of proof depending on whether the defence or the prosecution raise the defence of insanity.

The prosecution must prove beyond reasonable doubt, the defence on the balance of probabilities. This is likely to confuse a jury. It conflicts with the decision of *Woolmington v DPP (1935)* which states that the burden is on the prosecution to prove the offence not the defence.

The defendant has to prove that he is insane. This places the burden of proof on him. It is possible that this is in breach of Article 6 of the European Convention on Human Rights which states that the defendant is innocent until proven guilty.

The definition of Insanity

The definition has been said to be ‘medically irrelevant’. The legal definition has not changed significantly since 1843. In 1953 evidence given to the Royal Commission stated that the definition was obsolete and misleading.

People suffering from certain mental disorders do not come within the defence e.g. those suffering from irresistible impulses and psychopaths such as *Byrne*. They do not come within the M’Naghten rules as they know what they are doing and that it is wrong. However they cannot prevent themselves from acting and have a recognised medical disorder.

On the other hand, those suffering from physical illnesses such as diabetes (*Hennessy*), heart disease (*Kemp*) and sleep walkers (*Burgess*) are legally insane. Additionally in diabetes cases sometimes diabetics are classed as insane and other times not. Taking too much insulin is classed as automatism (*Quick*) but not taking insulin is insanity (*Sullivan*). This means that the law makes no difference between people who are a danger to society and those who suffer from illnesses such as diabetes and epilepsy which can be controlled by medication.

Social Stigma

The word insanity carries a social stigma. It is bad enough to use it in relation to people suffering mental disorders but is completely inappropriate to apply it those suffering from diseases such as epilepsy or diabetes.

The ineffectiveness of the verdict

If a person is found not guilty by reason of insanity then the recommendation could be an indefinite place in a secure hospital. In contrast, a conviction for murder or manslaughter would result in a life sentence.
that would be unlikely to mean life. Most defendants would probably prefer the conviction and sentence. It would appear that many defendants with mental problems do not raise the defence.

Article 5 of the European Convention on Human Rights says that a person of unsound mind may only be detained where proper account is taken of objective medical evidence. There is likely to be a human rights challenge on indeterminate sentences.

**The scope of the defence**

The Butler Committee recommended that proof of severe mental disorder should be sufficient to negate responsibility. This would create a presumption of no criminal responsibility where there is proof of a severe mental disorder. This assumes a lack of criminal responsibility simply because of a mental dysfunction.

Insanity overlaps with automatism. It is necessary to decide whether the defendant's automatic state is due to a mental illness or due to external factors. Anyone suffering from any kind of illness which puts them in an automatic state amounts to insanity. This has serious consequences as anyone who is able to use automatism has a complete defence and will be acquitted. If a person is found not guilty by reason of insanity the judge has to impose some kind of order on the defendant.

**Decision in Windle**

Following the decision in Windle a defendant who is suffering from a serious recognised mental illness and who does not know that his act is morally wrong cannot have a defence of insanity when he knows that his act is legally wrong. An Australian case refused to follow this decision. In Johnson (2007) the Court of Appeal thought that the Australian case had some merit but recognised that they were obliged to follow Windle.