



ACJRD SUBMISSION

The Criminal Law (Insanity) Act 2006
and
the Criminal Law (Insanity) Act 2010

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Association of Criminal Justice Research and Development

Submission on the Criminal Law (Insanity) Act 2006 and the Criminal Law (Insanity) Act 2010

The Association of Criminal Justice Research and Development (ACJRD) is an independent organisation that exists to promote reform, development and effective operation of the criminal justice system.

The submission to the Department of Justice and Equality includes commentary on the following:

1. Overview

The 2006 & 2010 Acts ('The Acts') sets out generally to amend the law relating to the trial and detention of persons suffering from mental disorders who are charged with offences or found not guilty by reason of insanity. In addition, it provides for the detention of such person to designated centres and provides for an independent review of such detention by a Mental Health (Criminal Law) Review Board. The key change to the 2010 Act is to provide greater power to the Review Board in relation to conditional discharge and return to the designated centre (Central Mental Hospital (CMH)).

2. General views on the 2006 and 2010 Acts

The views of the ACJRD on the Acts are contained within the overall report.

3. 'A Vision for Change' (2006) – Government Policy

The then new paradigm in the delivery of mental health services central to 'A Vision for Change' and the prolonged delays in the consistent and planned implementation of the recommendations set out in that report have been in turn much reported on. The recovery ethos and community based treatment of 'Vision for Change' with service users placed at the centre of decision-making requires consistent implementation without delay. Unfortunately, it has again been reported by The Independent Monitoring Group in its Fifth Annual Report (2010), that there has been little progress made in the setting up of fully staffed Community Mental Health Teams in adult or specialist mental health services such as Forensic Mental Health Care Service and that there is a critical and urgent need to establish these services.

'A Vision for Change' states "every person with serious mental health problems coming into contact with the forensic system should be afforded the right to mental healthcare in the non-forensic mental health services unless there are cogent and legal reasons why this should not be done" (p. 136). The key issue here is that service being delivered or is deliverable to that client population.

Pathways to care for the mentally ill have been distorted through under-resourcing of community mental health services, such that major mental health illness increasingly presents to the courts in the form of minor offending behaviour rather than to

psychiatric services ('Prison Psychiatric Inreach and Court Liaison Services in Ireland' by C.McInerney and C. O' Neill (2008)).

4. Discharge

The Report of the European Committee for the Prevention of Torture or Degrading Treatment or Punishment (CPT) predates the enactment of the 2010 amending Act which allows for the recall of conditionally discharged patients who are deemed to be in breach of a condition to which they are made subject. The operation of such conditional discharge by the Mental Health Review Board will be followed with optimistic expectation and it is hoped that patients admitted to the CMH following a verdict of Not Guilty By Reason of Insanity (NGRI) - or as designated by new post review terminology - will be quickly and increasingly considered for such conditional release. The CPT noted that many of the recommendations of the 'Vision for Change' had not been implemented.

5. The Acts

The provision for conditional release as provided in the 2010 Act is dependent on the availability of adequate resources being in place to provide for the necessary community based treatment and supervision that will enable the conditional discharge of persons detained under the Acts and not allow a situation arise where such conditional discharge is delayed or postponed due to lack of adequate resources. The putting in place of all necessary resources to enable the conditionally discharged person the facilities and supports required to comply with the Review Boards' conditions in the context of the recovery ethos of 'Vision for Change' should be implemented as part of the present review and give a clear statutory basis for community based services.

A shorter period of review should be legislated for and correspond with periods of review of detention as set out in the MHA 2001. The provision of an Independent Psychiatric Assessment as provided in the MHA 2001 should be put in place and safeguards in relation to consent, restraint and seclusion should be reviewed in tandem with the review of the MHA 2001 and accordingly legislated for.

The ACJRD agrees with the Irish Human Rights Commission recommendation that the interplay as between the MHA 2001 and the Criminal Law (Insanity) Act 2006 ensure equivalent procedural safeguards and protections afforded to those involuntarily detained under the MHA 2001 are also provided to persons detained under the 2006 Act. The Supreme Court decision in J.B. V. Mental Health (Review Board) & Others (2008) is noted.

6. Definition of 'Insanity'

ACJRD is of the view that the term "Insanity" is not in keeping with current psychiatric and medical understanding and is an inaccurate and stigmatising term. The term "insanity" has been dispensed with in Scotland and has been substituted with "criminal responsibility of persons with mental disorder". Such a change in terminology, it is submitted, should be included in the present review when dealing with the issue of mental disorder as excusatory of criminal liability. The Dutch

Criminal code is also of interest in this regard and allows for the capacity of the defendant to be determined as complete responsibility, slightly diminished, severely diminished, and the total absence of responsibility where an assessment is conducted at pre-trial stage to determine the degree to which the mental condition of the defendant is related to the crime.

There is much to be considered in this area of mental condition defences and the international and academic debate is well assessed and commented upon in this Jurisdiction.

The UK 19th Century M'Naghten Rule provides "*Every man is presumed to be sane, and...that to establish a defence on the grounds of insanity, it must be clearly proven that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of mind, and 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 was wrong*". The test to determine if a defendant can distinguish right from wrong is based on the idea that the defendant must know the difference in order to be convicted of a crime. The UK Durham Rule (1871) was seen as a way of simplifying the M'Naghten Rule and the Irresistible Impulse Test by making insanity and its relation to the crime a matter of objective diagnosis. The Irish insanity defence comprises the M'Naghten Rules and a control test, which asks whether the accused was debarred from refraining from committing the act because of a defect due to mental illness (Doyle v Wicklow County Council (1974) 55IR 71).

The defence of Diminished Responsibility as set out at section 6 of the Act should be retained but it is suggested that a plea of manslaughter by way of diminished responsibility where a charge of murder has been prosecuted, should be capable of being accepted by the DPP and Trial Judge and not be required to go before a Jury as is presently required where there is in effect agreement regarding the medical evidence. It is clear that a Jury verdict will be necessary where a verdict of Not Guilty By Reason of Insanity (NGRI) is the issue as it is an acquittal finding.

How to set out the scope of what the defence of those accused of criminal offences who are or who have suffered from mental disorder (even for a short period) should include, and how to determine when such a person should or should not be held to be criminally responsible due to such mental disorder, should be regularly and fully reviewed in order to more readily allow for the incorporation of advancements - medical, legal and ethical – which, form the basis of much international debate and evidence based research in mental condition defences.

The fact of the CMH being the only Designated Centre under the Act is clearly in need of review and the lack of provision of out patient treatment by such Designated Centre. The recent case of D.P.P. v. W.B. commented upon and highlighted this situation. There are difficulties in assessing beds for prisoners in the CMH, as referred to by the Inspector of Prisons' report (2011) on prisoner health.

7. European Convention of Human Rights Act 2003

The lack of clarity for detention under the 2006 Act with cross-referencing to the 2001 Act may breach the requirement in Art. 5 of the European Convention of Human Rights; where a person is found not guilty of a criminal offence by reason of insanity

and that person is found to be suffering from a mental disorder within the meaning of the MHA 2001, that person shall be committed to a designated centre where it should be possible for the court to consider whether out patient treatment would be the more appropriate option though such option is possible in fitness for trial cases and while such a person is detained using the civil criteria, their rights are not the same as patients detained under the MHA 2001 though Part 4 of that Act does apply to the person so detained as regards their position on consent to treatment.

The strengthening of the principle of autonomy as it pertains to informed consent and the necessary assessment of the detained person's capacity is recommended and should be legislated for in any revised Act thereby recognising that such capacity based informed consent is integral to a patient centred and recovery ethos. Provision should be made for such assessment of capacity and subject to regular review. The statutory recognition of Advance Care Directives in relation to treatment, including mental health treatment issues, should be enacted as a means of enhancing patient autonomy.

8. UN Convention on the Rights of Persons with Disabilities

The implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) will need to be considered as a central part of this review as it brings into focus how the detention of people based on mental disability must be reconsidered in light of Article 12 of the CRPD. It must be considered whether persons who are deemed to have intellectual disabilities should be excluded from the provisions of the MHA 2001 in light of the CRPD and the consequent effect of assessment pursuant to the 2006 Act.

9. Legal & Administrative Changes

Any revision of the Act/s should allow for diversion from the Criminal Justice System (CJS) at all stages of the process to the mental health services. It is to be welcomed that there is now a memorandum of understanding between An Garda Síochána and the Health Service Executive in relation to mental health liaison at Garda Station level and prison in-reach court diversion services available at Cloverhill and Dochas Prisons. Diversion at all levels should be given a statutory basis and the enactment for establishing the necessary services to enable such diversion be set out in detail in this legislative review.

A distinction needs to be drawn between diversion as an outcome and diversion as a process. Essentially this is a distinction between ends and means. Diversion in the former sense relates to an intended set of aims and objectives, for example reducing re-offending and improving mental health, while diversion in the latter sense refers to the activities and interventions which are used to achieve the desired objectives (Sainsbury Centre for Mental Health (2009)). Taking this view into account, diversion and liaison teams should be organised to provide an integrated through-care, supporting offenders with mental health problems at all stages of the criminal justice system.

This is clearly recommended in 'Vision for Change' where it is stated that a person with serious mental health issues and problems and who comes into contact with the

forensic mental health services, is to be dealt with in the non-forensic services unless there exist clear legal reasons that this should not occur. There is a need for a specific diversion programme for children who are experiencing mental health issues. Specialised child /adolescent focused services need to form part of the review of this Act and of the MHA 2001 and should fully comply with the UN Convention of the Rights of the Child (1989). Access to independent advocacy should be legislated for and made available to all children and young persons at all stages of diversion from the CJS.

10. Views of the ACJRD

In relation to the specific questions posed, the following applies, for ease of reference:

1. **Terminology (“insanity”)** – see Heading 6
2. **Role of the District Court** – The provisions of S4 (3) which deals with an accused charged with a summary offence, or an indictable offence which is being dealt with on a summary basis and sets out that the issue of fitness to be tried is to be dealt with in the District Court. However, there is the possibility that an accused person may not be fit to elect in the first place must be provided for in this review – see the B.G. Case (G-v-District Judge Murphy & Ors [2011] IEHC 445). Therefore, the District Court has a key role in such prosecutions.
3. **Diversion schemes** – see Heading 9
4. **Conditional discharge/leaving jurisdiction** – as Extradition or the European Arrest Warrant system cannot apply to a person who has received a verdict of Not Guilty by Reason of Insanity, which is an acquittal, it has to be considered whether such a risk of leaving the jurisdiction is a factor in the Board’s determination as to the granting of conditional discharge. However, putting in place a set of conditions of discharge may require a fuller discourse as to what may be considered as coercive or too restrictive. There is a requirement to ensure that the State Agencies have an assigned role (e.g. Probation Service, Irish Prison Service, An Garda Siochana, HSE)
5. **Right of appeal**- The right of appeal should be available to an accused who has been found to be fit to be tried as is available at S.7 where an accused has been found to be unfit to be tried.
6. **UN Convention on the Rights of Persons with Disabilities** – see Heading 8