



# OPERATING THE CRIMINAL LAW (INSANITY) ACT 2006: A PRACTITIONER'S PERSPECTIVE

---

Áine Hynes  
St.John Solicitors

# Legislative background

- Article 5, European Convention on Human Rights
- 5(4) “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”
- EctHR case: *X v United Kingdom* (1981) it was held by virtue of article 5(4) that a person of unsound mind who is compulsorily detained in a psychiatric institution for an indefinite or lengthy period is in principle entitled...to take proceedings at reasonable intervals before a court for the determination of the lawfulness of his detention.
- Prior to the implementation of the Criminal Law (Insanity) Act 2006, the legislation dealing with a criminal offences and mental illness was the Trial of Lunatics Act 1883, the Criminal Lunatic (Ireland) Act 1838, the Central Criminal Lunatics Act 1845 and the Lunatics Asylums (Ireland) Act 1875.

# Legislative background

- ▶ Under Section 2 of the Trial of Lunatics Act the verdict was guilty but insane.
- ▶ Detention was automatic and a person was indefinitely detained in the Central Mental Hospital “during the pleasure and in such place and in such manner as the Minister for Justice may seem fit.”
- ▶ On the civil side, Ireland was required to implement the *Mental Health Act 2001* following from the European Court of Human Rights case, *Croke v Ireland* [1999].
- ▶ Supreme Court had found that the Mental Treatment legislation was sufficient to meet the requirements of Article 5 in light of the requirements imposed on those detaining patients not to act arbitrarily and the Habeas Corpus remedy.
- ▶ ECtHR found that Article 5 required a proper system of judicial review of detention on the basis of mental disorder. 2001 Act was finally fully implemented in November 2006.

# Legislative background

- ▶ Henchy Committee – 1978 Report on Treatment and Care of Person Suffering from Mental Disorder who appear before the courts on Criminal Charges.
- ▶ Role of the Minister in determining the period of detention not consistent with the jurisprudence of the EctHR
- ▶ *(as above)X v United Kingdom* (1981) it was held by virtue of article 5(4) that a person of unsound mind who is compulsorily detained in a psychiatric institution for an indefinite or lengthy period is in principle entitled...to take proceedings at reasonable intervals before a court for the determination of the lawfulness of his detention

# Criminal Law (Insanity) Act 2006

- The Criminal Law (Insanity) Bill was published in 2002 and the Criminal Law (Insanity) Act was finally commenced in June 2006 (with the exception of Section 13)
- The Section 13 Review Provisions of the 2006 Act were implemented at approximately the same time that the review provisions of the MHA 2001 Act were commenced.
- The Review Board was established on the establishment day, the 26<sup>th</sup> of September 2006. **Mental Health (Criminal Law) Review Board (Establishment Day) Order 2006 SI 499/2006**
- First review under the 2006 Act took place on the 14<sup>th</sup> of December 2006

# Criminal Law (Insanity) Act 2006

**20.** (1) This Act shall apply to a person detained under section 17 of the Lunacy (Ireland) Act 1821, as if he or she were a person detained pursuant to an order under section 4 and, accordingly, such a person shall be entitled to the benefit of the provisions of this Act (fitness to be tried)

(2) This Act shall apply to a person found guilty but insane and detained under section 2 of the Trial of Lunatics Act 1883, as if he or she were a person detained pursuant to an order of the court made under section 5 and, accordingly, such a person shall be entitled to the benefit of the provisions of this Act.

This means that those previously “guilty but insane” are now considered and treated as if they were detained under section 5 and are now “not guilty by reason of insanity”

# Criminal Law (Insanity) Act 2006

- Central Mental Hospital – forensic facility, only designated centre as defined in S2 2006 Act
- S4 2006 Act “fitness to be tried”
- If court decides unfit to be tried, then accused person (who is in need of inpatient care) is committed to the CMH until discharged under S13 of 2006 Act.

# Criminal Law (Insanity) Act 2006

- ▶ Section 5 :- where the court finds that-
  - (a) the accused person was suffering at the time from a mental disorder, and
  - (b) the mental disorder was such that the accused person ought not to be held responsible for the act alleged by reason of the fact that he or she—
    - (i) did not know the nature and quality of the act, or
    - (ii) did not know that what he or she was doing was wrong, or
    - (iii) was unable to refrain from committing the act,the court or the jury, as the case may be, **shall return a special verdict to the effect that the accused person is not guilty by reason of insanity**
- ▶ Section 5 (2) If the court, having considered any report submitted to it in accordance with *subsection (3)* and such other evidence as may be adduced before it, is satisfied that an accused person found not guilty by reason of insanity pursuant to *subsection (1)* is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, the court shall commit that person to a specified designated centre until an order is made under section 13.



# Criminal Law (Insanity) Act 2006

## Section 15

(1) Where—

- (a) a relevant officer certifies in writing that a prisoner is suffering from a mental disorder for which he or she cannot be afforded appropriate care or treatment within the prison in which the prisoner is detained, and
  - (b) the prisoner voluntarily consents to be transferred from the prison to a designated centre for the purpose of receiving care or treatment for the mental disorder, then the Governor of the prison may direct in writing the transfer of the prisoner to any designated centre for that purpose.
- (2) Where 2 or more relevant officers certify in writing that a prisoner is suffering from a mental disorder for which he or she cannot be afforded appropriate care or treatment within the prison in which the prisoner is detained then then the Governor of the prison may direct in writing the transfer of the prisoner to any designated centre for the purpose of the prisoner receiving care or treatment notwithstanding that the prisoner is unwilling or unable to voluntarily consent to the transfer.

# Criminal Law (Insanity) Act 2006

- Section 13: The Review Board shall ensure that the detention of a patient is reviewed at intervals of such length not being more than 6 months as it considers appropriate and the clinical director of the designated centre where the patient is detained shall comply with any request by the Review Board in connection with the review

# Review Board hearings

- ▶ Section 13 (prior to amendment)
- ▶ The Review Board shall, having heard evidence relating to the mental condition of the patient given by the consultant psychiatrist responsible for his or her care or treatment, determine the question of whether or not the patient is still in need of in-patient treatment in a designated centre and shall make such order as it thinks proper in relation to the patient whether for further detention, care or treatment in a designated centre or for his or her discharge whether unconditionally or subject to conditions for out-patient treatment or supervision or both.

# Criminal Law (Insanity) Act 2006

**In reality – no discharges made as conditions of discharge were not enforceable.**

- ▶ No mechanism in the Act for a recall to the CMH in the event of a breach of conditions
- ▶ *B -v- Mental Health (Criminal Law) Review Board & Ors*. Judgment delivered 25 July 2008 by Mr. Justice Hanna
- ▶ Client could continue to be detained even though he was not suffering from a mental disorder and did not require treatment. This was held by the Court to be not contrary to ECHR or constitution.
- ▶ Appeal to the Supreme Court
- ▶ Amending legislation brought in  
**Criminal Law (Insanity) Bill 2010.**  
**Ministerial order signed on 8th February, 2011.**  
New sections amending fitness to be tried, and significantly, recall to the CMH in the event of a breach of a condition of recall.

**First conditional discharge granted by the Review Board on the 24th March, 2011**

# Criminal Law (Insanity) Act 2010

## New Section 13

The Review Board shall, having heard evidence relating to the mental condition of the patient given by the consultant psychiatrist responsible for his or her care or treatment, determine the question of whether or not the patient is still in need of in-patient treatment in a designated centre and shall make such order as it thinks proper in relation to the patient [whether for further detention, care or treatment in a designated centre, for his or her conditional discharge under section 13A or for his or her unconditional discharge].

# Criminal Law (Insanity) Act 2010

13B.— (1) A conditional discharge order shall, in respect of a person who is the subject of the conditional discharge order, be deemed to be revoked if the person is in material breach of that order and accordingly the person shall be deemed to be unlawfully at large.

(2) A person is in material breach of his or her conditional discharge order where the clinical director on reasonable grounds believes that the person is in breach of one or more conditions of his or her conditional discharge, and that—

(a) there is a serious likelihood of the person causing serious harm to himself or herself or to other persons, or

(b) the person may be in need of in-patient care or treatment.

# Criminal Law (Insanity) Act 2010

(3) Where the clinical director on reasonable grounds believes that a person is in material breach of his or her conditional discharge order, the director shall, unless subsection (4) applies, inform the person in writing of that fact and the reasons for that belief.

(4) Subsection (3) shall not apply where the clinical director on reasonable grounds believes that the material breach is such as to give reasonable grounds for the director to believe that there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons

# Criminal Law (Insanity) Act 2010

Section 13 (A) (2) The Review Board shall not make a conditional discharge order in respect of a patient until it is satisfied that such arrangements as appear necessary to the clinical director of the designated centre concerned have been made in respect of the patient, and for that purpose, the clinical director concerned shall make such arrangements as may be necessary for

(a) facilitating compliance by the patient who is the subject of the proposed order with the conditions of the order

(b) the supervision of the patient, and

(c) providing for the return of the patient to the designated centre under section 13B in the event that he or she is in material breach of his or her conditional discharge order.



# Criminal Law (Insanity) Act 2010

Section 13 (A) (3) Where the Review Board makes a conditional discharge order in respect of a person, the Board shall—

(a) order that the conditions imposed in the order be communicated to the person by notice in writing at the time of his or her discharge, and

(b) shall explain or cause to have explained to him or her—

(i) the effect of the conditional discharge order and the effect of the conditions imposed in the order,

(ii) the fact that the person may, under section 13B, be returned to the designated centre if he or she is in material breach of his or her conditional discharge order,

(iii) that the Board may in accordance with this section vary or remove any one or more of the conditions or impose further conditions on the application of either the person concerned or the clinical director of the designated centre concerned, and

(iv) that the person may in accordance with this section make an application for an unconditional discharge.

# Criminal Law (Insanity) Act 2010

Section 13 A (8) (a) A person who is the subject of a conditional discharge order may make an application in writing to the Review Board for an unconditional discharge (in this Act referred to as an 'application for an unconditional discharge').

(b) An application for an unconditional discharge may be made at any time after the expiration of 12 months from the date of the person's conditional discharge so long as a period of not less than 12 months elapses between an application and the next subsequent application.

# Numbers of discharges

- 2011 and 2012 – 7 conditional discharges in each year
- 2013 – 5 conditional discharges
- 2012 - 2 unconditional discharges with 1 refusal of application for unconditional discharge
- 2013- no unconditional discharges – 2 applications made but they did not satisfy the time requirements
- 2014 figures awaited

# Recent decision

*FX v Clinical Director of Central Mental Hospital & Anor* (Unreported judgments 3rd and 8th July 2012, Hogan J)

- In *FX* what was in question was the nature and effect of Sections 4 and 13 of the Criminal Law (Insanity) Act 2006 and whether or not a stay could be placed on an Order for release under Article 40.
- In July 2012, FX made an application to Hogan J in the High Court under Article 40.4.2 of the Constitution alleging that his detention was unconstitutional. FX argued that s 4 of the 2006 Act requires a two part process: a court hearing to order 14 days detention to facilitate a medical examination; and a second hearing so the court can determine if further detention is necessary, based on that report.
- Hogan J held that, as the CCC did not hold a second hearing, FX's detention was not in accordance with law. Hogan ordered FX's release but put a short stay on the execution of the order to allow the State to take steps to ensure that the detention was lawful.

# Recent decisions

- On appeal the Supreme Court had to determine:
- Has the High Court Article 40.4.2 jurisdiction to adjudicate on the legality of a detention order made by the Central Criminal Court.
- If it does, can the High Court place a stay on such an order.
- Does s 4 of the Criminal Law (Insanity) Act 2006 necessitate a two part process.

# Recent decisions

- The Director of the Central Mental submitted that the High Court did not have jurisdiction to adjudicate on the legality of an order issued by the CCC, as it is a court of equal jurisdiction.
- The Director argued that the courts should not interpret S 4 of the 2006 Act literally; the courts should look to the purpose of the legislation, which is to provide for the lawful detention of those who need to be detained. Argued that the two part process is unnecessary where there is undisputed evidence before the court, on the first date, that detention is necessary.
- **FX cross appealed.**
- Argued
- the primary issue was his constitutional right not to be unlawfully deprived of his liberty, and that the opinion of psychologists that he required detention is not a legal basis for depriving him of his liberty.
- S 4 of the 2006 Act is clear, it requires two separate hearings.
- as the High Court had determined that his detention was not valid in law, the only action available to the court was to order his release: the court has no power to stay an Article 40.4.2 order for release.

# Recent decisions

- The Supreme Court held:
- High Court can inquire into the lawfulness of a detention ordered by the Central Criminal Court only where there is a default of fundamental requirements such that it can be said that the detention is wanting in the due process of law.
- No constitutional provision to place a stay on an Article 40.4.2 order for release. The courts may stay an order only for the purpose of controlling the release in order to protect an individual who is incapable of protecting themselves.
- Any order for detention under s 4 of the 2006 Act must comply with requirement for the two part process outlined in the legislation. This process adds an extra layer of protection for vulnerable persons.
- As the legality of FX's detention was subsequently rectified, the matters on appeal were moot. The Court dismissed both the appeal and cross appeal



Thank you

Áine Hynes  
St. John Solicitors