



---

**AN BILLE UM AN DLÍ COIRIÚIL (GEALTACHT), 2002**  
**CRIMINAL LAW (INSANITY) BILL, 2002**

---

**EXPLANATORY AND FINANCIAL MEMORANDUM**

---

*Background to and purpose of the Bill*

The area of the criminal law which is the subject matter of this Bill is concerned with the drawing up of appropriate rules to govern the criminal responsibility of mentally ill persons who may have committed offences. It has its origins mainly in the common and statute law of the 19th century with further significant developments in case-law throughout the 20th century. While the legal and medical definitions which apply are not co-extensive, the approach adopted in the Bill takes into account the overlap between the criminal justice elements, and the need to have regard to the treatment aspects of mental health legislation, particularly concerning matters which a court must take into account when considering the options available to it following a determination of “unfitness to be tried” or “not guilty by reason of insanity”, otherwise known under existing law — but due to be changed under the Bill — as “unfitness to plead” and “guilty but insane”.

The issue of a person’s mental condition in criminal proceedings can arise in two main ways firstly, as a preliminary matter relating to the person’s fitness to be tried and secondly, as a defence to a criminal charge. The tests to be applied in each case are not the same. If any question arises as to the competence or fitness of an accused person to be tried, the existing law in the Lunacy (Ireland) Act, 1821, and the Juries Act, 1976, applies. There is no statutory definition of “fitness”. The criteria to be applied in deciding a person’s fitness to be tried are set out in statutory form in the Bill, and follow those laid down in case law. The conditions which have to be satisfied relate to the person’s ability to comprehend the course of the proceedings, so as to make a proper defence, to challenge a juror to whom he or she might wish to object, to understand the details of the evidence and to instruct counsel. Where it is determined by court that the person is fit to be tried, the trial may proceed. If the person is found unfit to be tried, he or she must be detained in the Central Mental Hospital.

The test for insanity as a defence under the criminal law has its origins in the M’Naghten Rules adopted in 1843. The Rules are restrictive and they confine the defence within narrow limits. They require, before a successful defence can be made out, that the accused person must have suffered, at the time of his or her act, from a defect of reason due to disease of the mind so that he or she did not know what he or she was doing, or did not know what he or she was doing was wrong. Strictly speaking, these Rules apply to a person who is suffering from insanity which manifests itself in insane delusions, but they were, nevertheless, accepted as the general test for insanity in Irish law, despite the fact that doubts had been

expressed as to whether they represented a comprehensive statement of Irish law on the issue. However, following the decision of the High Court in *The People (AG) v. Hayes* in 1965 and its subsequent approval by the Supreme Court in *Doyle v. Wicklow County Council* in 1974, it is clear that the M’Naghten Rules are not the sole and exclusive test of insanity in Ireland. The decision in the latter case means that a third factor — an irresistible impulse brought about by mental illness — which the Court said “debarred [the defendant] from refraining from committing the act” may also be taken into account. This extension of the Rules to comprehend a new criterion of volitional control goes further than a strict interpretation of the M’Naghten Rules would have allowed. Thus, Irish law seems to be more aligned with the formulation of insanity as set out by Sir James Fitzjames Stephen in his *Digest of the Criminal Law* in 1891 which admits of the possibility of a disease of the mind preventing a person from controlling his or her conduct.

The onus of proving insanity on the balance of probability is on the person who alleges it. If the defence is successful, the trial Judge must bring in the special verdict of “guilty but insane” as provided under the Trial of Lunatics Act, 1883, and commit the person to detention in the Central Mental Hospital. Decisions of the Court of Human Rights require that cases in this category (as well as those involving detentions of persons found unfit to be tried) must not only be fully reviewable by a quasi-judicial Body independent of the Executive, and as mentioned below, such a Body is provided for in the Bill, but also that the initial detention in these cases must also follow consideration of medical evidence. This is also provided for in the Bill.

With the development of modern psychiatry and greater understanding of the underlying causes of mental illness and its associated conditions, it has become apparent that this area of the criminal law needs clarification and development. The difficulty, however, in making any change is illustrated by the fact that no singular or uniform solution has been adopted in the various common law countries, including those with which we are closely connected. The purpose of the Bill is to clarify, modernise and reform the law on criminal insanity and fitness to be tried and on related issues; and, to bring it into line with the jurisprudence of the European Convention on Human Rights, which will soon be given further effect in domestic law in accordance with the provisions of the European Convention on Human Rights Bill, 2001. At present the Convention is law for Ireland on the international plane, but it is not part of the domestic law in Ireland. The Bill provides for extensive new provisions dealing with fitness to be tried, (which term will now apply rather than fitness to plead) as well as new rules in relation to appeals against such findings, a statutory definition and restatement of the test for criminal insanity based on the existing rules at common law as developed in Ireland, a new verdict of “not guilty by reason of insanity” to replace the existing “guilty but insane” verdict, and a new plea of “guilty but with diminished responsibility” in cases of murder. In doing so, the Bill implements certain recommendations made in the Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons (The Henchy Committee) published in 1978. In addition, and in the light of obligations under the Convention on Human Rights as already mentioned, the Bill will establish a new Review Body — the Mental Health Review Board — whose function it will be to review at regular intervals or on application the cases of persons detained following verdicts of “not guilty by reason of insanity” or findings of “unfitness to plead”.

## *Provisions of the Bill*

*Section 1 (Interpretation)* deals with definitions and two matters in particular. The first concerns the definition of designated centre which is further explained in *section 2 (Designated centres)* of the Bill. The section provides that it is a matter for the Minister for Health and Children (with the consent of the Minister for Justice, Equality and Law Reform in the case of the designation of a prison or any part thereof) to designate a psychiatric centre for the reception, detention, and where appropriate, care or treatment of persons committed there under the Bill. The designation of a prison as a designated centre is included to cater for situations where it might be more appropriate to detain a person under the Bill in prison rather than in a psychiatric hospital. The term “mental disorder” is defined for the purpose of findings of “unfitness to be tried” (*section 3*), “not guilty by reason of insanity” (*section 4*) and “diminished responsibility” (*section 5*). It is, as explained earlier in this Memorandum, a definition for the purposes of establishing criminal liability and includes a person suffering from a mental illness or handicap, dementia or any disease of the mind, but excludes intoxication by alcohol or other substances. While the definition is not fully inclusive, the essential element for the court, for example where criminal insanity is pleaded, is had the accused the mens rea to commit the crime for which he or she is charged. The definition of mental disorder plus the criteria in *section 4* are intended as the test for the court in coming to a decision on that issue.

### *Section 3 (Fitness to be tried)*

This section deals with the issue of fitness to be tried. This term is being adopted instead of the term fitness to plead which is used in the relevant provisions of the Lunacy (Ireland) Act, 1821, and which are being repealed. The section contains a new statutory definition of fitness to be tried based on the existing common law. It is also provided that the question of fitness to be tried will in future be determined by a court (including the District Court) without a jury. It may be noted in this regard that fitness to be tried is a medico-legal issue; it does not relate to the guilt or innocence of a person. If the person is found unfit to be tried, the proceedings will be adjourned, and the court will then determine how the person should be dealt with until such time as he or she has recovered (if ever). As the person will not have been found guilty of any crime, he or she will be detained following medical evidence. Safeguards are provided in the section to reduce the possibility of persons found unfit to be tried being detained unnecessarily under the criminal law. In effect, these provisions provide that where, despite the fact that the accused is unfit to be tried, the court is satisfied that there is a reasonable doubt that he or she committed the act alleged, it will acquit him or her. It will then be a matter for the relevant authorities acting under the civil law (the Mental Health Act, 2001) to take whatever measures they may deem necessary in relation to the person concerned i.e., the person will no longer be involved in the criminal justice system.

### *Section 4 (Verdict of not guilty by reason of insanity)*

This section provides for a new verdict of “not guilty by reason of insanity” to replace the existing special verdict of “guilty but insane” which has been criticised because of its pejorative connotations. In doing so the opportunity has been taken to set out in statutory form the parameters of the test for insanity which is based on the existing common law position (including Irish case law). It must be remembered that the test to be applied will be related to the time of the alleged commission of the offence and not the time of the trial. The section also provides that after a verdict of not guilty by reason of insanity is returned, the court will then consider the mental condition

of the person at that time to determine whether he or she should be released or detained on the grounds that in-patient treatment or care is required. This approach is in accordance with obligations arising under the European Convention on Human Rights which, as already noted, will be given further effect in Irish law in accordance with the provisions of the European Convention on Human Rights Bill, 2001.

*Section 5 (Diminished responsibility)*

This section introduces the concept of diminished responsibility into Irish law. It is only being applied in the case of murder — which carries a mandatory sentence of life imprisonment. The effect of this will be that if diminished responsibility is successfully pleaded, a conviction for manslaughter will be recorded with the sentence, at the discretion of the court, being any term of imprisonment up to life. There is no need to apply the concept in the case of other crimes where there is no mandatory sentence. In those instances the judge can at present take into account the mental condition of the convicted person when considering what sentence to impose. The availability of the verdict of diminished responsibility should reduce the danger that a jury will return an insanity verdict when faced with a person whom they regard as not being completely sane, even if he or she does not meet the legal criteria for insanity.

*Section 6 (Appeals (fitness to be tried)) and Section 7 (Appeals (not guilty by reason of insanity))*

These sections deal respectively with the question of appeals to higher courts from decisions of lower courts that a person is unfit to be tried or is not guilty by reason of insanity. Under existing law there is no provision for a person to appeal against findings of unfitness to plead or verdicts of guilty but insane.

*Section 8 (Appeals (supplemental provisions))*

This section provides that appeals may be made by the defence or the prosecution against a decision of the court of trial to order or not to order the detention of a person in these cases.

*Section 9 (Establishment day)*

This section provides that the Minister for Justice, Equality and Law Reform shall by order appoint a day to be the establishment day for the purposes of the provisions of the Bill insofar as it relates to the setting up of an independent Mental Health Review Board.

*Section 10 (Mental Health Review Board)*

*Section 10* and *Schedule 1* to the Bill provide for the establishment of an independent Mental Health Review Board (which will replace the existing *ad hoc* Advisory Committee). Again, this will comply with obligations in this area under the European Convention on Human Rights. The main function of the Board will be the regular review of the detention of persons found not guilty by reason of insanity or unfit to be tried, who have been detained in a designated centre by order of a court. The Board will determine when such a person should be released. The Board will be made up of a Chairperson (who must have not less than 10 years' experience as a practising barrister/solicitor or be a judge or former judge of the Circuit or Superior Courts) and a consultant psychiatrist and such other number of members as the Minister for Justice, Equality and Law Reform in consultation with the Minister for Health and Children shall appoint. The term of office of members is 5 years and provision is made for re-appointment. It is provided that the Minister for Justice, Equality and Law Reform may appoint the staff of the Board under the usual conditions, and that such staff shall be civil servants.

### *Section 11 (Powers of Review Board)*

This section sets out the various powers of the Mental Health Review Board. They include the power to hold sittings, take account of court records, assign a legal representative to the person seeking review, require the attendance of such person before it, obtain evidence and demand the production of information and documents, pay the reasonable expenses of witnesses, and administer oaths. The failure of persons to attend before the Board or to comply with requests by the Board for information or documents, or where a person is in contempt of the Board are offences punishable by a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both.

### *Section 12 (Review of detention)*

This section deals with the various ways in which the detention of persons in a designated centre found not guilty by reason of insanity or unfit to be tried, including persons detained under military law, may be reviewed. Such review in the case of a psychiatric hospital will be triggered by a notification from the Clinical Director of the centre where the patient is detained. Otherwise the Review Board has the responsibility for ensuring that the detention of such persons is reviewed six monthly or at such lesser intervals as it considers appropriate. In cases where a person is no longer unfit to be tried, the court of committal has to be so informed and shall order that the person be brought before it to be dealt with as the court thinks proper. In the case of detention under military law, the appropriate authority has to be similarly informed so that the court-martial shall be reconvened.

### *Section 13 (Temporary release, transfer and other matters)*

This section provides for the temporary release, transfer and other matters related to detained persons. The purpose is to arrange for such matters without the need to apply to the Review Board each time. It is provided that the consent of the Minister for Justice, Equality and Law Reform must be obtained to ensure that the public interest is safeguarded. The Minister for Health and Children might also have an interest particularly in the case of transfers to another designated centre and that is also covered in the section.

### *Section 14 (Notice of evidence)*

This section ensures that evidence as to the mental condition of an accused person shall not be raised by the defence during the course of a trial, unless notice of intention to do so has been given to the prosecution in accordance with rules of court. This is designed to ensure that neither the prosecution, nor the court itself, will be taken by surprise by the production of such evidence.

### *Section 15 (Applications to existing detentions)*

This section applies the provisions of the Bill on the review of detentions to persons already in detention before the Bill comes into operation.

### *Section 16 (Amendment of Defence Act, 1954)*

This section deals with consequential technical changes to the relevant provisions in military law (the Defence Act, 1954, as amended) so as to maintain consistency between courts martial and the non-military criminal law.

### *Section 17 (Expenses)*

This is a standard provision relating to administrative expenses which may be incurred in the operation of the Act.

*Section 18 (Grants to Review Board)*

This section provides for grants to be made to the Mental Health Review Board established under *section 10*.

*Section 19 (Repeals and transitional provision)*

This section is a repeals and transitional provision to be read in conjunction with *Schedule 2*.

*Section 20 (Short title and commencement)*

This section provides for the short title and commencement of the Act.

*Schedule 1 (Mental Health Review Board)*

*Schedule 1* sets out the provisions applicable to membership of the Mental Health Review Board and its procedures.

*Schedule 2 (Enactments Repealed)*

The enactments specified in *column 3* in *Schedule 2* are repealed to the extent specified in *column 4* of the *Schedule*.

*Financial Implications*

It is not anticipated that the proposals in the Bill will have significant financial or staffing implications. There will be some extra costs associated with the work of the new Mental Health Review Board because its responsibilities as set out in the Bill are more extensive and onerous than those of the *ad hoc* Advisory Committee which it replaces.

*An Roinn Dlí agus Cirt, Comhionannais agus Athchóirithe Dlí,  
Nollaig, 2002.*