Chance to put right the flaws in insanity laws

Darius Whelan

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It is often said that there are no votes in law reform, and the long delays prior to the recent publication of the Criminal Law (Insanity) Bill are a prime example of the lack of priority given to keeping our law up to date.

Now that the Bill has finally been produced, it contains many positive changes. For example, it introduces a defence of diminished responsibility, reforms procedures concerning the "insanity" defence and fitness for trial, and introduces a statutory Mental Health Review Board. But this Bill could be improved in various respects at Committee Stage as it passes through the Oireachtas.

While the Bill deals with those who are found unfit for trial or not guilty by reason of mental disorder, it will not introduce any power for judges to deal with the mental disorder of a convicted person at sentencing stage. If a person is convicted of assault, for example, but clearly has a mental disorder that requires treatment, a court should be able to order that the person be treated in a mental hospital.

Reform of this area of law was suggested in the White Paper on Mental Health in 1995, and Ireland has been criticised by the European Committee for the Prevention of Torture for failing to introduce such a change. Reform of the law concerning transfers from prisons to mental hospitals could also usefully have been included in the Bill.

The Bill imports some of the features of our new legislation concerning civil commitment, the Mental Health Act 2001, and applies them to criminal procedures, but it fails to adopt some of the more progressive features of that Act. For example, those detained under the civil Act will have a specific right to information concerning the reason for their detention and the fact that it will be reviewed by a tribunal, whereas there is no equivalent right for those detained after criminal charges. Similarly, the 2001 Act requires that the best interests of the patient be paramount at all times but this principle has not been imported into the 2002 Bill.

It is unclear whether people with personality disorders will come within the scope of some important concepts dealt with in the Bill, such as those of mental disorder, unfitness for trial, the insanity defence and diminished responsibility.

Some would argue that the definition of "mental disorder" could not cover a personality disorder, but others may maintain that the reference in the Bill to irresistible impulse (that the person was "unable to refrain from committing the act") is wide enough to include a personality disorder, referring to a statement by Chief Justice Finlay in 1985, and that the criteria for diminished responsibility could also apply to such a disorder.

Clear statements of inclusion or exclusion of personality disorder in each relevant section would remove such confusion. A previous Fianna Fail Private Member's Bill produced by John O'Donoghue in 1996 specifically included personality disorders in the definitions.

However, the Mental Health Act 2001 states that a person cannot be detained under that Act solely because of a personality disorder. The 2002 Bill specifically states that a person found not guilty by reason of insanity, for example, can only be detained if he or she has a mental disorder within the meaning of the 2001 Act, but it is unclear whether the section of that Act prohibiting detention based on personality disorder alone has an impact on "a mental disorder within the meaning of the 2001 Act".

The criteria concerning a person's mental unfitness for trial are an accurate restatement of the common law tests, but the opportunity could have been taken to develop those criteria beyond the traditional cognitive ones (whether the person can understand the nature and course of the proceedings so as to make a proper defence, instruct a lawyer, etc.) to a broader test of intellectual capacity.

Is it really sufficient that a person may be tried on a very serious criminal charge on the basis that he or she understands what is going on? It has been persuasively argued elsewhere that the law should require a person to have "decisional capacity" so that they can be a true participant in the process. Such a widening of the scope of unfitness for trial might not be popular as it might reduce the number of "show trials", but it would probably be more protective of the person's constitutional right to a fair trial.

In England and Wales, a person who is found unfit to plead cannot be detained by a criminal court unless it has first been found that he or she committed the alleged act. It is regrettable that the new Bill will not require a compulsory "trial of the facts" before a person who has been found unfit for trial can be detained. While the option of such a trial is included, it is not a prerequisite.

The retention of the archaic term "insanity" in the Bill is surprising as it could quite easily have been replaced with a more modern term such as "mental disorder", which applies in Canada, or "mental impairment", the term used in Australia.

This is no mere question of semantics, as the use of the word conjures up inaccurate images which may have an adverse effect on the appropriateness of juries' decisions and defendant's instructions to their lawyers. It is ironic that the pejorative connotations of the old "guilty but insane" verdict have been only partly removed - the person will now be referred to as "not guilty" but will continue to be classified as "insane".

Additional concerns about the Bill have rightly been raised by the Mental Health Commission, the Irish Psychiatric Association, and others. These include its possible incompatibility with the European Convention on Human Rights and the inadequacy of resources available for treatment and detention of patients.

This Bill concerns important issues of relevance to the criminal justice system and the medical professions. Even though it is long overdue, time spent ensuring that this legal reform measure is of the highest possible quality will be time well spent.

Dr Darius Whelan, is lecturer in law in the Law Department, University College Cork.