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REFORMING THE FITNESS TO BE TRIED PROCEDURE IN IRELAND TO COMPLY WITH THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

LUKE NOONAN*

I. INTRODUCTION

A criminal trial involves the balancing of three competing rights: the public interest in seeing offenders prosecuted and punished, the right of the victim to have their rights vindicated,[1] and the right of the accused to receive a fair trial. Where there is a conflict, the accused's right to a fair trial will be considered superior to the public interest and the rights of the victim.[2] The procedures which declare an accused unfit to plead/be tried/stand trial result from this balancing exercise. To stand trial or enter a plea, a person must have an adequate ability to communicate and a sufficient cognitive faculty to be able to understand the proceedings.[3] Where either is absent, the accused is protected from the risk of an unfair trial, and possible criminal sanctions, until such time as they recover to the extent necessary to participate meaningfully in their own defence.

The procedure by which a person is declared unfit to be tried, and its potential consequences, are not without its drawbacks. They can deprive a person of the right to be equal under the law[4] and their right to autonomy by removing their ability to make their own decisions.[5] They can prevent them from being held responsible for their actions or from clearing their name,[6] based on the existence of a disability. They can also result in a loss of liberty,[7] despite the lack of a criminal conviction or full trial, on an indefinite basis. As a result of these defects, two commentators have described the process as a "cruelly ironic way" to try to ensure that persons with disabilities are treated fairly.[8]

This article considers reform of the fitness to be tried procedures currently used in Ireland, in light of the ratification of the Convention on the Rights of Persons with

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[1] *Attorney General's Reference (No. 3 of 1999)* [2001] 2 AC 91.

[2] *People (DPP) v Harrison* [2016] IECA 212 [48] (Edwards J).

[3] Ralph Slovenko, 'The Developing Law on Competency to Stand Trial' (1977) 5 J Psychiatry & L 165, 166 https://dx.doi.org/10.1177/009318537700500202.

[4] The right to equality before the law is protected by the Constitution of Ireland; 1937 Constitution, Article 40.1.

[5] The right to autonomy is a derived personal right under the Constitution of Ireland; 1937 Constitution, Article 40.3.1°. See *Creighton v Ireland* [2010] IESC 50 [4] (Fennelly J).

[6] The right to a good name is protected by the Constitution of Ireland; 1937 Constitution, Article 40.3.2°.

[7] The right to personal liberty is protected by the Constitution of Ireland; 1937 Constitution, Article 40.4.1°.

[8] Robert A Burt & Norval Morris, 'A Proposal for the Abolition of the Incompetency Plea' (1972) 40 U Chi L Rev 66, 75 https://doi-org.ucc.idm.oclc.org/10.2307/1599068.

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Disabilities in 2018.[9] The CRPD places an emphasis on protecting a person's legal capacity and removing any legal processes which implement substitute decision-making. It is challenging to accomplish this objective whilst still protecting the accused's right to a fair trial, particularly as fundamental protections regarding a fair trial under the Irish Constitution and the European Convention on Human Rights (ECHR)[10] must be given priority in domestic law.

This article consists of four main sections. Section II describes the current fitness to be tried procedure in Irish law. Section III then assesses whether the current law is compliant with the CRPD and considers how the Committee on the Rights of Persons with Disabilities (Committee) views on supported decision-making impact the right to a fair trial. It is determined that the CRPD does not require the complete abolition of unfitness to be tried declarations, but does require greater safeguards, such as an assessment of the supports a person with a disability requires, an increased focus on the accused's right to access justice, and a reconsideration of provisions that permit these defendants to be detained without a trial indefinitely. Finally, using the insights gained in section III, section IV considers reform in this area.

II. FITNESS TO BE TRIED IN IRISH LAW

A. The Statutory Test and Procedure under Irish Law

In Ireland, a declaration that an accused is unfit to be tried is made when, by reason of a mental disorder,[11] they are unable to:

> understand the nature or course of the proceedings so as to:
> (a) plead to the charge,
> (b) instruct a legal representative,
> (c) in the case of an indictable offence which may be tried summarily, elect for a trial by jury,
> (d) make a proper defence,
> (e) in the case of a trial by jury, challenge a juror to whom he or she might wish to object, or
> (f) understand the evidence.[12]

The issue can arise at any point of criminal proceedings and be raised by either party or the court itself.[13] The determination is made by the court of trial,[14] by the judge sitting alone.[15] The judge may request the evidence of a consultant psychiatrist as to

[9] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).
[10] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) (ECHR).
[11] The statute only covers cases where the unfitness is caused by a mental disorder. If the accused suffers from another form of disability, the common law test continues to apply; Simon Mills, 'Criminal Law (Insanity) Bill 2002: Putting the sanity back into insanity' (2003) 8 Bar Rev 101, 102. A mental disorder is defined as including "mental illness, mental disability, dementia or any disease of the mind but does not include intoxication"; Criminal Law (Insanity) Act 2006, s 1. Mental disability includes intellectual disabilities.
[12] 2006 Act (n 11) s 4(2).
[13] ibid, s 4(1).
[14] ibid, s 4(3)(a), s 4(4)(a).
[15] ibid, s 4(4)(b), s 4(5)(b).

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the condition of the accused.[16] A right of appeal exists to the Circuit Court, where the decision was made by the District Court, or otherwise the Court of Appeal against a determination of unfitness.[17] The legislation does not directly provide for a right of appeal against a determination of fitness, however any resulting conviction can be quashed if the accused is subsequently found unfit to be tried.[18]

Upon a determination that an accused is unfit to be tried, criminal proceedings are adjourned and the court may issue a committal order to a designated centre if it is satisfied that, on considering medical evidence, the accused has a mental disorder within the meaning of the Mental Health Act 2001[19] and is in need of in-patient care or treatment.[20] Issuing a committal order is a two-step process: the accused must first be detained for a period of fourteen days for the purposes of examination by an approved medical officer,[21] and may then be detained for an indefinite period after a second hearing which considers the opinion of the approved medical officer following the examination. Alternatively, the court is also permitted to issue an order for out-patient care or treatment, in the event it determines that this is more appropriate.[22]

The court also has the power to defer consideration and determination of the issue until before the opening of the defence's case, allowing the trial judge to grant a directed acquittal if appropriate, rendering the issue moot.[23] Additionally, after a defendant has been found unfit to be tried, an application can be made to the court for a hearing to determine whether reasonable doubt exists as to the defendant's guilt.[24] The purpose of this section was to ensure that a person was not being detained unnecessarily under the criminal law.[25]

The legislation states that the accused will be "discharged" if the court is satisfied that reasonable doubt exists following a "trial of the facts".[26] Reporting on evidence adduced during a "trial of the facts" is an offence unless the accused is discharged because a reasonable doubt exists, a trial has concluded, or a decision has otherwise

[16] ibid, s 4(3)(aa), s 4(5)(bb).
[17] ibid, s 7(1), s 7(3).
[18] *People (DPP) v Redmond* (COA, 22 July 2019) (Birmingham P).
[19] Mental disorder is defined as meaning "mental illness, severe dementia or significant intellectual disability where (a) because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or (b) (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and (ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent"; Mental Health Act 2001, s 3(1).
[20] 2006 Act (n 11) s 4(3)(b)(i), s 4(5)(c)(i).
[21] ibid, s 4(6)(a)(i)(I).
[22] ibid, s 4(3)(b)(ii), s 4(5)(c)(ii).
[23] ibid, s 4(7).
[24] ibid, s 4(8).
[25] Department of Justice, Equality and Law Reform, *Criminal Law (Insanity) Bill 2002 – Explanatory and Financial Memorandum* (Department of Justice, Equality and Law Reform 2002) 3 https://data.oireachtas.ie/ie/oireachtas/bill/2002/44/eng/memo/b4402s-memo.pdf.
[26] ibid.

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been made not to proceed with the prosecution.[27] This restriction is to protect the accused's right to a good name and is a recognition of the fact that they were unable to make a proper defence at this hearing.[28]

B. Review of Detention

In Ireland, the only designated centre is the Central Mental Hospital in Portrane, County Dublin. An independent review board, known as the Mental Health (Criminal Law) Review Board (Review Board), was established by the 2006 Act to review the detention of patients committed as a result of unfitness to be tried declarations.[29] A patient's detention is reviewed at least every six months.[30] After considering evidence relating to the patient's mental condition, the Review Board can make any order regarding committal and treatment that it thinks proper.[31] Reviews can also take place outside of this cycle, either at the request of the patient,[32] on the Review Board's own initiative,[33] or if the clinical director of the Central Mental Hospital forms the opinion that the patient is no longer in need of inpatient treatment.[34] If either the clinical director or the Review Board forms the opinion that the patient is no longer unfit to be tried, they must notify the court that detained the patient, which will order the patient to be brought before it.[35]

III. ASSESSING COMPLIANCE OF FITNESS TO BE TRIED PROCEDURE WITH THE CRPD

A. Overview of the CRPD

The CRPD was ratified by Ireland in March 2018.[36] It emphasises that persons with disabilities have the right to an equal enjoyment of all human rights. These rights include the right to equal recognition and legal capacity (Article 12), the right to an equal access to justice (Article 13), the right to liberty (Article 14), the right not to be tortured (Article 15), and the right to freedom from abuse (Article 16). Where a person requires support or "reasonable accommodation" in order to enjoy a human right on an equal basis with others, this should be provided.[37] However, Article 2 clarifies that the CRPD requires only "reasonable accommodation" and it does not require any adjustments or modifications which impose a "disproportionate or undue burden" on

[27] 2006 Act (n 11) s 4(9).
[28] Liz Campbell, Shane Kilcommins, Catherine O'Sullivan & Alan Cusack, *Criminal Law in Ireland*: *Cases and Commentary* (2nd edn, Clarus Press 2021) [26-56].
[29] 2006 Act (n 11) s 11 as amended by Criminal Law (Insanity) Act 2010, s 6.
[30] 2006 Act (n 11) s 13(1) as amended by Criminal Justice Act 2006, s 197(1).
[31] 2006 Act (n 11) s 13(4) as amended by 2010 Act (n 29) s 7.
[32] 2006 Act (n 11) s 13(7) as amended by Defence (Amendment) Act 2007, s 11.
[33] 2006 Act (n 11) s 13(9) as amended by CJA 2006 (n 30) s 197(1).
[34] 2006 Act (n 11) s 13(3) as amended by CJA 2006 (n 30) s 197(1).
[35] 2006 Act (n 11) s 13(2)(a) as amended by CJA 2006 (n 30) s 197(1); 2006 Act (n 11) s 13(2)(a) as amended by 2007 Act (n 32) s 11.
[36] United Nations Treaty Collection, 'Ratifications and Signatures of the C.R.P.D.' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec> accessed 6 July 2025.
[37] CRPD (n 9) Article 5.4.

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the State.[38] Article 1 states that persons with disabilities include persons with mental or intellectual impairments.

At the time of ratification, Ireland issued declarations regarding Articles 12 and 14, stating that Article 12 was understood as permitting substitute decision-making where necessary and subject to safeguards and that Article 14 was understood as permitting compulsory care as a last resort.[39] Ireland also stated that if it should be determined that Article 12 prohibits substitute decision-making, the State was reserving the right to permit such arrangements subject to safeguards when appropriate.[40] It should also be noted that as Ireland is a dualist country, the CRPD does not automatically form part of domestic law despite ratification. This means that where there is a clash between the CRPD and the Irish Constitution or the ECHR, the latter must take priority. The Irish Constitution is the highest source of national law in Ireland, and any legislation must be compliant with its provisions.[41] The ECHR was incorporated into national law in 2003, and courts must interpret legislation in a manner which is compatible with the ECHR[42] or make a "declaration of incompatibility".[43] Every organ of the state must perform its functions in a manner compatible with the ECHR.[44]

B. Legal Capacity and Supported Decision-Making

Article 12 of the CRPD requires that the legal capacity of people with disabilities is respected on an equal basis with others. Legal capacity includes the right to have one's actions and choices recognised by the law, even if one's decision-making skills are impaired.[45] The Committee, which was established by Article 34 and is primarily responsible for monitoring compliance with the treaty, considers the functional approach to be discriminatory as it assesses mental capacity to determine if legal capacity should be respected resulting in the lowering of a person's status before the law.[46]

The fitness to be tried process assesses the accused's mental capacity to ensure that they can understand matters relevant to the trial and assist in their own defence. However, when the accused is unable to satisfy this test, they are declared 'unfit'. As this process denies the accused their legal capacity, it is potentially not compliant with Article 12. The solution, according to the Committee, is to provide support for persons who may have impaired decision-making skills to help them stand trial, rather than deny them their legal capacity.[47]

[38] ibid, Article 2.
[39] UNTC (n 36).
[40] ibid.
[41] 1937 Constitution, Article 15.4.
[42] European Convention on Human Rights Act 2003, s 2(1).
[43] ibid, s 5.
[44] ibid, s 3(1).
[45] UN Committee on the Rights of Persons with Disabilities, 'General Comment No 1 – Article 12: Equal Recognition Before the Law' (2014) UN Doc CRPD/C/GC/1 [14] https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1.
[46] ibid [15].
[47] ibid.

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A finding that an accused is unfit to stand trial is a form of substitute decision-making. The judge is deciding that it is in the accused's best interests that they do not stand trial, regardless of what the accused might want.[48] This process is paternalistic; it is designed to protect defendants that the court feels are vulnerable and to ensure that the trial is fair.[49] It is feared that there is a greater risk of a wrongful conviction if the accused cannot participate effectively in the trial, particularly if their counsel is unable to obtain information essential to their defence.[50] The key difference between the paternalistic unfit to be tried process and the CRPD respect for legal capacity regime is that the former results in a decision which is in the objective best interests of the person, and the other results in a decision which aims to be the will and preference of the person and fully protects their rights. The latter decision may appear unwise to some observers, but it is regarded as preferable because it does not interfere with the legal capacity of the person, which when deprived hinders full and effective participation in society. Supported decision-making also ensures that the voices of persons with disabilities are heard.

There are several decisions that an accused might need to make during a trial which are relevant to being found fit to stand trial: the accused needs to elect how to plead, whether to challenge a juror, what defence they wish to raise, and whether (in appropriate cases) they elect to have a summary trial or a trial by jury. Support may also be required beyond just decision-making in order to help the accused follow and understand the proceedings. Supported decision-making is defined by the Committee as one way in which a person receives support in the exercise of their legal capacity and relates specifically to when a particular decision needs to be made. This approach is endorsed by Article 12.3 of the CRPD. Thus, rather than declaring a person unable to make their own decisions and appointing a third party to make these decisions, the person is given assistance to express their will and preferences and protect their rights. The type and magnitude of the support will differ according to the person's needs. The Committee advised that:

> persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication. Support to persons with disabilities in the exercise of their legal capacity might include measures relating to universal design and accessibility — for example, requiring private and public actors, such as banks and financial institutions, to provide information in an understandable format or to provide professional sign language interpretation — in order to enable persons with disabilities to perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions. Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences.[51]

[48] ibid.
[49] *O'C v Judges of Dublin Metropolitan District* [1994] 3 IR 246, 251-252 (Finlay CJ).
[50] Stuart E Eizenstat, 'Mental Competency to Stand Trial' (1969) 4 Harv CR-CL L Rev 379, 379 https://heinonline.org/HOL/P?h=hein.journals/hcrcl4&i=385.
[51] General Comment No 1 (n 45) [17].

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A person with a disability is not obliged to accept or ask for help. They are entitled to insist that decisions made without support are respected.[52] This support must replace any substitute decision-making regime where a person is deprived of legal capacity, even if only for a single decision.[53]

C. Issues with Identifying a Person's Will and Preferences

Although supported decision-making respects a person's legal capacity, it can be challenging to implement when the patient is unable to express their will and preferences. In this instance, Article 12.4, following guidance from the Committee, directs that a facilitated decision-making process should take place which must be based on the "best interpretation of will and preferences" that can be formulated rather than what is perceived to be in their best interests.[54] This approach prioritises the views of persons with disabilities. Unfortunately, the Committee has not provided much detail on how this could be achieved. The Committee has recommended that States Parties provide "various forms of advance planning mechanisms to accommodate various preferences" to aid a facilitated decision-maker.[55] It views the ability to plan ahead as an important form of support for persons with disabilities.[56]

By using advance planning mechanisms, a person can state their will and preferences for a time in the future when they might be unable to communicate them.[57] The Committee directs that an advance directive should include the decision of the person regarding "the point at which … [it] … enters into force … and ceases to have effect".[58]

The Committee further emphasised that an assessment that a person lacks mental capacity cannot be used to invoke the provisions of an advance directive, unless it is that person's desire.[59] This is to prevent an advance directive being used against a person who is perceived as behaving unwisely in the future.

It is not clear how these advance planning mechanisms would be relevant to criminal justice matters. It would not be possible for a person to advance plan what their will and preferences would be in relation to their defence for a crime that may not have occurred yet. Further, this approach implies that the only relevant consideration in ensuring a fair trial is that the accused's wishes are known. Fair trial protection under the Irish Constitution[60] and the ECHR [61] is wider than this, and because of the status of these legal sources in domestic law, these rights have to take priority.

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[52] ibid [19].
[53] ibid [27].
[54] ibid [21].
[55] ibid [17].
[56] ibid.
[57] ibid.
[58] ibid.
[59] ibid.
[60] 1937 Constitution, Article 38.1; See *Blanchfield v Hartnett* [2002] 3 IR 207, 221 (Fennelly J).
[61] Defendants have the following minimum rights under Article 6.3 of the ECHR:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and the facilities for the preparation of his defence;

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Whilst there is no exhaustive list of the components which are required in order to constitute a fair trial in the Constitution itself,[62] it is particularly important that an accused has an adequate opportunity to make a full answer and defence. This is based on the principle of "equality of arms" which provides that the trial should not take place in circumstances where the accused is placed at a substantial disadvantage against their opponent (the prosecution).[63] The accused is not able to waive this right to a fair trial as judges are not permitted to allow unconstitutional trials to proceed.[64] As a result, a court is obliged to find a defendant unfit to stand trial if the statutory test is satisfied, even if the defendant objects and wishes to proceed with the trial.[65] Similarly, Article 6 of the ECHR requires that the accused is able to participate effectively in their trial.[66] This requires that:

> the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary, with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.[67]

Thus, even if a best interpretation of a person's will and preferences could be formulated, it seems that this would not be enough to ensure a fair trial under the Constitution or ECHR. Both these instruments appear to require active participation from an accused and must take precedence over the CRPD.

D. The Committee's Views on Fitness to be Tried Procedures

The Committee has confirmed that when a person is deemed "incapable of discernment" and procedural and age-appropriate accommodations are not provided to allow them to participate in judicial proceedings, this will not comply with Article

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(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[62] Some of the ingredients are discussed by Gannon J in *State (Healy) v Donoghue* [1975] IR 325, 335: the [right] to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or of excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence.

[63] Tom O'Malley, *The Criminal Process* (Round Hall 2009) [4-13] *et seq.*

[64] *State (Byrne) v Frawley* [1978] IR 326, 344-345 (Henchy J).

[65] *O'C* (n 49) 252 (Finlay CJ).

[66] *T & V v United Kingdom* (2000) 30 EHRR 12 [85].

[67] ibid [29].

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13.[68] In particular, the Committee has highlighted that legislation that views persons with disabilities as unfit to be tried violates Article 13 as it restricts their access to achieving justice in their case.[69]

Regarding compatibility with Article 12, the Committee did not explicitly discuss unfit to be tried determinations in its General Comment on Article 12, but the issue arose for its consideration in a complaint submitted under the Optional Protocol. In *Noble v Australia,*[70] the applicant had been charged with several sexual offences against children. He was found unfit to stand trial, the charges were quashed, and he was detained in a prison. He spent over a decade in prison before being discharged subject to several strict conditions. The complaint alleged that the applicant's detention and the conditions imposed upon his release violated Article 14.[71] It was also argued that he was deprived of the opportunity to plead not guilty and to "test the evidence" and was thus still presumed guilty, violating Article 12.

Australia argued that although the fitness to plead legislation resulted in differential treatment, it was on legitimate grounds and subject to safeguards.[72] The Committee acknowledged that not all differential treatment was discriminatory and prohibited by Article 5 of the CRPD, and that such treatment could be legitimate if it was reasonable.[73] The Committee noted that the State had not provided the applicant with any support to enter a plea, and had not analysed whether such measures could have been adopted, and this was a violation of Articles 12 and 13.[74]

It is important to note that the Committee did not declare that an unfitness to plead declaration was an automatic violation of the CRPD but rather based its finding on the failure of Australia to adequately consider what support could be provided. The Committee also found a violation of Article 14. It noted that the charges had been dismissed and Mr Noble had been detained in a prison despite not having been convicted of any offence. The State conceded that the decision to detain in a prison was because of the "lack of available alternatives and support services", an admission that the Committee felt supported the view that the applicant's disability was the core cause of his detention.[75] It also noted that any conditions that are imposed upon release from detention also fell foul of Article 14.

Finally, the Committee found that the indefinite character of the detention violated Article 15, which protects persons with disabilities from "torture or cruel, inhuman or degrading treatment or punishment".[76] It noted the "irreparable psychological effects" that indefinite detention can have on a detainee and considered that it was "inhuman

[68] Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Switzerland' (2022) UN Doc CRPD/C/CHE/CO/1 [27]-[28].
[69] Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Australia' (2019) UN Doc CRPD/C/AUS/CO/2-3 [25]-[26].
[70] *Noble v Australia* (CRPD/C/16/D/7/2012) (Decision of 2 September 2016).
[71] ibid [7.8].
[72] ibid [8.2].
[73] ibid [8.3].
[74] ibid [8.4].
[75] ibid [8.7].
[76] CRPD (n 9) Article 15.1.

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and degrading treatment".[77] Article 15 was also violated because the applicant was subjected to violence and abuse in prison that he was unable to protect himself from as a result of his disability. The State was under an obligation to prevent or protect the applicant from this abuse.[78]

It is not entirely clear from the *Noble* decision how broadly the decision is to be interpreted. There was an acknowledgment that some degree of differential treatment may be reasonable, but the Committee was silent on what that might be. Presumably any measures which are necessary to achieve equality will be permissible, a position endorsed by Article 5.4 of the CRPD.[79] However, in its Guidelines on Article 14, the Committee was more forceful in its views that unfit to be tried declarations were not CRPD compliant:

> [t]he Committee has established that declarations of unfitness to stand trial … in criminal justice systems and the detention of persons based on those declarations is contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant. The Committee has also called for States parties to remove those declarations from the criminal justice system. The Committee has recommended that all persons with disabilities who have been accused of crimes and… detained in jails and institutions, without trial, are allowed to defend themselves against criminal charges, and are provided with required support and accommodation to facilitate their effective participation, as well as procedural accommodations to ensure fair trial and due process.[80]

Gooding *et al* interpret the Committee's comments in the Guidelines on Article 14 as obliging States Parties to remove all declarations of unfitness from national law.[81] However, it could perhaps be argued that this is ignoring the context of the comments, which concerned persons deprived of their liberty without the chance to defend themselves at a trial. If a person is declared unfit to stand trial and is not detained, this does not violate Article 14.

Gooding *et al* also cite the Committee's Concluding Observations for Ecuador and South Korea[82] as evidence that this direction is not contingent on involuntary detention. However, the Committee's concerns were again expressed in a discussion of Article 14 and appear to be primarily concerned with the misuse of using the

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[77] *Noble* (n 70) [8.9].
[78] ibid.
[79] CRPD (n 9) Article 5.4.
[80] Committee on the Rights of Persons with Disabilities 'Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities' (2015) [16] https://www.ohchr.org/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc#:~:text=Article%2014%20of%20the%20Convention%20is%2C%20in%20essence%2C%20a%20non,on%20disability%20in%20its%20exercise.
[81] Piers Gooding, Bernadette McSherry, Anna Arstein-Kerslake & Louis Andrews, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' (2017) 40 Melb Univ Law Rev 816, 843 https://www.proquest.com/scholarly-journals/unfitness-stand-trial-indefinite-detention/docview/1899315486/se-2.
[82] Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Ecuador' (2014) UN Doc CRPD/C/ECU/CO/1 [28]-[29]; Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Republic of Korea' (2014) UN Doc CRPD/C/KOR/CO/1 [27]-[28].

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unfitness to stand trial process to detain persons indefinitely without a trial.[83] In its Concluding Observation for Ecuador, under the category of "Liberty and security of the person (art. 14)" the Committee expressed concern that:

> the State party has not taken action to guarantee due process for persons with disabilities accused of having committed an offence. It is also concerned that declaring persons with disabilities unfit to stand trial is a pretext for applying security measures involving their indefinite deprivation of liberty and that they are not entitled to the same guarantees as other persons in the criminal justice system.[84]

The Committee then recommended that Ecuador:

> [r]efrain from declaring persons with disabilities unfit to stand trial when they are accused of an offence so that they are entitled to due process, on an equal basis with others, and that the general guarantees of criminal law and procedure are observed.[85]

Whilst the recommendation appears to require the abolition of unfitness to stand trial declarations, when placed in context and when other Concluding Observations are considered, the comments are ambiguous. Concluding Observations to other countries which still use fitness to plead procedures, such as the United Kingdom, do not contain any discussion on the subject.[86] Therefore, it is possible that either there was something particular about Ecuador's process that attracted the Committee's attention, or the Committee is not being consistent in its approach to the matter. The Concluding Observations do not provide any detail on the specifics of the law in Ecuador, and all earlier reports such as the List of Issues do not refer to the issue at all.

Furthermore, it seems unlikely that the CRPD was intended to impose an absolute prohibition on persons being declared unfit to stand trial. There will obviously be some extreme cases (for example, comatose patients) where it is difficult to see how refusing to try such a person would be in violation of the CRPD. In its decision in *Noble,* the Committee emphasised that the support and accommodation given to a person should facilitate their effective participation in the trial. This is the same standard that is required under the ECHR. It seemed as if the Committee was acknowledging in *Noble* that there will be some circumstances when support cannot achieve effective participation, and other measures may then be permissible. It is worth keeping in mind that the CRPD only requires the State to give reasonable support and accommodations. Thus, providing that the accused is assessed for what supports are required and that any support that is proportionate and not unduly burdensome is provided, it seems the State will be compliant. The Guidelines on Article 14 indicate that the Committee's real issue is the potentially indefinite detention without a trial, and that a person is deprived of the opportunity to clear their name, potentially impacting on their right to access justice on an equal basis with other defendants.

[83] Gooding *et al* (n 81) 844.
[84] Ecuador Concluding Observation (n 82) [28].
[85] ibid at [29(b)].
[86] Committee on the Rights of Persons with Disabilities 'Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland ' (2017) UN Doc CRPD/C/GBR/CO/1.

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IV. RECOMMENDATIONS FOR REFORM

In the previous section, it was identified that the fitness to be tried procedure contravened Article 12 of the CRPD by removing an accused's legal capacity on the basis of a mental disorder when an accused is declared unfit to be tried. This approach fails to respect the voices of persons with disabilities and also deprives them of their right to equal enjoyment of legal capacity. It was outlined that Article 12.3 required the abolition of substitute decision-making and directed that it should be replaced by support to enable a person to express their will and preferences. Where it was not possible to identify a person's will and preferences, a facilitated decision-maker should make a determination based on the best interpretation of that person's will and preferences that can be formulated.

However, it was identified that support for the exercise of legal capacity must help the accused to participate effectively in their trial, otherwise it will contravene the accused's right to a fair trial under the Irish Constitution and the ECHR. In these circumstances the right to a fair trial must take priority over the right to legal capacity and the respect for the diversity and voice of the accused. Additionally, it needs to be emphasised that the State is only under an obligation to provide reasonable support.[87] Support which would impose a disproportionate or undue burden on the State is not required. Where reasonable support will not guarantee that the accused can participate effectively in the trial, the accused should still be given the opportunity to test the evidence and clear their name. Although this procedure does not result in complete equality, it is as protective of the right of equal access to justice as possible.

In addition to the changes required to the fitness to be tried procedure itself, reform is also needed in the areas of involuntary detention and treatment that might be ordered when a person is subjected to an unfitness declaration. For example, whilst a court directing an accused to involuntarily undergo treatment may eventually help them stand trial, this is not permissible under Article 12 as this alone does not provide justification for the deprivation of legal capacity. Treatment should only be ordered by a court where it is consistent with the accused's will and preferences, or the best interpretation of their will and preferences that is possible. If it is not possible to provide such an interpretation, a best interests principle can be used to make decisions until it is possible to determine that person's will and preferences.

A. Determining the Support Required

The first step in reform is to redefine the focus and standard of the legal test regarding if an accused should be found unfit to stand trial. Rather than being used as a tool to exclude a person from standing trial, the assessment should be used to determine

[87] It should be noted that Article 13 requires the "provision of procedural and age-appropriate accommodations". However, Article 5 seems to indicate that only reasonable accommodation is required. Reasonable accommodation is defined in Article 2 as "mean[ing] necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

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what supports are required to ensure that the trial is fair and the accused can participate effectively. This reflects the paradigm shift endorsed by disability studies where the focus is put on removing obstacles and providing support, rather than depriving the accused of their right to legal capacity. The difficulty is that there are very few studies on how support in the exercise of legal capacity would work in the context of a defendant participating in a criminal trial.[88]

The Law Commission in England and Wales (Law Commission) determined that the test[89] in that jurisdiction was too narrow and recommended that it be widened.[90] It found that there was a disproportionate emphasis on a person's intellectual abilities rather than the other aspects of mental disorders which might affect the defendant's ability to make rational decisions.[91] As a result, it recommended introducing a test which considered capacity for effective participation, including an assessment of the defendant's decision-making ability, often referred to as a 'functional' assessment.[92] It also recommended a separate test of capacity for assessing an accused who wished to plead guilty.[93]

The Law Commission acknowledged that its approach may violate a literal reading of the CRPD.[94] However, it took the view that the defendant's ECHR rights must be protected as a priority, and that for the few defendants who do not gain or recover capacity, a functional approach would not necessarily violate the CRPD because of additional safeguards and an expressed desire to respect the "defendant's rights, will and preferences" where possible.[95] Widening both the statutory and common law test to include a consideration of rational decision-making, along with the traditional requirements of an ability to communicate and having a sufficient intellect or awareness to understand the proceedings, has the potential to improve the fairness of the trial process for persons who have impaired decision-making ability and result in more effective participation. However, the challenge is how to reconcile the Law Commission's approach with a respect for legal capacity, as some academics have questioned whether it is compliant with the CRPD.

[88] A 2023 support program trialled placing a number of support persons in community legal centres; Piers Gooding, Bernadette McSherry & Anna Arstein-Kerslake, 'Supported Decision-Making in Criminal Proceedings: A Sociolegal Empirical Study' (2023) 34(1) J Disabil Policy Stud 28. Whilst the authors note a number of limitations including small sample size and a limited duration of the support, the study provides promising evidence that formal supports can reduce the number of unfitness to be tried declarations.

[89] The *Pritchard* test requires the accused to be able to understand the charges, decide whether to plead guilty or not, challenge jurors, instruct lawyers, follow the proceedings, and give evidence in own defence; *R v Pritchard* (1836) 7 C & P 303, 304; This test is likely to still represent the law in Ireland when the unfitness does not arise because of a mental disorder, as the provisions of the 2006 Act only explicitly cover circumstances where the unfitness is caused by a mental disorder.

[90] Law Commission, *Unfitness to Plead, Volume 1: Report* (Law Com No 364, 2016) [2.5] https://lawcom.gov.uk/project/unfitness-to-plead/.

[91] ibid at [2.6]-[2.8].

[92] ibid [3.121].

[93] ibid [3.155]-[3.156].

[94] ibid [3.163]-[3.164].

[95] ibid [3.165].

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Flynn and Arstein-Kerslake argue that such provisions, even if worded neutrally, will have a disproportionate impact on persons with psychosocial disabilities, as they are the group most likely to be found to have impaired decision-making.[96] Gooding and O'Mahony argue that the Committee has concluded that any mental capacity testing is prohibited outright, as it denies a core human right (equal recognition) if the assessment is failed.[97] These observations are correct. However, functional capacity assessments which are not used for justifying a deprivation of legal capacity may not necessarily violate the CRPD. If the assessments are used only to identify what support is required for the person to have effective participation in their own trial, there is no reason why this change in the legal test would not be an improvement. The current statutory test's focus on communication and understanding excludes persons who may require decision-making support from its scope. By identifying defects in mental capacity, these persons can be provided with support that they previously would not have had access to. This is a similar approach to that recommended by Bach and Kerzner, who argue that the crux of the CRPD issue is "ensuring that individuals are exercising their capacity through the most appropriate status", either independently or with support.[98]

Flynn and Arstein-Kerslake express a fear that such assessments may become status contingent, in that persons with disabilities will have to demonstrate rational decision-making in order to have their decisions legally recognised.[99] They argue that despite the approach being considered as a more just determination of capacity by focusing on behaviour rather than the disability itself, it has the result of holding persons with disabilities to a higher standard than other defendants.[100] However, this fear does not provide sufficient justification for ruling out this approach. The CRPD acknowledges that persons with defects in mental capacity should be provided with support to exercise legal capacity. We can only provide this support by assessing a person's mental capacity in the first place.

Similarly, Gooding and O'Mahony comment that a functional approach to determining fitness to be tried will result in a greater number of defendants with disabilities being stripped of their legal capacity.[101] As acknowledged above, this is a valid concern. However, this can be avoided by ensuring that the focus of the process is changed. Rather than viewing the procedure as a method for excluding 'incompetent' defendants from standing trial, it should be regarded as a means for improving the fairness of the trial and ensuring that persons with disabilities have the same access to justice as everybody else. Thus, the criteria are used to determine the various

[96] Eilionoir Flynn & Anna Arstein-Kerslake, 'Legislating personhood: realizing the right to support in exercising legal capacity' (2014) 10 Int J Law Context 81, 87 https://doi.org/10.1017/S1744552313000384.
[97] Piers Gooding & Charles O'Mahony, 'Laws on unfitness to stand trial and the UN Convention on the Rights of Persons with Disabilities: Comparing reform in England, Wales, Northern Ireland and Australia' (2016) 44 Int J Law Crime Justice 122, 136 https://doi.org/10.1016/j.ijlcj.2015.07.002.
[98] Michael Bach & Lana Kerzner, 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' (2010) <https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf> accessed 3 July 2025, 98-100.
[99] Flynn & Arstein-Kerslake (n 96) 88-89.
[100] ibid 87.
[101] Gooding & O'Mahony (n 97) 138.

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supports that a person will need, not to determine whether they should be found unfit to be tried. It may well be the case that once support is provided, an accused may disagree with advice they have been given and make an unwise decision. Providing that the support has been effective in making sure that they understand their various choices (and the consequences of those choices), it should be their will and preferences that will prevail.

Considering the above, it is suggested that the Law Commission's approach of combining the ECHR effective participation test with an additional consideration of rational decision-making ability is the optimum standard to apply as a starting point, in the absence of empirical research. When more data is available on supported decision-making, there may be a need to revisit and revise this approach. Instead of using the Law Commission's criteria for exclusion, it will be used to evaluate what supports need to be provided.

The purpose of this new evaluation is to remove the discriminatory approach that is occasionally evident in Irish law against persons with a mental disorder. In *People (DPP) v Harrison*, a trial judge finding that the accused was unfit to be tried was overturned.[102] During the original hearing, the psychiatric evidence established that the stress of a trial might put an "extra demand or cognitive load" onto the accused, resulting in their condition causing greater difficulties than it ordinarily would, particularly in recalling details.[103] Dr Monks of the Central Mental Hospital testified that notwithstanding these difficulties, "accommodations could be made" to assist the accused in the event that he was found fit to stand trial.[104] The Circuit Court judge held that such accommodations were an impossibility as:

> the Court cannot assess specifically what can be put in place. It's a matter that would evolve over time during the process of the trial and it appears difficult to be able to anticipate what structures could possibly be put in place or to anticipate the difficulties that would be encountered on a day-to-day basis by the accused in respect of the conduct of the trial as the evidence evolved.[105]

The Court of Appeal held that this was an error in principle. The ruling that the accused could not receive a fair trial was premature and the issue of unfitness should not have been confused with the practical accommodations that might have to be introduced to protect the accused's right to a fair trial.[106] The Court also stated that:

> [a] question raised as to a person's fitness to be tried in principle must be considered and determined separately and discretely from any issue as to whether a person, having been found fit to be tried in principle, can in fact receive a fair trial in light of particular personal, mental or physical difficulties.[107]

The Court of Appeal's reasoning was not entirely clear. It discussed the accommodation of other difficulties, such as deaf defendants who may require sign

[102] *Harrison* (n 2) (Edwards J).
[103] ibid [34].
[104] ibid.
[105] ibid [35].
[106] ibid [53].
[107] ibid.

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language, blind defendants who may require documents in Braille, and non-English speaking defendants who might require an interpreter. These accommodations may be essential in ensuring a fair trial in a broad sense, but the affected person would be found unfit to be tried if they were not provided. Thus, there seems to be a difference in approach. When we consider the issue of a deaf person, our instinct is not to question whether such a person is unfit to be tried, but rather to consider what support may be required during the trial. There is no reason why our approach to a person with a mental disorder should be different. A deaf defendant may struggle to understand the evidence presented without assistance just as a defendant with a mental disorder might, but if reasonable assistance or accommodation can resolve this issue for both persons, there seems to be no logical reason why only one should be declared unfit to stand trial merely because of how that difficulty arises. Therefore, the Court's direction that the two issues should be considered separately and discretely is unhelpful. Whether the defendant's particular difficulty can be resolved by assistance or accommodation is surely relevant to whether it is appropriate to declare them unfit to be tried. Thus, whilst the judgment produced the correct result, it still appears to be treating psychiatric difficulties differently from other difficulties, which is contrary to Article 5.4 of the CRPD, which permits differential treatment only when the result is equal enjoyment of a human right.

Therefore, the first step to this issue should always be an evaluation of what support is required to ensure a fair trial. This evaluation should be carried out with the presumption that the accused will be able to stand trial with the appropriate support and accommodation. Only if it is determined that no support can be provided to ensure effective participation should we consider if the trial should be prohibited from proceeding.

B. Steps If Support Will Not Result in a Fair Trial

It is inevitable that there will be some defendants for whom support or accommodations would be inadequate to ensure a fair trial. In this section, it will be considered what provisions should be introduced into Irish law to deal with this issue.

There are some academics who have argued that unfitness to be tried declarations will not be CRPD compliant under any circumstances. Minkowitz argues that the CRPD requires the abolition of all determinations that a defendant is unfit to stand trial, interpreting the provisions of Article 12 (The right to equal treatment) and Article 13 (Access to Justice) to imply that persons with disabilities must be recognised as having the capacity to stand trial for a criminal offence.[108] She argues that procedural accommodations and support can be provided for all stages of criminal proceeding to accomplish this.[109] She further contends that the obligation to abolish such procedures also derives from Articles 13 and 14, as a result of the right to equality in proceedings relating to the deprivation of liberty.[110] The latter argument assumes incorrectly that

[108] Tina Minkowitz, 'Rethinking criminal responsibility from a critical disability perspective: The abolition of insanity/incapacity acquittals and unfitness to plead, and beyond' (2014) 23 Griffith L Rev 434, 444-445 https://doi-org.ucc.idm.oclc.org/10.1080/10383441.2014.1013177.
[109] ibid 458.
[110] ibid 447.

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an unfit declaration and involuntary detention are inextricably linked, which is not the case. The former point seems relatively uncontroversial; if a defendant would be deemed fit to be tried only if support was provided, that support should be provided rather than declaring them unfit to stand trial. However, what is not acknowledged in her analysis is that support cannot remedy every risk of an unfair trial.[111] For example, there may be exceptional cases where patients with dementia are unable to retain any new information or recall facts that are vital to their defence. Therefore, there will be occasions when support mechanisms cannot result in effective participation. Rather than insisting that support will always be effective, there needs to be some provisions which can guide courts in those exceptional cases.

Dhanda argues that whilst Article 12 does not prohibit substitute decision-making in its text, when the CRPD is read in light of the treaty's object and purpose, the shift towards supported decision-making is obvious.[112] The solution, where a person's will and preferences cannot be determined, is to decide any matters according to the best interpretation of will and preferences that can be formulated. As discussed in section 3.3, it would be extremely difficult to apply this standard to a defendant participating in a criminal trial. Even if it was possible, it would likely not be sufficient to ensure a fair trial which requires effective participation throughout, not just a prediction of what the defendant might decide on a particular matter.

There may be other difficulties, depending on the particular decision. For example, even if the supported decision-maker, attempting to determine a defendant's will and preferences, is convinced that it would be their desire to plead guilty, it is difficult to believe that the courts could ever permit a guilty plea to be made based on such a belief. They could not be satisfied that the defendant understands the legal consequences of making such a plea. Even if we can determine a defendant's preference in some matters, such as that an incapacitated person would have chosen to testify in their own defence, it may be of limited practical use if the person is incapable of providing this testimony. Furthermore, an accused's role in their own defence is not limited to making decisions. Often it is their own knowledge of the events that is essential to their defence, which is why an emphasis is placed on the ability to instruct a legal representative. If this knowledge cannot be communicated, then there is a risk of injustice and an unfair trial.

Thus, it is acknowledged that there will be some occasions when it will not be possible to ensure that a defendant can have a fair trial. However, some additional safeguards are required to ensure that the defendant is not prematurely or unnecessarily excluded from the trial process.

[111] Jill Peay, 'Mental incapacity and criminal liability: Redrawing the fault lines?' (2015) 40 Int J Law Psychiatry 25, 29 https://doi.org/10.1016/j.ijlp.2015.04.007.
[112] Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2007) 34 Syracuse J Int'l L & Com 429, 460-462 https://www.proquest.com/scholarly-journals/legal-capacity-disability-rights-convention/docview/197142449/se-2.

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Studies have shown different psychiatrist and psychologist findings regarding fitness evaluations in a number of hypothetical cases.[113] The Interdepartmental Group, which was set up to examine issues relating to people with mental illness who come in contact with the criminal justice system, recommended the introduction of an obligation on the part of the trial judge to consider medical evidence before making an unfitness to be tried declaration.[114] This is currently optional under the 2006 Act. Whilst making the consideration of medical evidence mandatory is a step in the right direction, this recommendation does not alleviate the concern of unreliable assessments. In its 2016 report, the Law Commission recommended that a second medical report should be required to aid in filtering out "rogue reports".[115] This approach is preferable to the single report recommendation of the Interdepartmental Group.

The reports should aid the court in determining the defendant's prognosis. If there is a reasonable chance that the defendant may recover to the extent necessary to stand trial with appropriate supports in a reasonable amount of time, then the hearing should be adjourned without a declaration that the accused is unfit. What constitutes a 'reasonable' amount of time is difficult to ascertain in the absence of research, but for the purposes of this article, it will be set at six weeks.[116] If it is determined that the accused is not likely to recover within six weeks, the court will need to decide between three possible courses of action.

(i) where there is a reasonable chance that the defendant's condition will improve to the extent necessary to participate effectively in a trial, but not within a reasonable amount of time.

There may be some cases where there is a reasonable chance that the defendant will recover, but not within a short period of time. In this case, the State's responsibility will be to assist the defendant to getting to a place where their cognition and decision-making skill will be at a point where they can be supported to stand trial. An unfitness declaration should still not be issued, but it will be necessary for the court to order treatment as part of the support and accommodation measures that are necessary.

Treatment can be ordered, providing there are no indications that it would be against the true will and preferences of the defendant, and should be recommended by the same two approved medical officers who have determined that the accused is currently unable to receive a fair trial. This treatment can be based on the assumption in Saks model[117] that when a mental disorder has deprived a person of their ability to

[113] Grant H Morris, Ansar M Haroun & David Naimark, 'Competency to Stand Trial on Trial' (2004) 4 Hous J Health L & Pol'y 193, 214 https://heinonline.org/HOL/P?h=hein.journals/hhpol4&i=203.
[114] Department of Justice and Equality, *First Interim Report of the Interdepartmental Group to examine issues relating to people with mental illness who come in contact with the criminal justice system* (Department of Justice and Equality 2016) 21.
[115] Law Com 364 (n 90) 113.
[116] This time period was chosen because it may be up to six weeks before some patients feel the "full effect" of antipsychotic medication; National Institute of Mental Health, 'Mental Health Medications' <https://www.nimh.nih.gov/health/topics/mental-health-medications> accessed 3 July 2025.
[117] Elyn Saks, 'Refusing Care: Forced Treatment and the Use of Psychiatric Advance Directives' (2004) 4(4) J Forensic Psychol Res Pract 35, 38 https://doi-org.ucc.idm.oclc.org/10.1300/J158v04n04_03.

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communicate or make decisions, a person would typically opt for assistance in returning to a state when they are able to communicate their will and preferences.[118] Treatment and care may be ordered on an outpatient basis, although dependant on the defendant's own circumstances, it may be necessary to detain them in the Central Mental Hospital for the purposes of this treatment. If detention is essential, additional safeguards will be required. Those detained for treatment under this process should receive a review of detention and progress every 28 days, although an additional review can be requested by the patient or their legal representatives. An appropriate length of time needs to be set by the medical officers by which the defendant would normally have been expected to start recovery.[119] This will vary according to the condition but is necessary to ensure that the restriction of liberty is proportionate to the goal of helping the defendant communicate their will and preferences.

Available data suggests that recovery was most common in patients with schizophrenia or related conditions and occurred within 18 months.[120] Thus, 18 months seems to be the most reasonable estimate that can be formulated at this time. This process may create a tension with the accused's right to a speedy trial, guaranteed by both the ECHR[121] and the Constitution,[122] but on balance it seems to be a proportionate limitation. Rather than depriving the accused of the right to stand trial and subjecting them to a determination of 'unfitness', it should be recognised that justice may sometimes be better served by delaying the trial and allowing the accused to recover before presenting their defence.

If, at any point, it becomes apparent that treatment is against the true will and preferences of the defendant or that the defendant is not likely to recover within a reasonable period of time, the process must be discontinued and either of the procedures outlined in (ii) or (iii) below should be followed, as appropriate. This approach ensures that the voices of persons with disabilities are respected but also ensures that the State is able to assist the accused in recovering to the extent that they can have an equal access to justice.

(ii) where there is no reasonable prospect that the defendant's condition will improve to the extent necessary to participate effectively in a trial.

As psychiatry is uncertain and inexact, a "reasonable certainty" test has been suggested rather an absolute certainty that the accused will never regain the capacity to stand trial.[123] It seems futile to leave charges pending, or to keep the defendant detained if there is no reasonable prospect that they will ever be able to stand trial.

[118] On this point, see Flynn & Arstein-Kerslake who argue that: "the social contract provides the framework within which we can presume that no individual prefers to be harmed, and where someone is being harmed she would like assistance in ending the harm"; Flynn & Arstein-Kerslake (n 96) 99.
[119] Eizenstat (n 50) 406.
[120] Luke Noonan, 'Reforming Mental Condition Defences and Procedures in the Criminal Justice System in light of the Convention on the Rights of Persons with Disabilities' (PhD thesis, University College Cork 2023), Appendix 9 https://hdl.handle.net/10468/15552.
[121] ECHR (n 10) Article 6.
[122] *State (O'Connell) v Fawsitt* [1986] IR 362, 371 (Murphy J).
[123] Eizenstat (n 50) 405.

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This may particularly be the case where the defendant has a severe intellectual disability or a condition like dementia which will only worsen over time. In Ireland, it appears that such defendants are not usually subjected to a committal order if treatment will not help their conditions.

However, at this stage the question becomes whether we should proceed to a trial in light of the defendant's condition. Does an incapacitated defendant have the right to test the charges against them? Delaying the trial further will not improve matters. Either the charges are dropped or the trial proceeds. The CRPD indicates that the latter option is preferable, whilst the ECHR would seem to prohibit such an approach. Arstein-Kerslake *et al* suggest that in these "hard cases", the accused should be provided with an advocate who has the "responsibility for interpreting the will and preference of the individual to the best of that person's ability and to convey that to the court and the relevant professionals involved with the trial process".[124] They do not discuss any specific functions that this advocate could perform. Whilst it is acknowledged that an advocate could play a role distinct from a legal advisor, it was discussed above that there are limitations as to the utility of the best interpretations of a defendant's will and preferences in a criminal trial. It may help to ensure that the defendant's preferences are respected by their legal representation, but it is unlikely that it would result in a fair trial, where justice may depend on knowledge that is only known to the defendant.

As outlined in section 2.1, the Irish legislation provides for a hearing to be held to determine if reasonable doubt exists as to the accused's guilt after they have been found unfit to be tried, although such a procedure is not mandatory, and it is unclear how often it occurs in practice. The Interdepartmental Group has recommended that this optional 'trial of the facts' procedure should be mandatory before any committal order is made.[125] To comply with the CRPD, it seems that any such opportunity for a defendant to clear their name must be mandatory, especially in circumstances where it is likely that they will never recover to the extent that they will be able to stand trial. In this case, rather than being a criminal trial, the process would be an 'without prejudice' hearing into the alleged incident. The hearing would resemble an actual criminal trial in all respects except one. There are no consequences for the accused if they are not acquitted; it is an opportunity for them to test the evidence and clear their name, it does not result in a conviction if the prosecution is able to prove their case beyond reasonable doubt. In this 'without prejudice' hearing, the accused's legal representatives would be able to argue any defence that would normally be admissible at a trial, and the prosecution would have to prove all the elements of the offence, including *mens rea*, beyond reasonable doubt.[126]

Arstein-Kerslake *et al* are doubtful that this separate adjudication process meets CRPD standards as it still deprives persons with disabilities of the full trial that other

[124] Anna Arstein-Kerslake, Piers Gooding, Louis Andrews & Bernadette McSherry, 'Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities' (2017) 17 HRLR 399, 414 https://doi-org.ucc.idm.oclc.org/10.1093/hrlr/ngx025.
[125] First Interim Report (n 114) 22.
[126] See further, Gooding *et al* (n 81) 847.

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defendants receive, and thus is still discriminatory.[127] However, there is no way that a fair trial can be conducted without effective participation from the defendant and thus, any attempts to impose a criminal sanction in this hearing would be in violation of both the Constitution and the ECHR. Gooding *et al* are more optimistic about alternative trial processes, believing that such may be acceptable under the CRPD if the same standard of proof is used as in typical criminal trials, the accused continues to be presumed innocent, and all defences are available.[128]

It seems that double jeopardy will not attach if the accused is cleared at the hearing. If the accused is not in jeopardy to begin with, the prosecution cannot be prevented from trying the accused again. Therefore, a specific statutory provision would also be required to establish that an accused who is acquitted at the 'without prejudice' hearing cannot be subjected to a subsequent criminal trial in relation to the same incident if they were to regain capacity.

Where the result of the 'without prejudice' hearing is that the prosecution has proven all the elements of the offence, the reporting restrictions contained in the 2006 Act should apply to this result. This is necessary to protect the accused's right to a good name. In this regard, it is important to bear in mind the point of the hearing. It gives the incapacitated person the right to test the evidence and clear their name, but it is not enough to actually prove their guilt. This goal is not possible unless the accused is in a position to assist in their own defence.

Where an accused is acquitted, the situation is more complicated. It seems as if it might be necessary to extend the reporting restrictions to cover acquittals. This is because of the new mandatory nature of the 'without prejudice' hearing. If the media could report acquittals, then silence on the result would indicate that the accused had not been acquitted at this hearing. However, this seems to deprive the accused of their right to clear their name in public. One solution is to prevent the media from publishing an accused's details if there is a fitness to be tried issue and only permit the accused's identity to be revealed if they are cleared at the 'without prejudice' hearing or are subsequently found fit to be tried.

Where the 'without prejudice' hearing has failed to exonerate the accused, they should be discharged unless "because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other person".[129] The position of this article is that the CRPD does not prohibit involuntary detention in such cases. In the unlikely event that the accused should recover to such an extent that they are able to stand trial, an actual criminal trial should take place, subject to the standard safeguards regarding the prejudice that delay may cause an accused's defence.

[127] Arstein-Kerslake *et al* (n 124) 415.
[128] Gooding *et al* (n 81) 863.
[129] This is currently the first ground contained in the Mental Health Act 2001 which permits involuntary detention; Mental Health Act 2001, s 3(1)(a).

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(iii) where there is a reasonable prospect that the defendant's condition will improve to the extent necessary to participate effectively in a trial, but treatment is contrary to the defendant's true will and preferences.

Determining a defendant's true will and preference can be challenging when they lack insight into their condition, but generally the CRPD prohibits forced treatment unless there is an immediate risk of death or serious injury. When it is clear that it is the defendant's true will not to undergo treatment, and this is not caused by a lack of insight, then treatment or detention must not be ordered.

At this stage, the process can move to the procedure outlined in (ii) unless it is determined that the defendant's refusal to undergo treatment is a deliberate attempt to frustrate the trial process or avoid being answerable for their crime. If it is the latter, it may be permissible under the ECHR to consider that the defendant has waived their right to be present and participate in their trial, and the criminal process can continue with a trial *in absentia*.[130] To what extent the Irish Constitution would permit such a process is uncertain.[131] In *People (Attorney General) v Messitt*, Kenny J, delivering the judgment for the Court of Criminal Appeal, considered it "unnecessary to attempt to state comprehensively when it is permissible to depart from the rule that the trial of an indictable offence must be conducted in the presence of the accused", and that the court only had to decide whether the absence in the present case invalidated the trial.[132]

However, it is clear that in certain circumstances trials *in absentia* would pass constitutional muster. It could be argued that the policy reasons for not allowing a defendant to deliberately frustrate the trial process by refusing to undergo treatment are just as strong as defendants who voluntarily absent themselves by other means, such as bad behaviour in the courtroom. Certain safeguards will be required, and the discretion must be exercised with "great caution and with close regard to the overall fairness of the proceedings".[133] It will only be appropriate to hold a trial *in absentia* in circumstances when the defendant has been adequately warned and given sufficient notice about the consequences of their deliberate attempts to avoid a trial. The Court must be satisfied the defendant understands this warning. Additionally, the trial should only continue with adequate legal representation for the defence. If the defendant has not appointed their own representation, the Court should do so for the purposes of the trial *in absentia.* It may also be appropriate for the trial judge to provide the jury with special instructions depending on the nature of the specific case.[134] If the result of the trial *in absentia* is a conviction, the defendant should be provided with an option of a trial *de novo* if they now wish to participate in the proceedings.

[130] *Colozza v Italy* App No 9024/80 (ECHR, 12 February 1985) [28]-[29]; *Sanader v Croatia* App No 66408/12 (ECHR, 12 February 2015) [77]-[78].
[131] Michael Forde & David Leonard, *Constitutional Law of Ireland* (3rd edn, Bloomsbury 2013) [17.22].
[132] *People (Attorney General) v Messitt* [1972] IR 204, 211 (Kenny J).
[133] O'Malley (n 63) [4-58].
[134] ibid [4-59].

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V. CONCLUSION

Arstein-Kerslake *et* al argue that:

> [i]nstead of seeing inconsistencies ... as an insurmountable barrier, [the innovations of the CRPD should be used as a lens to] … examine the status quo and explore whether the antiquated – and sometimes inconsistent – laws of the past sufficiently protect the rights of persons with cognitive disabilities.[135]

When examining the fitness to be tried procedure under the lens of the CRPD, it can be seen that the process often discriminates unfairly against persons with disabilities and deprives them of their legal capacity without appropriate safeguards. However, any reform needs to comply with the constitutional right to a fair trial and the ECHR requirement of effective participation on the part of the defendant.

To achieve an appropriate balance, it has first been suggested that the legal test for unfitness should be widened to include an assessment of decision-making capacity. This new legal test should not be used to assess fitness to stand trial, but to determine what supports or accommodations are necessary for the accused to participate effectively in the trial.

There may be hard cases, where no amount of support will be sufficient to satisfy ECHR or constitutional requirements. In this situation, an assessment should be made by at least two medical practitioners as to whether the accused is ever likely to be able to stand trial with support. If there is no reasonable chance at recovery, the matter should proceed to a 'without prejudice' hearing so the evidence against the accused can be tested, and their legal representatives can present a defence and attempt to clear their name. If there is a reasonable chance of recovery within a short period of time, the trial should be postponed. At this point, efforts should focus on "augmenting [the accused's] decision-making ability to a point at which [they] can clearly express [their] wills and preferences", communicate their decisions, and adequately understand and follow the trial process.[136]

Whilst this article has suggested a procedure which strikes a balance between CRPD compliance and the rights to a fair trial, there are limits to what can be achieved by a doctrinal methodology. Reform in this area should be paused until there has been sufficient research conducted into supported decision-making, particularly by the disciplines of psychiatry and psychology, and how it would work in the context of a criminal trial. This article provides a legal framework that can act as a basis for future research for these disciplines.

[135] Arstein-Kerslake *et al* (n 124) 418.
[136] Flynn & Arstein-Kerslake (n 96) 98.

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