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The Insanity Defence, Indefinite Detention and the UN Convention on the Rights of Persons with Disabilities

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Abstract

The defence of insanity has long provided a means by which persons with a psychosocial disability can be detained in a designated facility, for the purpose of receiving medical treatment. As such, the operation of the insanity defence results in the removal of the right to liberty and the right to consent to treatment, for potentially an indefinite period of time. The defence has been subject to criticism for many decades, but it is now time to take stock of its relevance, especially in light of the Convention on the Rights of Persons with Disabilities. This paper will critically examine the application of the insanity defence in Ireland and investigate its future considering Ireland's expected ratification of the UN Convention on the Rights of Persons with Disabilities.

1. INTRODUCTION

The insanity defence is one of the cornerstone defences of criminal law, which serves to exempt an individual from criminal liability based on their mental condition. The rationale of the defence is to protect the defendant from facing punishment for an act that they did not form the necessary *mens rea* to commit.[1] This in turn, serves as a means of upholding the integrity of the adversarial criminal process, as it would be 'discriminatory if the defendant could not understand and participate meaningfully in proceedings against them.'[2] The

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[1] For further information on the insanity defence in Ireland, see generally: Finbarr McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Round Hall: Dublin, 1993) and Darius Whelan, *Mental Health Law and Practice* (Round Hall: Dublin, 2009).

[2] Piers Gooding and 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 *International Journal of Law, Crime and Justice* 122, 123.

defence traditionally operates in two parts; that the individual was insane at the time the act was committed, or the individual was insane at the time of the trial, and so incapable of defending him or herself.[3]

One of the most controversial defences of criminal law, the jurisprudence relating to the defence has long been 'in a state of chaos,' according to Slobogin.[4] While proponents argue that the defence is fundamentally important to the criminal justice process, critics have voiced concerns regarding the appropriateness of the defence, the length of time an individual spends in psychiatric detention following a successful plea and the possibility of involuntary treatment.[5] This is particularly problematic in Ireland, as a country with a long history of institutionalising persons with psychosocial disabilities.[6] The debate regarding the future of the insanity defence has arisen once again, following the commencement of the UN Convention on the Rights of Persons with Disabilities.[7] The Convention, which is provoking law reform in the area of disability law and policy, casts uncertainty as to the continued reliance on capacity-based legislation. The objective of this paper is to consider the implications arising from a verdict of not guilty by reason of insanity from a right to liberty perspective. Specifically, it will seek to review the safeguards currently in place to provide for the review of continued detention and treatment for all persons detained on foot of the insanity verdict.

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[3] *R v M'Naghten* [1843-1860] ALL ER Rep 229. This landmark case established that if an accused person was 'labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.'

[4] Christopher Slobogin, 'An End To Insanity: Recasting The Role Of Mental Disability In Criminal Cases' (2000) 86 *Virginia Law Review* 1199, 1199 referencing Sheldon Glueck, *Mental Disorder and the Criminal Law: A Study in Medico Sociological Jurisprudence* (California: Little, Brown and Company, 1925) 187-88: 'Perhaps in no other branch of American law [is] there so much disagreement as to fundamentals and so many contradictory decisions in the same jurisdictions. Not a modem text or compilation begins the discussion of the subject of insanity and its relation to the criminal law without a doleful reference to the chaos in this field.'

[5] For more information regarding the debate, see Piers Gooding and Tova Bennet, 'The Abolition of the Insanity Defense in Sweden and the United Nations Convention on the Rights of Persons with Disabilities: Human Rights Brinksmanship or Evidence it does not Work?' (2017) (Forthcoming) *New Criminal Law Review*;
Thomas Szasz, *Insanity and its Consequences* (New York: Syracuse University Press, 1997); Christopher Slobogin, 'An End to Insanity: Recasting the Role Of Mental Disability In Criminal Cases' (2000) 86 *Virginia Law Review* 1199.

[6] For further information on the history of mental illness in Ireland see generally: Brendan Kelly, 'Mental Health Law in Ireland 1821 to 1902: Building the Asylums' (2008) 76(1) *Medico-Legal Journal* 19; Joseph Robins, *Fools and Mad: A History of the Insane in Ireland* (Institute of Public Administration 1986); Elizabeth Malcolm, *Swift's Hospital: A History of St. Patrick's Hospital, Dublin, 1746–1989* (Gill and Macmillan 1989); Joseph Reynolds, *Grangegorman, Psychiatric Care in Dublin Since 1815* (Institute of Public Administration 1992).

[7] Convention on the Rights of Persons with Disabilities 2007 A/RES/61/106 Annex I.

This discussion is even more pertinent in light of Ireland's recent ratification of the Convention in March 2018, eleven years after first signing it in 2007.[8] Therefore, it is timely to consider the implications of ratifying this Convention with respect to all law and policies relating to people with disabilities, including the Criminal Law (Insanity) Act 2006. This legislation, which was commenced just one year before Ireland signed the UN CRPD, introduced significant reforms in the area of criminal responsibility including a new definition of insanity, moving away from the earlier "guilty but insane" to the revised verdict of "not guilty by reason of insanity."[9] In this vein, the law moved away from the earlier approach which recognised both findings of guilt and mental disorder, towards a defence which explicitly precludes a finding of guilt, but which recognises the existence of a mental disorder.[10]

Moreover, in line with the updated language, the 2006 Act removes the earlier requirement of automatically removing an individual found "guilty but insane" to the Central Mental Hospital,[11] where they would inevitably remain without the right to a periodic review, in violation of the right to liberty as set out in Article 5(4) European Convention on Human Rights. The 2006 Act was therefore a welcome improvement which introduced a number of much-needed reforms, the most important being the establishment of the Mental Health (Criminal Law) Review Board, an independent monitoring body responsible for reviewing the treatment and detention of persons detained in accordance with the criminal law.[12] While this serves as an important safeguard for the right to liberty, there remains a significant risk of indefinite detention following a verdict of "not guilty by reason of insanity". There are also several shortcomings that need to be addressed, particularly in the wake of the CRPD and the emerging literature on the rights contained therein.

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[8] See the transcript of the Dáil debate on the motion to ratify the CRPD: Kildare Street, United Nations Convention on the Rights of Persons with Disabilities: Motion (Wednesday, 7 March 2018) available: <https://www.kildarestreet.com/debates/?id=2018-03-07a.457&s=uncrpd#g498>.

[9] For further information see Louise Kennefick, 'Diminished responsibility in Ireland: historical reflections on the doctrine and present-day analysis of the law (2011) 62(3) Northern Ireland Legal Quarterly 269.

[10] Section 1, Criminal Law (Insanity) Act 2006.

[11] Trial of Lunatics Act 1883.

[12] Section 11(2) Criminal Law (Insanity) Act 2006: 'The Review Board shall be independent in the exercise of its functions under this Act and shall have regard to the welfare and safety of the person whose detention it reviews under this Act and to the public interest.'

This paper begins with an analysis of the Convention and the challenges it poses for the criminal justice system, particularly with regard to the defence of insanity.[13] Article 12 (the right to capacity) and Article 14 (the right to liberty) are the most pertinent for the purpose of this discussion. Part two of the paper will then seek to trace the history of the insanity defence in Ireland, from the Trial of Lunatics Act to the current Criminal Law (Insanity) Act. Finally, the role of the Criminal Law Review Board will be addressed with respect to its role to safeguard the right to liberty. The objective of this discussion is to consider the potential future orientation of Irish law in securing the rights of persons with disabilities and reflecting the standards of the UN Convention on the Rights of Persons with Disabilities.

2. THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The UN Convention on the Rights of Persons with Disabilities was introduced in 2006, and came into effect in 2008.[14] The first human rights treaty of the twenty-first century, this Convention re-envisioned existing human rights protections with respect to all people with disabilities. The widespread ratification of the CRPD, and the participation of disability rights organisations during the drafting process, heralded a significant turning point in the disability rights movement, which has been ongoing since the 1960s.[15] All States Parties are required to protect, promote and enforce the rights of all persons with disabilities,[16] including 'those who have long-term physical, mental, intellectual or sensory impairments.'[17]

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[13] While the Convention does not specifically address criminal justice, apart from Article 13 which provides for a broad right of access to justice; it does signal the need for a reconsideration of all existing laws and policies which discriminate against persons with disabilities. Indeed, many of the rights contained in the Convention such as the right to non-discrimination, right to exercise legal capacity, right to be free from inhuman treatment can be applied within a criminal justice context.

[14] For more information on the Convention, see: Rosemary Kayess & Philip French, 'Out of the darkness into the light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1; Arlene S Kanter, 'Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2006) 34(2) *Syracuse Journal of International Law and Commerce* 287; Anna Lawson, 'United Nations Convention on the Rights of Persons with Disabilities: New Era or false Dawn' (2006) 34(2) *Syracuse Journal of International Law and Commerce* 563; Eilionoir Flynn, *From Rhetoric to Action; Implementing the UN Convention on the Rights of Persons with Disabilities* (Cambridge University Press 2011).

[15] The civil rights movement in America played an important role in the re-conceptualisation of disability during the 1960s. See generally Michelle Fine and Adrienne Asch, 'Disability Beyond Stigma: Social Interaction, Discrimination, and Activism' (1988) 44(1) *Journal of Social Issues* 3-21, 3-5.

[16] Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating personhood: realising the right to support in exercising legal capacity' (2014) 10(1) *International Journal of the Law in Context*, 82.

[17] Article 1, Convention on the Rights of Persons with Disabilities.

There is some debate with regard to whether persons with mental health conditions are included within the scope of the definition of disability as provided in the CRPD, as some psychosocial disabilities which may occur intermittently, and therefore may not meet the standard of a "long term" disability.[18] The nature of mental health conditions, such as the experience of depression and schizophrenia, can be disabling in itself, and may prevent an individual from participating fully in society and they may be experience a risk of discrimination as a result. Further, the definition of disability put forward in the CRPD is not exhaustive and must be interpreted in a broad sense to include all persons with long-term disabilities; such would include intermittent mental health conditions.[19]

Article 2 also provides that for the purposes of interpreting the CRPD, all discrimination on the basis of disability includes all forms of discrimination; direct, indirect, structural, multiple or other, as well as discrimination by association and discrimination based on assumed or future disability.[20] Fennell has stated that in terms of protecting the rights of the mentally ill going forward, there must be a re-conceptualisation of mental health rights into disability rights as it 'lays greater emphasis on positive rights and upholds the social inclusion, anti-stigma and equality agenda, without losing sight of the key imperative of legality, due process and proportionality.'[21] Therefore, the rights contained within the CRPD should be applied equally to all people with long-term disabilities, including mental health conditions, and in this light, the rights contained in the CRPD must be extended to all people detained in public asylums, psychiatric facilities and all other institutions including those detained following a finding of unfitness to plead or not guilty by reason of insanity.

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[18] See Brendan Kelly, *Mental Illness, Human Rights and the Law* (RCPsych Books, 2016); George Szmukler, Rowena Daw and Felicity Callard, 'Mental health law and the UN Convention on the rights of persons with disabilities' (2013) 37(3) *International Journal of Law and Psychiatry* 245, 246.

[19] Ibid: 'The use of the word 'include' in the statement above allows for a non-exhaustive description of 'disability' that is not settled; neither are the meanings of terms such as 'long-term' and 'impairments.''.

[20] European Foundation Centre, Study on Challenges and Good Practices in the Implementation of the UN Convention on the Rights of Persons with Disabilities' VC/2008/1214 Final Report, 54.

[21] Phil Fennell, 'Institutionalising the Community: The Codification of Clinical Authority and the Limits of Rights-Based Approaches' in Bernadette McSherry & Penelope Weller (eds.), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing, 2010) 7.

The principle framework underpinning the CRPD is the social model of disability, which has been described as a generic term for a broad theory of disability studies that is continuing to develop under the influence of critical disability studies.[22] In contrast to the medical model of disability, social model theorists argue that there is a duty on society to dismantle the physical and societal barriers within communities to enable the inclusion and participation of persons with disabilities.[23] The fundamental difference between the two models is that the medical model seeks to find medical solutions or a cure to adjust the individual to fit society, whereas the social model focuses on adjusting the social environment to fit individuals.[24] The social model of disability can be said to have two central philosophies. Firstly, it challenges the belief that individuals are "impaired" by their personal "condition", and secondly, it asserts that individuals are limited by obstacles that are created by society.[25] As stated by De Paor and O'Mahony, '[t]he rationale of many of the articles of the CRPD and the definitions further reflect the social model of disability ethos. In reaffirming the social model, Article 1(2) reflects the philosophy that limitations arise as a result of the interaction with various barriers in society.'[26] The Convention emphasises the importance of the social model within the Preamble, which states that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'.[27] This definition also reflects the holistic approach adopted by the Convention, which incorporates an inclusive understanding of the term "disability."

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[22] Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1, 6-7.
[23] Ibid.
[24] Bradley A. Areheart, 'When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma' (2008) 83(1*) Indiana Law Journal* 181, 189.
[25] See Mark Priestley, 'Constructions and Creations: Idealism, Materialism and Disability Theory' (1998) 13 *Disability and Society* 75; Michael Oliver, Understanding Disability: From Theory to Practice (Macmillan Press, 1996); Adam Samaha. 'What Good is the Social Model of Disability' (2007) 74(3) *The University of Chicago Law Review*.
[26] Aisling de Paor and Charles O'Mahony, 'The Need to Protect Employees with Genetic Predisposition to Mental Illness? The UN Convention on the Rights of Persons with Disabilities and the Case for Regulation' (2016) *Industrial Law Journal* 25, referencing Michael Stein and Janet Lord, 'Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities' in Oddny Arnardóttir and Gerard Quinn (eds.), UN Convention on the Rights of Persons with Disabilities (Leiden: Martinus Nijhoff, 2009) 25.
[27] Preamble (e), Convention on the Rights of Persons with Disabilities.

3. THE DEFENCE OF INSANITY AND THE UN CONVENTION

Since its adoption, the CRPD has elicited widespread commentary from State institutions, academics, disabled peoples organisations, non-governmental bodies, among others. In particular, there are significant challenges for States Parties in the area of criminal justice policies and procedures, as this area remains comparatively underdeveloped in both the literature regarding the Convention and the jurisprudence of the Committee on the Rights of Persons with Disabilities.[28] One of the biggest challenges will involve a reconsideration of existing capacity-based criminal defences such as insanity, diminished responsibility and fitness to plead.[29] The imperative for such a reconsideration arises on foot of one of the hallmark provisions of the Convention, Article 12, which provides that people with disabilities are entitled to equal recognition before the law and requires States parties to 'recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.[30] This right therefore affirms the status of persons with disabilities as persons before the law, entitled to human rights on an equal basis with others.[31]

[28] Article 34, Convention on the Rights of Persons with Disabilities.

[29] For further discussion regarding the laws of unfitness to plead, see Bernadette McSherry, Eileen Baldry, Anna Arstein-Kerslake, Piers Gooding, Ruth McCausland and Kerry Arabena, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community* (Melbourne Social Equity Institute, 2017) Available: http://socialequity.unimelb.edu.au/ data/assets/pdf_file/0006/2477031/Unfitness-to-Plead-Main-Project-Report.pdf.

[30] Article 12(2), Convention on the Rights of Persons with Disabilities.

[31] There has been a considerable amount of literature written about this right, see generally: Amita Dhanda, 'Legal Capacity in the Disability Right Convention: Stranglehold of the past or lodestar for the future?' (2007) 34 *Syracuse Journal of International Law and Commerce* 429; Anna Arstein-Kerslake and Eilionóir Flynn, 'The right to legal agency: Domination, disability and the protections of Article 12 of the Convention on the Rights of Persons with Disabilities' (2017) 13(1) *International Journal of Law in Context* 22; Penelope Weller, 'Supported Decision-Making and the Achievement of Non-Discrimination: The Promise and Paradox of the Disabilities Convention' (2008) 26 *Law in Context* 85; Arlene Kanter, 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 *Syracuse Journal of International Law and Commerce* 287.

The Convention has potentially signalled the end of the insanity defence, and capacity-based defences more generally.[32] Indeed, Gooding and Bennet have noted that the CRPD implies a 'prohibition of separate processes for people with disabilities in criminal law.'[33] The right to equal recognition before the law is thus one of the most progressive rights contained within the Convention. However, it has also become one of the more challenging rights as 'it challenges literally centuries of legal practice which may now be directly contrary to Article 12.'[34] In the context of all legislation, Article 12 has a wide application and may push the boundaries of traditional practices in regards to the law concerning persons with disabilities. One such practice includes the continued reliance on legislation wherein disability is used as a criterion to distinguish between persons, such as guardianship laws, laws which operate to exclude persons with disabilities from providing consent (to marriage, to enter into a legally binding contract, etc.)[35]

In regards to the criminal law, persons with psychosocial disabilities are may be found unfit to plead, or not guilty by reason of insanity during the trial process and are subsequently diverted away from the traditional prison system into a designated psychiatric facility.[36] The existence of such capacity-based defences contradicts the very objective of Article 12 and the ethos of Convention to ensure full equality of all persons with disabilities. Furthermore, as Weller as argued, 'tests for mental capacity offend the principle of indirect discrimination

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[32] See Tina Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23(3) *Griffith Law Review* 434; Piers Gooding and Tova Bennet, 'The Abolition of the Insanity Defense in Sweden and the United Nations Convention on the Rights of Persons with Disabilities: Human Rights Brinksmanship or Evidence it Does not Work?' (2017) (Forthcoming) *New Criminal Law Review;* Michael L. Perlin, ''God Said to Abraham/Kill Me a Son': Why the Insanity Defense and the Incompetency Status are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence' (2017) 54 *American Criminal Law Review* 477.

[33] Piers Gooding and Tova Bennet, 'The Abolition of the Insanity Defense in Sweden and the United Nations Convention on the Rights of Persons with Disabilities: Human Rights Brinksmanship or Evidence it does not Work?' (2017) (Forthcoming) *New Criminal Law Review* 6

[34] Nandini Devi, Jerome Bickenbach and Gerold Stucki, 'Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities' (2011) 5 *European Journal of Disability Research* 249.

[35] United Nations High Commissioner for Human Rights, 'Thematic Study on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities', UN Doc A/HRC/10/48 (26 January 2009) [45]: 'In the area of civil law, interdiction and guardianship laws should represent a priority area for legislative review and reform.'

[36] Section 3(1), Criminal Law (Insanity) Act 2006 provides that 'The Central Mental Hospital is hereby designated as a centre (in this Act referred to as a "designated centre") for the reception, detention and care or treatment of persons or classes of persons committed or transferred thereto under the provisions of this Act.'

because they will have a disproportionate impact on people with cognitive impairment.'[37] A finding of not guilty by reason of insanity is therefore a product of the medicalised conception of disability and may contradict the guarantee provided under Article 12 of the CRPD. States Parties may need to consider introducing a disability neutral approach, which does not seek to distinguish between persons based on the existence of a disability.[38] Equally, if a person with a psychosocial disability has been found to have committed the crime (actus reus) and had formed the necessary intention to commit the crime (mens rea), then they can be found culpable on an equal basis with others.[39]

According to the Subcommittee on Prevention of Torture for Thematic Discussion on Mental Health and Places of Deprivation of Liberty, persons with mental health conditions can be held accountable for their actions through civil and criminal processes, as Article 12 recognises the ability of all persons, without distinction, to exercise legal capacity.[40] As such, this may indicate a departure from capacity-based criminal defences such as insanity, as it seeks to distinguish between persons who are have capacity and persons that do not, thereby limiting the latter from participating equally as an accused person within the criminal process. Such a discrepancy discriminates against persons with disabilities, as the existence of a mental health condition is used to validate a two-tiered criminal justice system.

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[37] Penelope Weller, 'Legal Capacity and Access to Justice: The Right to Participation in the CRPD' (2016) 5(1) *Laws* 13, 18.

[38] One such approach would include the integrationist approach as developed by Slobogin, see 'Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons with Disabilities on the Insanity Defense, Civil Commitment, and Competency Law' (2015) 40 *International Journal of Law and Psychiatry* 36; Christopher Slobogin, *Minding justice: Laws that deprive people with mental disability of life and liberty* (Cambridge, MA: Harvard University Press, 2006).

[39] Christopher Slobogin, 'Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons with Disabilities on the Insanity Defense, Civil Commitment, and Competency Law' (2015) 40 *International Journal of Law and Psychiatry* 36, 37: 'People with impaired decision-making abilities are to be assisted in, not prevented from, making decisions, and if the decisions they make violate a criminal law, they are to pay the consequences to the extent that everyone else does.'

[40] Submission to the Subcommittee on Prevention of Torture for Thematic Discussion on Mental Health and Places of Deprivation of Liberty 22-23 February 2012: www.wnusp.net. This is because Article 12 explicitly recognises the legal capacity rights of persons with disabilities on an equal basis with others 'in all aspects of life.'

The debate regarding the future status of such defences was further bolstered by a position taken by the UN Office of the High Commissioner for Human Rights, wherein it was noted that Article 12 'requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability.'[41] The Office recommended States Parties should replace existing capacity defences with disability-neutral concepts, such as the existing subjective element of a crime which take account of the situation of the individual concerned.[42] While States Parties to the CRPD are not bound by the statements of the Committee or the Office of the High Commissioner, they are often seen as an influential source for interpreting the treaty which can, in turn, guide law and policy reform in this area. Nevertheless, the Office of the High Commissioner for Human Rights has not provided any further guidance or provide reasoning for this assertion and it remains somewhat unclear whether Article 12 absolutely prohibits the use of capacity based defences going forward, and if so, what alternative measures could be put in its place in order to protect people who perhaps, at the time the act was committed, did not form the requisite level of mens rea to be found criminally liable.[43] This has been the focus of much academic discussion to date, however the intricacies of this debate must be further examined, as it is not 'a simple question of abolishing or not abolishing the defence.'[44]

[41] United Nations High Commissioner for Human Rights, 'Thematic Study on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities', UN Doc A/HRC/10/48 (26 January 2009) [47].
[42] Ibid.
[43] In regards to the application of this statement to the laws on unfitness to plead, see Piers Gooding and 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 *International Journal of Law, Crime and Justice* 122.
[44] Mark Hathaway, 'The Moral Significance of the Insanity Defence' (2009) 73(4) *Journal of Criminal Law*, 310.

There has been debate regarding the position of the insanity defence in Irish law for some time now, with Casey and Creven commenting in 1999, that it is an old and outdated forensic and clinical nosology, and its characterisation is a source of bewilderment to medical practitioners.[45] Commenting more broadly, Slobogin has repeatedly argued that the defence is overbroad,[46] and should be abolished as a special defence in criminal law.[47] The integrationist defence, as advocated by Slobogin, would see mental illness as a determining factor removed from legislation.[48] As opposed to relying on disability as a criterion, 'the effects of mental disorder should still carry significant moral weight. More specifically, mental illness should be relevant in assessing culpability only as warranted by general criminal law doctrines concerning mens rea, self-defence and duress.'[49] This approach would also remove the stigma associated with capacity-based criminal defences, which remains one of the most compelling reasons to abolish capacity-based defences; Slobogin has stated that the 'category of "criminal insanity" perpetuates the extremely damaging myth that people with mental disability are especially dangerous or especially uncontrollable.'[50] It must be acknowledged however, that this approach remains incompatible with the CRPD Committees' interpretation of Article 12, as it does permits deprivations of liberty for "undeterrable" persons, essentially those who pose a risk to themselves or society including persons with infectious or contagious diseases, and 'enemy combatants'.[51] In criticising this approach from a disability rights perspective, Minkowitz has argued that this model includes an 'obvious discriminatory purpose and effect against people with psychosocial disabilities.'[52]

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[45] Patricia Casey and Ciaran Craven 'Psychiatry and the Law' (Oak Tree Press Dublin 1999) 367-8, as cited in Louise Kennefick 'What The Doctor Ordered: Revisiting The Relationship Between Psychiatry And The Law In The UK And Ireland' (2008) 58 *Cork Online Law Review*.

[46] Christopher Slobogin, 'Abolition of the Insanity Defence' in Paul H. Robinson, Stephen Garvey, and Kimberly Kessler Ferzan, *Criminal Law Conversations* (Oxford University Press, 2009).

[47] Christopher Slobogin, 'An End to Insanity: Recasting The Role of Mental Disability In Criminal Cases' (2000) 86(6) *Virginia Law Review* 1199.

[48] Christopher Slobogin, 'Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons with Disabilities on the Insanity Defense, Civil Commitment, and Competency Law' (2015) 40 *International Journal of Law and Psychiatry* 36, 36.

[49] Ibid.

[50] Ibid, 39.

[51] Christopher Slobogin, 'Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons with Disabilities on the Insanity Defense, Civil Commitment, and Competency Law' (2015) 40 *International Journal of Law and Psychiatry* 36, 39.

[52] Tina Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23(3) *Griffith Law Review* 434, 439.

In contrast to Slobogin, Perlin has written in defence of preserving insanity and has stated that 'instead of things getting *better* in the future, they may get far *worse* if the General Comments (GC) to Articles 12 and 14 of the CRPD are to gain traction, and if those comments lead to the abolition of the insanity defense, or, even more stupefyingly, of the incompetency status.'[53] According to Perlin, the CRPD requires the continued application of the insanity defence and in criticising the position of the Committee on the Rights of Persons with Disabilities, he argues that the abolition of this defence would result in increased findings of guilt for persons who are morally and factually innocent, and such imprisonment would be for far longer than persons without mental disabilities for similar offences.[54]

Bartlett has also questioned the abolition of the defence and has reasoned that such an approach may be 'counter-intuitive.'[55] According to Bartlett, persons with mental disabilities are already overrepresented in criminal law and in the prison population and a move away from disability-based criminal law would exacerbate the problem.[56] This concern is heightened in countries 'where conditions of detention may be more profoundly substandard, and where fewer legal protections (such as an effective system of legal aid) assist people with mental disabilities in the criminal justice system.'[57] In countries where capital punishment is still in existence, Bartlett notes that the abolition of disability-based defences may lead to the execution of persons whose responsibility for the crimes of which they are accused is in doubt.[58] The World Network of Users and Survivors of Psychiatry have also raised concerns with the proposal to abolish disability-based criminal laws, as 'while we cannot agree with the insanity defense in principle, it needs to be left open as a practical option as long as the death penalty and other harsh measures are being used in the penal

[53] Michael L. Perlin, ''God Said to Abraham/Kill Me a Son': Why the Insanity Defense and the Incompetency Status are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence' (2017) 54 *American Criminal Law Review* 477.
[54] Ibid, 481
[55] Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75(5) *Modern Law Review* 752, 772
[56] Ibid.
[57] Ibid.
[58] Ibid: 'The situation in countries that retain capital punishment is even more stark: if disability-based defences are removed without provision of equally extensive alternatives, more people will be executed who are doubtfully responsible for the crimes of which they are accused.'

system.'[59] According to this report, it is argued that all persons should be protected from the death penalty and other such punishments that inflict long-term and significant harm to the person.[60] Instead of removing the defence of insanity completely, this report argued that the abolition of the defence should be part of a comprehensive penal reform policy, which does not lead to the unjust punishment of persons with disabilities.[61]

Following such concerns, it remains necessary to be cautious moving forward with regard to the future of the insanity defence. On the one hand, there are legitimate concerns regarding the numbers of persons with disabilities within the prison population, with persons with psychosocial disabilities particularly overrepresented.[62] The removal of existing capacity-based legislation, such as the existing insanity defence in Irish law, could lead to greater numbers of people within the prison population. This concern can however be offset by introducing greater procedural and supportive accommodations within all stages of the criminal justice system for persons with disabilities, to enable them to participate equally as defendants.[63] This would also ensure compliance with Article 13, which provides for a right of access to justice through the provision of procedural and age-appropriate accommodations.[64] According to Minkowitz, States Parties are obligated:

> [T]o eliminate the practice of deeming a person unfit to plead or to stand trial has been found under both Article 13 and Article 14, being derived from the right to have equal substantive and procedural guarantees in a proceeding related to the deprivation of liberty. People with disabilities have the right to go to trial, making use

[59] World Network of Users and Survivors of Psychiatry, Implementation manual for the United nations convention on the Rights of Persons with Disabilities.
[60] Ibid.
[61] Ibid.
[62] For information regarding the prevalence of disability within prisons, see United Kingdom, Her Majesty's Inspectorate of Prisons, 'The mental health of prisoners' (London: HM Inspectorate of Prisons, 2007); Harry G. Kennedy et al, Mental Illness in Irish Prisoners: Psychiatric Morbidity in Sentenced, Remanded and Newly Committed Prisoners (National Forensic Mental Health Service: Dublin) Available online: http://www.drugsandalcohol.ie/6393/1/4338_Kennedy_Mental_illness_in_Irish_prisoners.pdf.
[63] Article 2, Convention on the Rights of Persons with Disabilities: '"Reasonable accommodation" means 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.'
[64] Article 13, Convention on the Rights of Persons with Disabilities.

> of accommodations and supports they may need to exercise their rights as defendants and to testify as witnesses if they so choose.[65]

It is necessary to consider the possibility of introducing a disability-neutral framework as recommended by the UN Office of the High Commissioner of Human Rights, which would in turn remove the existing discriminatory treatment of persons with disabilities and remove the stigma associated with the existing insanity defence. However, one must consider the broader implications of removing capacity-based defences and replacing them with disability-neutral alternatives.

Right to Liberty Perspectives

While there are a number of concerns which arise in relation to the continued reliance on capacity-based criminal defences, including the mere existence of such defences, the most immediate concern remains the possibility of long-term or indefinite detention following a successful plea of insanity, for the purpose of receiving medical treatment. In reality a successful insanity verdict could lead to a greater period of time spent in a hospital than if the individual had been found guilty of committing the offence in question. This therefore raises complex issues regarding the fundamental human right to liberty as set out under Article 14 of the Convention and also protected in Article 5 of the European Convention on Human Rights. Article 14 on the right to liberty and security of the person, includes an absolute prohibition of detention on the basis of impairment:

> [T]he Committee has established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment. However, legislation of several States parties, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived impairment, provided there are other reasons for their detention, including that they are deemed dangerous to themselves or others. This practice is

[65] Tina Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23(3) *Griffith Law Review* 434, 447-448, citing Committee on the Rights of Persons with Disabilities, Concluding Observations on Belgium, 12th sess, UN Doc CRPD/C/BEL/CO/1 (3 October 2014) paras 27–28.

incompatible with article 14; it is discriminatory in nature and amounts to arbitrary deprivation of liberty.[66]

This right reaffirms the well-established right to liberty which already appeared in international human rights laws, but reappears within the Convention as a disability-specific right.[67] This follows a long history of institutionalisation, whereby people with disabilities have been deprived of their right to liberty in an arbitrary or unlawful manner, across the world.[68] Article 14 therefore seeks to provide a guarantee to people with disabilities, and enforce a duty on States Parties to adhere to this right. The wording of Article 14 is important, as it provides that States Parties "shall ensure" that persons with disabilities enjoy the right to liberty and security of person on an equal basis with others. The use of the word "shall" indicates that the it is not an absolute right to liberty, as it may be qualified or modified depending on the circumstances of the case, similar to Article 5 of the European Convention on Human Rights.[69] But, in all cases, disability can no longer be used as a criterion to justify a deprivation of one's liberty.

Arguably, this provision provides far less detail than other human rights Conventions with regards to the procedural guarantees available to persons who have been deprived of their liberty. Article 14(2) provides that if a person with a disability is deprived of their liberty through any process (civil or criminal); they are entitled to due process guarantees which are available to all individuals under international human rights law, and shall be treated in line with the objectives and the principles as set out in the Convention.[70] Article 14 is however

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[66] Committee on the Rights of Persons with Disabilities, 'Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities' Adopted during the Committee's 14th session, held in September 2015, [6].

[67] The right to liberty is one of the most fundamental human rights that and is well established in international law. Article 3 of the Universal Declaration of Human Rights proclaims that everyone has the right to life, liberty and security of person. The right to liberty is further recognised in a number of soft law instruments including the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

[68] Mental health laws, for example the Mental Health Act 2001, continue to provide for the deprivation of liberty for the purpose of receiving care, observation or treatment.

[69] Jean Allain, Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities (Disability Action's Centre on Human Rights for People with Disabilities, 2009) Available online: http://www.disabilityaction.org/fs/doc/legal-report-2-treaty-interpretation-and-the-un-convention-on-the-rights-of-persons-with-disabilities.pdf.

[70] Gerard Quinn, 'A Short Guide to The United Nations Convention On The Rights Of Persons With Disabilities' in Gerard Quinn and Lisa Waddington (eds.), *European Yearbook on Disability Law: Vol 1* (Intersentia, 2009)

subject to immediate effect and is not subject to the clause of progressive realisation, as with other rights contained in the Convention.[71] This reaffirms the level of importance associated with the right to liberty, and all such laws providing for the deprivation of one's liberty based on the existence of a disability, must be repealed.

While Article 5 ECHR also provides for the right to liberty and security of person, it is qualified by a number of provisions which permit deprivation of liberty in a number of circumstances. One such exception allows for the 'lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.'[72] In contrast, the existence of a disability can never justify a deprivation of one's liberty under Article 14. This has led to considerable debate about whether perceived "dangerousness" can continue to be used to justify detention where an individual is seen to be at risk to themselves or others. According to the Committee on the Rights of Persons with Disabilities, legislation permitting deprivation of liberty on the basis of dangerousness will be incompatible with Article 14 as such an approach is 'discriminatory in nature and amounts to arbitrary deprivation of liberty.'[73] According to Amnesty, 'it was always the conjunction of disability with "danger to self" or to "others" that justified the deprivation of liberty.'[74] As preventative detention is no longer permissible on the basis of dangerousness associated with disability, this raises further dilemmas for the continued reliance on the insanity defence, as an individual cannot be held in a designated facility as a preventative measure, as will be discussed further below.

[71] For example, Article 4(2) of the CRPD is subject to progressive realisation.
[72] Article 5(1) (e), European Convention on Human Rights.
[73] Committee on the Rights of Persons with Disabilities, 'Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities' Adopted during the Committee's 14th session, held in September 2015.
[74] Amnesty Submission to the 'Interdepartmental Group to examine the issue of people with mental illness coming into contact with the criminal justice system' citing Gerard Quinn & Charles O'Mahony "Disability and Human Rights: A New Field in the United Nations" Krause & Scheinin (eds.), *International Protection of Human Rights: A Textbook* (2nd edn., Turku: Åbo Akademi University Institute for Human Rights, 2012).

4. A HISTORY OF INDEFINTE DETENTION IN IRELAND

Ireland has a long history of detaining people with disabilities and mental health conditions.[75] The Central Mental Hospital was set up under the Lunatics Asylums (Ireland) Act (1845) to provide *'*a central asylum for insane persons charged with offences in Ireland.'[76] The first facility of its kind, which catered for "criminal lunatics" in Europe, the Central Mental Hospital provided care and treatment to mentally disordered offenders detained there on foot of a court order, or following a transfer from a prison or psychiatric hospital. At the time, officials made a conscious decision to separate the hospital from a prison, as 'lunatics were not criminals and should, therefore, not be treated in the same way or on the same premises – in other words, lunatics and criminals were different kinds of people and therefore warranted different institutional approaches.'[77]

The law relating to people with mental illnesses and insanity can be traced back to the Trial of Lunatics Act 1883.[78] This Act provided that following a "guilty but insane" verdict, an individual accused would be subjected to automatic detention in the Central Mental Hospital.[79] The duration of an individuals' detention following this ruling was at the discretion of the Executive, with the Minister for Justice possessing sole responsibility for granting the release of an individual who was found "guilty but insane."[80] While the decision of the Executive was subject to judicial review, this constituted a limited and unsatisfactory safeguard as the courts were slow to interfere with the powers of the Executive. Furthermore, a successful review did not provide for the automatic release of the individual. In reality, following a verdict of guilty but insane, the individual accused was detained in the Central Mental Hospital indefinitely. In the case of *DPP v Redmond* for example*,* the accused chose not to plead insanity, as he preferred to have a definite sentence rather than be detained at the pleasure of the government in the Central Mental Hospital, without the real possibility of

[75] For further information on this, see fn 6.
[76] Brendan Kelly, 'Intellectual disability, mental illness and offending behaviour: forensic cases from early twentieth-century Ireland' (2010) 179 *Irish Journal of Medical Science* 409.
[77] Pauline M Prior, 'Prisoner or patient? The official debate on the criminal lunatic in nineteenth-century Ireland' (2004) 15(2) *History of Psychiatry* 177, 178.
[78] See also the Criminal Lunatic (Ireland) Act 1838, the Central Criminal Lunatics Act 1845 and the Lunatics Asylums (Ireland) Act 1875. This regime continued to exist up until the commencement of the Criminal Law (Insanity) Act 2006, which introduced substantial changes to the insanity defence in Ireland.
[79] Section 2, Trial of Lunatics Act 1883.
[80] As confirmed in the case of Gallagher, *Application of Gallagher* (No.1) [1991] 1 IR 31.

release.[81] The lack of an independent, formal process to oversee and review the detention of people detained under the 1883 Act amounted to a serious breach of international human rights law and raised concerns regarding the law governing criminal psychiatry in Ireland.

The John Gallagher period illustrates the inadequate protections afforded to people who were detained by reason of insanity according the 1883 Act, from a right to liberty standpoint.[82] In *Application of Gallagher No. 1*, the applicant unsuccessfully sought a judicial review in respect of his application to be released from the Central Mental Hospital.[83] The court held that in considering applications for release, the Executive must be satisfied that the individual in question, is no longer suffering from a mental disorder and it is safe to release them.[84] Mr Gallagher subsequently initiated a second case, challenging the lawfulness of his continued detention, contrary to Article 40.4.2° of the Constitution.[85] In her judgment, Laffoy J. stated that the role of the court in this case:

> It is to determine whether by reason of mental ill health the person currently constitutes such a risk or danger to the public or to a section of the public or to himself that he should be detained. Mental ill health in this context encompasses all forms of mental illness and disorder recognised by psychiatry: major illnesses, such as schizophrenia and manic depression; lesser mental illnesses or neuroses; and personality disorders. The foundation of such a determination is the evidence of experts, such as psychiatrists and psychologists, as to the current clinical condition of

[81] *DPP v Redmond* [2006] 3 IR 188.
[82] See Tony McGillicuddy, 'The Criminal Law (Insanity) Bill 2002' 2 April 2006, available at <www.lawlibrary.ie>. This case generated public interest and disquiet, according to McGillicuddy, regarding the detention and supervision of persons who were found guilty but insane of criminal charges. Mr Gallagher was found guilty but insane for the murder of his girlfriend and her mother and was detained in the Central Mental Hospital under the 1883 Act.
[83] *Application of Gallagher* (No.1) [1991] 1 IR 31.
[84] Ibid. This position thereby confirmed that it was the role of the Executive, rather than the Minister for Justice, to release an individual following a guilty but insane verdict.
[85] *Application of Gallagher (No.2)* [1996] 3 IR 10. Article 40.4.2 of the Constitution: 'Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law.'

the person, his past clinical condition and behaviour being relevant only insofar as they are relevant to an assessment of his current mental condition.[86]

In rejecting the application, the court found that while the applicant no longer suffered from a mental disorder, he did in fact have a personality disorder which required continued detention.[87] While unsuccessful, this case is one of the most important rulings relating to the detention of persons following a guilty but insane verdict under the terms of the 1883 Act. In particular, it illustrates the inadequacy of the lack of a formal review mechanism, which vested an inordinate amount of power in the Executive to exercise sole discretion regarding one's release. In their judgment, the long delays associated with making an application for release was criticised by the Court, however Laffoy J. noted that 'while the delay has infringed the applicant's rights, the infringement is not of the order to render his detention unlawful and it has been rectified, the decision having been made.'[88]

On account of emerging jurisprudence of the European Court of Human Rights relating to the rights of persons with psychosocial disabilities, impetus began to emerge to reform the law relating to the detention of people with mental health conditions in Ireland.[89] Article 5 of the Convention provides that 'everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.'[90] The ECtHR also clarified the procedural rights of people in detention facilities, including several cases of a similar nature to Gallagher, which in turn created further impetus to reform the Irish law in this area.[91] In particular case, *X v United Kingdom,* it was held that a person who is of unsound mind and who is compulsorily detained in a psychiatric institution is, in principle, entitled to initiate proceedings for the determination of the

[86] *Application of Gallagher* (No.2) [1996] 3 IR 10, 34 as per Laffoy J.
[87] Ibid, 49.
[88] Ibid, 42.
[89] For example see *Winterwerp v Netherlands* 6301/73 [1979] ECHR 4. In this case, the Court held that an individual should not be deprived of their liberty, save in the event that he has been reliably shown to be of unsound mind, and that the mental disorder in question must be of the kind or degree which warrants compulsory confinement.[89] See also *Stanev v Bulgaria* 36760/06 [2012] ECHR 46.
[90] Article 5, European Convention on Human Rights.
[91] European Convention of Human Rights, Article 5(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

lawfulness of their detention at regular intervals.[92] Following this ruling, the indefinite detention of people found guilty but insane pursuant to the 1883 Act, without a formal system of review, amounted to a breach of Article 5 of the ECHR. Furthermore, the limited right to initiate a judicial review of the Executive's decision under the 1883 constituted an unsatisfactory and ineffective safeguard for the purposes of complying with Article 5.

5. CURRENT LEGAL FRAMEWORK IN IRELAND

Growing impetus to reform the law relating to mentally disordered offenders in Ireland arose following the introduction of the Mental Health Act 2001.[93] This long-awaited Act sought to reform the civil law relating to the detention and treatment of patients with mental illnesses. While this legislation has been criticised by several academics, most notably because it fails to provide adequate protections to voluntary patients, it was nevertheless a significant reform at the time, as it introduced a number of important changes in Irish mental health care for patients detained involuntarily.[94] Of particular note, the Act established a mechanism for the review of detention for patients detained in approved centres after 21 days of the order being made.[95] Thereafter, this can be extended up to three months, whereby the case will be reassessed by an independent tribunal.[96] However, this right was not extended to those who were detained in the Central Mental Hospital following a guilty but insane verdict. This led to a lacuna within the law, whereby people who were detained pursuant to the 1883 Act were denied the right to a periodic review of their detention, and by extension, their right to liberty.[97]

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[92] *X v United Kingdom* (1981) (Application no. 7215/75).
[93] Mental Health Act (Commencement) Order 2006 (SI 411/2006).
[94] For more information, see Mary Donnelly, 'Legislating for Incapacity: Developing a Rights-Based Framework' [2008] *Dublin University Law Journal* 1; Claire Murray, 'Moving Towards Rights-Based Mental Health Law: The Limits of Legislative Reform' (2013) *The Irish Jurist*; Annamarie Brennan, 'The Mental Health Act 2001 and the Best Interests Principle: A Revolutionary Step in the Improvement of Mental Health Law in Ireland?' (2010) 28 *Irish Law Times* 290.
[95] Mental Health Act 2001, section 15(1). This can be extended by a renewal order which can last up to three months, section 15(2). When this expires, an order can be made for a period of six months, and thereafter for periods of 12 months at a time, (section 15(3)).
[96] Section 30, Mental Health Act 2001.
[97] While the 2001 Act was not enacted until 2006, the imbalance between the protection offered to civil and criminal detainees is an important consideration.

The Criminal Law (Insanity) Act 2006, as amended by the Criminal Law (Insanity) Act 2010, was introduced to provide a framework for governing the criminal responsibility of mentally disordered persons in Ireland.[98] The term mental disorder is defined in the Act as including mental illness, mental disability, dementia or any disease of the mind, apart from intoxication.[99] Among the many legislative changes introduced by the 2006 Act there is a new verdict of 'not guilty by reason of insanity,' from the earlier 'guilty but insane' plea.[100] This particular reform signalled a departure from the earlier approach, which recognised the dual existence of both guilt and mental ill health and amounted to automatic, indefinite detention. The wording of section 5 alone was therefore an improvement, as it served to decriminalise the individual and expressly stipulated a finding of not guilty. Further reforms were also introduced in relation to fitness to be tried,[101] and the introduction of a new defence of diminished responsibility.[102]

Following a successful plea of not guilty by reason of insanity under section 5, an individual can be acquitted or detained for assessment for up to a fortnight, in order to determine whether further detention for the purpose of treatment is required in the Central Mental Hospital.[103] The emphasis switches at this stage from the person's mental health on the day of the act to their health at the time of assessment. This is markedly different to the earlier law, which saw the immediate removal of a person to the Central Mental Hospital following a guilty but insane verdict, under the 1883 Act. The requirement to assess the persons health at this stage is particularly noteworthy from the right to liberty perspective, particularly with regard to ensuring compliance with the European Convention on Human Rights.

The Mental Health (Criminal Law) Review Board came into effect on the 27th of September 2006, to provide a framework for reviewing the continued detention and treatment of persons found unfit to be tried, or found not guilty by reason of insanity.[104] The current Board is comprised of four members, including a Chairperson who is to be a lawyer with not less

[98] Criminal Law (Insanity) Act 2006 (Commencement) Order 2006 (S.I. No. 273 of 2006).
[99] Section 1, Criminal Law (Insanity) Act 2006.
[100] Section 5, Criminal Law (Insanity) Act 2006. The Trial of Lunatics Act 1883 was repealed in full by section 25 of the 2006 Act.
[101] Section 4.
[102] Section 6.
[103] Sections 5(2) and (3).
[104] Mental Health (Criminal Law) Review Board (Establishment Day) Order 2006 SI 499/2006

than 10 years' experience in practice, a judge or a former judge of the Circuit Court, High Court or Supreme Court.[105] The Board is further comprised of two consultant psychiatrists and a counsellor psychotherapist.[106] Usually, three members of the Board will conduct a review of an individual's detention in the Central Mental Hospital. In contrast to the 2001 Act, there is no requirement to appoint a lay member to the Criminal Law Review Board.[107] Interestingly, before the 2001 was commenced, there was also no requirement to have a lay member sit on the Mental Health Tribunal, but this approach was subject to criticism and subsequently revised to provide the inclusion of a lay member.[108]

The main role of the Board is to carry out reviews of detention in respect of persons detained on the grounds of insanity, even those who were tried prior to 2006.[109] This eliminates any risk of discrimination between detainees and will provide a uniform approach in respect of all individuals, whether they were detained before the Act was commenced or detained thereafter. This provision is significant as a person's mental health may fluctuate or improve over time, and an individual found 'guilty but insane' under the terms of the previous Act may no longer require detention in the Central Mental Hospital. This reform also brings Ireland in line with its obligations under Article 5 of the ECHR, particularly Article 5(4) which imposes a duty on States to provide regular independent reviews of a person's detention in a psychiatric facility.

[105] Tony McGillicuddy, 'The Criminal Law (Insanity) Bill 2002' document dated 2 April 2006.
[106] For more information on the members of the Board see the website of the Mental Health (Criminal Law) Review Board, available here: http://www.mhclrb.ie/en/mhb/pages/board_members
[107] Section 48, Mental Health Act 2001, the mental health tribunal must consist of a legal member (a Barrister or Solicitor who will act as Chairman), a Lay Person and a Consultant Psychiatrist.
[108] See for example Liz McManus, Mental Health Bill, 1999- Second Stage, Dáil Debates, Volume 517, no. 5, 6 April 2000, 1016: 'It is not the role of politicians to perpetuate the power of the professions but to challenge it and to recognise the contribution of lay people. I urge the Minister not to become part of this potential conspiracy. If it is not challenged it will be perpetuated. The Courts Service is an example of how to do things right. The fact that lay people who are outside the judiciary participate in the new structures running our courts has improved the capability of the Courts Service in ways that would not have been dreamt of in the past. The Minister should move with the times and recognise the contribution of lay people. The lay perspective, the importance of which even professionals recognise, will be missing from the commission and from the decision making table.'
[109] Section 20, Criminal Law (Insanity) Act 2006.

According to the Act, this review must take place at least once every six months in the Central Mental Hospital.[110] Section 13(10) affords the Board the option of initiating the review either by way of an application submitted by a detainee, or of the Board's own initiative. The right to make an application directly to the Board for a review of one's detention is particularly imperative, as mental health is recognised as a fluid condition which, depending on a variety of factors such as the diagnosis and the treatment plan, may occur sporadically. The right to make an appeal to the Board outside of the regular six-month period is therefore important in this respect; but also, six months is a particularly long period of time, during which one's mental condition could fluctuate considerably, and therefore it may not be best representative of one's overall general mental status. In that case, two reviews a year may be insufficient for the purpose of ensuring that the right to liberty is not denied unfairly or arbitrarily, as one's health could improve within a short space of time following the initial review (especially if this involved a change in regard to the treatment plan).

The six month timeframe is also questionable on the grounds that it is considerably longer than the three monthly right to review, as set out under the Mental Health Act 2001.[111] As discussed, involuntary patients detained under the 2001 Act, have the right to an initial independent review within 21 days of their detention, and every three months thereafter.[112] It is argued that the 2006 provisions regarding a review of detention should be amended to bring the period of detention before review in line with the 2001 Act. It could be argued that the current framework discriminates against those who have been detained pursuant to the criminal law, and those detained involuntarily under the 2001 Act. In light of the nature of the current insanity defence, which decriminalises the actions of an individual, as discussed, all persons detained in the Central Mental Hospital should have equal rights regarding their care and opportunities for release. The Committee on the Prevention of Torture in its 2006 report on Ireland, highlighted the distinction between patients held under the Mental Health Act

[110] Section 13(2): 'The Review Board shall ensure that the detention of a patient is reviewed at intervals of such length not being more than 6 months as it considers appropriate and the clinical director of the designated centre where the patient is detained shall comply with any request by the Review Board in connection with the review.'

[111] Mental Health Reform, 'Submission on the Criminal Law (Insanity) Act 2006 as amended by the Criminal Law (Insanity) Act 2010' (2012) available at http://mentalhealthreform.ie/docs/MHR%20submission%20on%20the%20Criminal%20Law%20Insanity%20Act%2031%20Jan%20final.pdf.

[112] Section 18(2), Mental Health Act 2001.

2001 and those held under the Criminal Law (Insanity) Act 2006, noting that the latter are afforded considerably fewer safeguards.[113] According to the report, 'the 2006 Act lacks provisions on the use of physical restraint, seclusion and inspection. Similarly, the mandate of the Mental Health (Criminal Law) Review Board is rather limited when compared with that of the Mental Health Board.'[114]

Release from the Central Mental Hospital

The main function of the Criminal Law Review Board is to review the detention of patients detained in the Central Mental Hospital, following a decision that they are unfit to stand trial or a verdict of not guilty by reason of insanity. Following a review hearing, the Board may authorise the release of an individual on a conditional or unconditional basis, or order their continued detention.[115] The introduction of an independent statutory body is a very significant reform, as it removes the extensive powers previously enjoyed by the Executive under the terms of the 1883 Act. In carrying out their functions, the Board has responsibility to consider the patient's welfare, safety and also the public interest, which may carry considerable weight depending on the nature of the criminal offence and the levels of media interest generated by the case. The Board may also review the level of in-patient care or treatment that a person is receiving and make amendments to the regime of care, if appropriate.[116] If the clinical director of the designated centre is of the opinion that care is no longer required, they have a responsibility under the provisions of the Act to communicate these views to the Board in order to allow a review hearing to proceed.[117]

If the Board believes the individual no longer requires continued detention for treatment, they can make an order for the person to be released, unconditionally or subject to conditions for out-patient treatment or supervision or both.[118] However, the Review Board were initially

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[113] Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 13 October 2006" (Strasbourg: Council of Europe, 2007) 106.
[114] Ibid.
[115] Section 11, Criminal Law (Insanity) Act 2006.
[116] Section 13.
[117] Section 13(3) (a-b).
[118] Section 13(8) (b): 'if the Review Board determines that the patient, although still unfit to be tried is no longer in need of in-patient care or treatment at a designated centre, the Review Board may make such order as it thinks proper in relation to the patient, whether for further detention, care or treatment in a designated centre or for his

unable to make conditional discharge orders as the 2006 Act failed to provide an enforcement mechanism in such cases whereby the patient chose not to comply with the order. Essentially, the Act lacked a statutory mechanism to recall a person to the Central Mental Hospital, in the event of a breach of their conditional discharge. The power to recall an individual to the Central Mental Hospital did not come into effect until the Criminal Law (Insanity) Act 2010 was enacted, which was introduced to remedy the existing problems with 2006 Act relating to conditional discharge orders and provide the Review Board a power to recall a person to the Central Mental Hospital.[119]

The 2010 Act now provides for a mechanism in which a person can be recalled by the Board, in such circumstances where they have breached the conditions of their discharge order. In the interim period between the 2006 Act and the 2010 amendment, a number of cases came before the courts concerning the nature of conditional discharge orders. The case of *J.B v Mental Health (Criminal Law) Review Board,* for example, illustrates the tensions created by the 2006 Act from a right to liberty perspective.[120] According to evidence presented to the Review Board, the applicant in this case was no longer suffering from a mental disorder and therefore no longer required treatment in the Central Mental Hospital.[121] The court held that

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or her discharge whether unconditionally or subject to conditions for out-patient treatment or supervision or both.'

[119] Section 8, Criminal Law (Insanity) Act 2010.

[120] *J.B v Mental Health (Criminal Law) Review Board & Ors* [2008] IEHC 303, [2011] 2 IR 15. The applicant in this case was subjected to continued detention as the Board had no means of enforcing the conditional discharge order.

[121] In the judgment, the court referred to the interpretation of Article 5 of the European Convention on Human Rights which was applied in the case of.*Johnson v UK* (1999) 27 EHRR 296. This case considered the lawfulness of the continued detention of an individual who was found to be no longer suffering from a mental illness in 1989. According to the original conditions for his release, the applicant was required to undergo a period of rehabilitation in an approved hostel, where he would be supervised by a psychiatrist and a social worker. Such a suitable environment was never located, and in 1991 the Mental Health Tribunal reissued the order to release the applicant as medical evidence proved he was no longer suffering from a mental illness. Concerns were raised regarding whether it would be safe to release him unconditionally, as the applicant had never received rehabilitation, and there was a chance he would become ill again. Therefore, the Tribunal made the decision to defer his conditional release, until such time as appropriate accommodation could be arranged. In 1993, the applicant was released unconditionally, as he had not suffered from a mental illness since 1987 and did not require continued detention in a hospital. the court in Johnson held that while there is no requirement for a discharge to be of immediate effect, especially in the event that aftercare provisions must be put in place (such as arranging for a suitable hostel or otherwise appropriate accommodation), the indefinite deferral of the applicant's release amounted to a breach of Article 5 of the Convention. The court in *J.B. v Mental Health (Criminal Law) Review Board* distinguished the present case from the Johnson decision, on the grounds that the patients concerned were living under different circumstances. Namely, J.B was on temporary release, he lived with his family four nights a week and then in the hospital the other nights.

in certain cases, it would be lawful to defer the release of a patient on foot of a conditional discharge, as a 'responsible authority is entitled to exercise discretion in deciding whether, in the light of all the relevant circumstances and the interests at stake, it would be appropriate to order the immediate and absolute discharge of a person who is no longer suffering from a mental disorder which led to his confinement.'[122] The court proceeded to state that safeguards would have to be put in place to ensure that the practice of delaying a person's release is in line with the purpose of Article 5(1) of the ECHR and to ensure that the discharge is not unreasonably delayed.[123] In finding against the applicant, the court was satisfied that the applicant was afforded a "significant measure of liberty" and there was no unreasonable delay in implementing his discharge.[124] In raising the separation of powers argument, Hanna J. opined that in interpreting section 13, 'one must be careful not to invade the realm of the legislator by interpreting legislation in such a way as would amount to a re-writing of same.'[125] Hanna. J proceeded to note that:

> Section 13 (a) of the Act of 2006 is silent as to any regime for the supervision of a person provisionally discharged from a designated centre. As already observed, one of three orders can be made - the further detention of the patient, the unconditional discharge of the patient or his or her discharge subject to conditions for outpatient treatment or supervision or both.[126]

In this regard, the Court recognised the lack of enforcement powers afforded to the Review Board to release people from detention, which is 'telling when one considers the provisions of s. 14 of the Act relating, as they do, to temporary release. That section does empower the Clinical Director and his staff to move in response to a breach of conditions. So too may a member of an Garda Siochána.'[127] But, in conclusion, the court was satisfied that the Board was acting within their powers to continue the detention of the applicant, taking into

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[122] Ibid, [63].
[123] Ibid, citing *Luberti v. Italy* (1984) 6 E.H.R.R. 440.
[124] Ibid, [72]: 'As this matter stands, whether the applicant's current situation be unsatisfactory or otherwise, I do not perceive it to amount to a violation of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 [...] The applicant has been afforded a significant measure of liberty founded upon unanimous medical advice and the Board has properly and lawfully acted upon same.'
[125] *J.B. v Mental Health (Criminal Law) Review Board & Ors*. (2008) IEHC 303, [2011] 2 IR 15, [48].
[126] Ibid, [49].
[127] Ibid, [52].

consideration the interests of the patient and the interests of the general public.[128] As such, the court found that the applicant's detention was lawful and was not in violation of Article 5.[129]

The case of *L v Kennedy* also considers the difficulties with regard to conditional discharge orders under the 2006 Act.[130] This case concerned a challenge on the grounds that the Board refused to release a patient using a conditional discharge order, despite evidence that the applicant was no longer suffering from a mental disorder requiring detention for the purposes of in-patient care or treatment and furthermore, the applicant had not taken any medication for two years.[131] On behalf of the Review Board, it was argued that it was necessary to continue the detention in light of the public interest,[132] as there was no mechanism in place to recall the individual to the Central Mental Hospital or to enforce conditions to a conditional discharge.[133] In his judgment, Peart J. held the 2006 Act allows the Board to detain a person, even if they are no longer suffering from a mental disorder.[134] In regards to the powers of the Review Board, Peart J. also recognised the importance of employing discretion in determining each case, but in all cases the Board must act rationally, judicially and in accordance with principles of constitutional justice.[135]

The above cases illustrate the tensions created in this area of law, as in effect the efficacy of the 2006 Act and the role of the Review Board were challenged because of the inability to recall a person back to the Central Mental Hospital. Therefore, the Board operated on a policy of continuing the detention based on the perceived risk that there would be a need to recall

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[128] Ibid, [72].
[129] The plaintiff appealed this decision to the Supreme Court but in the interim, the Criminal Law (Insanity) Bill 2010 was drafted in order to remedy the problems with conditional discharges.
[130] *L v Kennedy* [2010] I.E.H.C. 195.
[131] Ibid.
[132] Citing section 11(2), Criminal Law (Insanity) Act 2006: 'The Review Board shall be independent in the exercise of its functions under this Act and shall have regard to the welfare and safety of the person whose detention it reviews under this Act and to the public interest.'
[133] *L v Kennedy* [2010] I.E.H.C. 195.
[134] Ibid.
[135] Ibid, [83]: 'That does not mean that the Review Board is entitled to make whatever order it wants. It must act rationally, judicially and in accordance with principles of constitutional justice. It seems to me that provided that it goes about its decision making task in a proper manner, the decision to detain the applicant in the circumstances of the present case is made in accordance with law, and does not mandate the applicant's release on the basis that his detention is unlawful.'

them at a later date. This policy is a marked contrast to Article 14(1)(b) which prohibits deprivations of liberty on the basis of actual or perceived impairment, even in such cases where additional factors or criteria are used to justify the detention.[136] While the 2010 Act now provides for a mechanism in which a person can be recalled in such circumstances where they have breached their conditional discharge, the risk of indefinite detention is still a relevant concern. According to the 2015 Annual Report of the Mental Health Criminal Law Review Board, the average duration of detention for the conditionally discharged patients was eight years; whereas in the previous year the average length of detention for conditionally discharged patients was 17 years.[137] While this is a marked improvement, the operation of the existing defence of insanity in Irish law continues to raises serious concerns regarding the individuals' right to liberty. These cases also raise questions regarding the legitimacy of findings in favour of continued detention due to public interest concerns. This position is a clear violation of Article 14 and would also contradict the position taken by the Irish Court in the case of *Gallagher* relating to preventative detention, wherein the court opined that a person could not be detained on grounds of risk alone, as this would constitute preventative detention.[138] According to Geoghegan J.:

> I would not be anxious that he would immediately become dangerous to others in the short term. However, if he was at large and stressed and pressurised, I would have to be concerned about the possibility that he would disintegrate into some sort of dangerous state. The only way that I know of testing out medium and long term

[136] Committee on the Rights of Persons with Disabilities, 'Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities' Adopted during the Committee's 14th session, held in September 2015, [7]

[137] Mental Health (Criminal Law) Review Board*, Annual Report* (Dublin, 2015) p 9 and Mental Health (Criminal Law) Review Board*, Annual Report* (Dublin, 2014) p 8-9. In 2014, the duration of time the two longest patients spent in the CMH averaged 31.5 years, whereas in 2015 the two longest averaged 11 years. While this was a significant improvement, the length of time spent in the CMH is 'neither a necessary nor a sufficient ground, in itself, for granting a conditional discharge.' Annual Report, 2015. According to the 2014 Annual Report, the Board reviewed the detention of 80 patients, holding a total of 166 reviews hearings, The average duration of detention for the conditionally discharged patients was 17 years.

[138] *Application of Gallagher* (No.2) [1996] 3 IR 10, 34 as per Laffoy J: 'The test contended for by counsel for the notice parties, dangerousness whether attributable to mental ill health or not, fails to take account of the clear requirement in the formulation of the test by the Supreme Court which links continued detention or release to the existence or non-existence respectively of mental ill health. Furthermore, to construe s. 2, sub-s. 2 of the Act of 1883 as permitting detention while a person is dangerous but not mentally ill would be to construe it as permitting deprivation of liberty for the purpose of preventing possible future criminal activity or deviant behaviour, in other words, preventive detention, which is a construction which is impermissible under the Constitution […]and cannot have been intended by the Supreme Court.'

> dangerousness is over a phased release period and I am talking about several years. That is the way we do it for ordinary patients here and that is the way we would have ultimately gone about preparing Mr. Gallagher for release, had his legal manoeuvrings to obtain his release not pressurised us towards an earlier and premature decision. It is worth going over the facts of the case from the time he arrived with us and even before that the facts of his trial.[139]

Prior to this decision, the Irish courts had confirmed that the use of preventative detention was unconstitutional as it breached the right to liberty protected by Article 40.2.[140] Essentially, a person cannot be detained because there is a risk they might commit a crime, as this practice would constitute a violation of one's right to liberty. Notably, the issue of preventative detention was not considered by the court in *J.B,* although in his judgment, Hanna J. noted that the Board must consider the public interest in considering an application for release.[141] Moving forward, a finding in favour of continued detention based on a perceived risk posed to the public will constitute a direct breach of Article 14. Therefore, the practice of detaining individuals in the Central Mental Hospital because they pose a risk must be revoked to comply with Article 12 and the principle of non-discrimination.

The role of the Mental Health (Criminal Law) Review Board cannot be understated; however, more could be done to ensure that patients are treated equally and afforded the same safeguards to ensure compliance with the UN Convention. There are also shortcomings and oversights in relation to the powers of the Board which cannot be overlooked. One significant shortcoming is that there is no obligation for the Review Board to be informed that a person has been ordered to be detained by a court on foot of the 2006 Act.[142] Secondly, there is a noticeable difference in the treatment of civil and criminal detainees and this is made apparent when one compares the remit of the Tribunal as established by the Mental Health

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[139] *Application of Gallagher* (No.2) [1996] 3 IR 10, 27.
[140] See *People (Attorney General) v O'Callaghan* [1966] I.R. 501 and *Ryan v DPP* [1989] I.R. 399.
[141] *J.B. v Mental Health (Criminal Law) Review Board & Ors.* (2008) IEHC 303, per Hanna J.
[142] Explanatory Memo to the 2002 Bill 'since the Bill envisages periodic reviews of detention every six months, one might expect that the Board should be informed of a person's arrival at a designated centre, so that it can exercise its powers within the six months following the start of such a detention'.

Act 2001, and the Review Board.[143] This problem was previously noted by Sheehan J.; who has commented that there is a huge discrepancy in the protection afforded to patients detained pursuant to the 2006 Act and those admitted to the Central Mental Hospital pursuant to the Mental Health Act 2001.[144] Moving forward, there should be full equality between all persons detained pursuant to mental health legislation in Ireland.

6. FUTURE ORIENTATIONS FOR IRISHLAW

In their guidelines on Article 14,[145] The Committee on the Rights of Persons with Disabilities stated that all 'declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations, are 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.'[146] Following this position, it is necessary for all States Parties to reconsider and potentially, remove such declarations from criminal legislation.[147] While a broad reading of this position and Article 14 of the CRPD, would require all capacity-based defences to be abolished and replaced with disability neutral alternatives, a more narrow or short term approach would include focusing on the existing safeguards in place to ensure that detention following a finding of insanity is not arbitrary or unnecessarily long. Furthermore, it would also require the introduction of safeguards to prevent forced medical treatment while in hospital; as such individuals should still retain their basic right to human dignity and to consent to treatment. This is also imperative as Article 15 of the Convention provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment', and Article 17 provides that '[e]very person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others'.

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[143] Amnesty International has also noted that the mandate of the Review Board is limited when compared to the Tribunal established by the 2001 Act (see Amnesty International, 'Submission to the Department of Health and Children on the need for a substantive review of the Mental Health Act 2001' <http://www.amnesty.ie/sites/default/files/MENTAL%20HEALTH%20ACT%20REVIEW.pdf>, 62)
[144] *D.P.P. v. W.B.* [2011] IECCC 1, at para [5.17].
[145] Adopted during the Committee's 14th session, held in September 2015.
[146] Committee on the Rights of Persons with Disabilities, 'Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities' Adopted during the Committee's 14th session, held in September 2015
[147] Ibid.

A reading of the jurisprudence of the Committee on the Rights of Persons with Disabilities with regards State compliance with the Convention also indicates an emphasis on the use of detention arising from criminal responsibility laws. In its concluding observation with respect to Australia, the Committee expressed concerns that people with disabilities who are deemed unfit to stand trial on account of an intellectual or psychosocial disability, are being detained indefinitely in prisons or psychiatric facilities.[148] The Committee noted that such detention can amount to a significantly longer period in detention than would have been warranted under the legislation for the relevant offence, even though the person has not yet been tried for the offence. The Committee recommended, 'as a matter of urgency,' Australia:

i. End the unwarranted use of prisons for the management of unconvicted persons with disabilities … by establishing legislative, administrative and support frameworks that comply with the Convention.
ii. Establish mandatory guidelines and practice to ensure that persons with disabilities in the criminal justice system are provided with appropriate supports and accommodation
iii. Review its laws that allow for the deprivation of liberty on the basis of disability, including psychosocial or intellectual disabilities, and repeal provisions that authorize involuntary internment linked to an apparent or diagnosed disability.[149]

Many jurisdictions are in the process of reviewing their domestic criminal laws in relation to the insanity defence, fitness to plead and the diversion of offenders with mental health problems, with a view to recognising the rights of persons with disabilities and reflecting the standards set out in the UN Convention on the Rights of Persons with Disabilities.[150] In particular, an expansive project was undertaken by the New South Wales Law Reform

[148] UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013) CRPD/C/AUS/CO/1, [32].
[149] Ibid.
[150] See Centre for Disability Law and Policy, Submission to the Law Reform Commission on its Fourth Programme of Law Reform (2012)

Commission, in order to examine the legal issues pertaining to people with cognitive and mental health impairments in the criminal justice system.[151] These reports considered the events that occur in the pre-trial, trial and post-trial process, and recommendations were made to improve the overall fairness and efficiency of the criminal justice process in New South Wales.[152] In the report entitled *'Criminal Responsibility and Consequences,'* the Commission recommended that the existing law relating to a defence of mental illness should be revised to clarify the language of the provision and to update it to reflect contemporary understandings of cognitive and mental health impairments and mental health law.[153] In this regard, for the defence of mental illness to apply, one does not have to be affected by an '*abnormality of the mind arising from an underlying condition'*, as provided within section 23A of the Crimes Act 1900.[154] The LRC propose a new threshold test for the defence of mental illness, which requires the defendant to have a cognitive impairment, mental health impairment, or both. Once this test is established, the defendant must then show that their impairment substantially diminished his or her capacity to understand the events, to judge whether actions were right or wrong, or to control him or herself.[155] The Law Commission for England and Wales is also examining this area, focusing in particular on the defence of insanity.[156] As part of this project, the criticisms of the defence are being considered, as well as the incoherence in the relevant case law.[157] It has been argued that even though the Irish law governing the insanity defence is relatively new, there is a need for the Law Reform Commission to re-examine the relevant legislation in light of international developments and the impending ratification of the Convention.[158]

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[151] See Centre for Disability Law and Policy, Submission to the Law Reform Commission on its Fourth Programme of Law Reform (2012)

[152] Law Reform Commission New South Wales, 'People with cognitive and mental health impairments in the criminal justice system' available at < http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem.aspx>

[153] Law Reform Commission New South Wales, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences* (New South Wales Law Reform Commission, Sydney, 2013) 101.

[154] Ibid.

[155] Ibid, 102.

[156] Michael L. Perlin, ''God Said to Abraham/Kill Me a Son': Why the Insanity Defense and the Incompetency Status are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence' (2017) 54 *American Criminal Law Review* 477.

[157] See Centre for Disability Law and Policy, *Submission to the Law Reform Commission on its Fourth Programme of Law Reform* (Centre for Disability Law & Policy, NUI Galway, 30 November 2012).

[158] Ibid.

The Irish Department of Justice and Equality published a Roadmap to Reform in 2015, which outlined various legislative changes which were required to enable ratification of the Convention.[159] Among the main legislative amendments was the Assisted Decision-Making (Capacity) Act, which has yet to be commenced in full, and provides for an extensive reform of the law relating to personal decision-making and legal guardianship. In relation to criminal legislation, the roadmap necessitates the replacement of section 5 of the *Criminal Law (Sexual Offences) Act* 1993, which relates to the criminalisation of sexual activities of persons with "mental impairments."[160] The second legislative amendment highlighted by the roadmap in relation to criminal law is section 4 of the *Criminal Law (Insanity) Act* 2006, in order to 'address the issue of discriminatory treatment of persons whose decision-making capacity is in question'.[161] This follows the judgment in the case of *G v District Judge Murphy*, in which the High Court ruled that section 4 contained an unconstitutional lacuna in respect of people with mental disorders. The court held that '…the Oireachtas has inadvertently failed to have proper regard to the rights and interests of those who are either mentally ill or whose mental capacity is in doubt.'[162]

[159] Department of Justice and Equality, *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities* (2015) available here: http://www.justice.ie/en/JELR/Roadmap%20to%20Ratification%20of%20CRPD.pdf/Files/Roadmap%20to%20Ratification%20of%20CRPD.pdf

[160] Section 5 of this Act will be replaced. According to the roadmap at [3]: 'On 16 September 2015, the Government approved the Criminal Law (Sexual Offences) Bill for publication. The Bill includes wide ranging provisions to enhance the protection of children and vulnerable persons from sexual abuse and exploitation. Amendments to replace section 5 of the 1993 Act are being prepared and will be brought forward at a later stage.'

[161] See Department of Justice and Equality, 'Fitzgerald and Ó Ríordáin publish Roadmap to Ratification of the UN Convention on the Rights of Persons with Disabilities' (21 October 2015) available: <http://www.justice.ie/en/JELR/Pages/PR15000550>

[162] *B.G v District Judge Murphy* [2011] IEHC 445. This case considered whether the question of the accused's fitness to plead should be determined by the District Court, or by the Circuit Court. The DPP consented to the charge of sexual assault being dealt with summarily by the District Court, on the provision that the accused pleaded guilty, in which case the Court could impose a maximum 12 month sentence. However, the option of pleading guilty to a criminal offence is not available to an accused person if there are doubts regarding their mental capacity – which therefore raised the issue of fitness to plead. This therefore resulted in the case being sent to the Circuit Court as an indictable offence, as the accused could not plead guilty. In the High Court, it was held that the Oireactas 'failed to provide a mechanism whereby persons charged with indictable offences whose fitness to plead is later established can obtain the benefit of a guilty plea before the District Court. This is … in stark contrast to the position of an accused person whose mental capacity is not in doubt and who is thereby not impeded from availing of this option.'

7. CONCLUSION

The Convention is still in its infancy and best practices and ideas are still emerging, but we must take a proactive approach to exploring all possibilities for the promotion of the rights of all persons with disabilities. As Ireland has yet to ratify the convention, it is even more pertinent that we remain open to all potential outcomes and possibilities for law reform, including in relation to the defence of insanity. While the first steps are to ensure the protection of the basic fundamental right to liberty, by means of ensuring non-arbitrary or illegal detention of persons found not guilty by reason of insanity, it will also be necessary to explore the continued relevance of such capacity based defences into the future. In the spirit of the Convention, which is inclusive, progressive and an enlightened restatement of laws, it is important that we take all such steps that are required to ensure its realisation, and to do this all existing laws which discriminate against persons with disabilities must be re-examined. While it is necessary to reconsider the future operation of the defence, the short-term goal should be in ensuring that the current framework for the defence operates in a way that seeks to uphold the dignity of the individual while also addressing issues such as consent to treatment and ensuring that findings of detention are non-arbitrary and regular reviews are in place. It is also important to ensure people are not detained on the grounds of risk alone, in keeping with Article 14.

The long-term objectives for the law of criminal responsibility should include a reconsideration of the criminal law relating to criminal responsibility. It is argued that the right to legal capacity and the ongoing debates surrounding the future of capacity based defences offers a sounding board for reflection and re-examination of the current system in place in light of human rights laws. Going forward, the main impetus for reform in regards to the rights of all people with disabilities is the CRPD and it requires a paradigm shift for its full realisation. Therefore, it is important that we take stock of the existing Criminal Law (Insanity) Act, with regard to whether capacity-based defences can continue to play a role in our criminal law, and also, perhaps more immediately, whether the existing right to liberty safeguards are sufficient. It is fundamentally important to ensure that a charge of "not guilty

by reason of insanity" does not amount to indefinite detention in the Central Mental Hospital unnecessarily.