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Submission from the

Centre for Disability Law and Policy,

NUI Galway

on the

General Scheme of the

Equality/Disability

(Miscellaneous Provisions) Bill

Table of Contents

[Introduction 3](#_Toc465782716)

[Head 1 Reasonable accommodation 3](#_Toc465782717)

[Further Comments 5](#_Toc465782718)

[Intersectional claims 6](#_Toc465782719)

[Employment Equality Act 1998-2011 7](#_Toc465782720)

[Head 2 National Mechanisms 10](#_Toc465782721)

[Head 3 Deprivation of Liberty 12](#_Toc465782722)

[UN Treaty bodies 12](#_Toc465782723)

[European Court of Human Rights position 15](#_Toc465782724)

[Concerns about Deprivation of Liberty Safeguards 18](#_Toc465782725)

[Recommendations 20](#_Toc465782726)

[Head 4 Amendment of Electoral Acts 22](#_Toc465782727)

[Head 5 (Juries Act 1976) 23](#_Toc465782728)

[Head 6 Criminal Law (Insanity) Act 2004 26](#_Toc465782729)

[Head 7 Replacement of 'persons of unsound mind' and 'lunatics' in statute law 28](#_Toc465782730)

[Head 13 (Amendment of Taxes Consolidation Act 1997) 29](#_Toc465782731)

[Concluding Comments 29](#_Toc465782732)

## Introduction

The Centre for Disability Law and Policy (CDLP) welcomes the opportunity to make this submission to the Department of Justice and Equality on the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill. This Bill is a key legislative reform which has been identified as a necessary step to bring Ireland’s laws into conformity with the UN Convention on the Rights of Persons with Disabilities (CRPD) and enable ratification. Therefore, it is imperative that the Bill reflect the human rights principles contained in the CRPD in the areas identified – equality law, human rights monitoring, electoral law, jury service, the insanity defence and the replacement of discriminatory language to refer to persons with disabilities in various statute law. We welcome many of the proposals made in the General Scheme which aim to bring Ireland’s law into closer compliance with the CRPD. However, there are some outstanding issues which need to be addressed in order to ensure that the General Scheme achieves its aim of ensuring conformity between Ireland’s legislative framework and the CRPD. These issues will be explored under each proposed Head of the Scheme in our submission and we welcome further engagement with the Department to discuss how the Bill can fully reflect the core human rights norms set out in the CRPD. The CDLP has been joined by our coalition partners, the Disability Federation of Ireland, the Irish Advocacy Network and Recovery Experts by Experience in supporting this submission.

## Head 1 Reasonable accommodation

We welcome the intention to broaden the reasonable accommodation requirements on public bodies and other essential service providers. However, we believe that listing specific bodies required to provide reasonable accommodation in accordance with the ‘disproportionate burden’ standard is not consistent with the need for all services, including public and private entities to make reasonable accommodation a universal principle. While we recognise that the Department is somewhat constrained in its efforts to achieve legislative reform in this arena by the Supreme Court decision in Re Article 26 and the Employment Equality Bill, we note with interest that this decision has not prevented the Department from changing the requirement on providers of goods and services (currently set at a ‘nominal cost’) to a disproportionate burden for the named list of providers in Head 1. If it is possible to extend the obligation on this set of providers without creating a conflict in our Constitutional jurisprudence, we would argue that it should also be possible to extent the obligation to all service providers. Indeed, in reviewing the jurisprudence to date of the Equality Tribunal/Workplace Relations Commission on the Equal Status Act, the ‘nominal cost’ standard has been interpreted quite generously, and in our view, is closer in practice to the ‘disproportionate burden’ standard required by the CRPD.[[1]](#footnote-1)

Reasonable accommodation is the most fundamental instrumental element of the CRPD and a core element of the demand for equality of the disabled people's movement. We regret the continuation of limitations on the provision of reasonable accommodation beyond employment and service provision rights. We believe that all public and private service providers have the resources (given the 'disproportionate burden' provision discussed below) to respond to the fundamental principle of making accommodations to facilitate the inclusion of people with disabilities in all aspects of public life. Not to do so is a form of discrimination against people with disabilities, as set out by the CRPD.

Article 2 of the CRPD defines ‘discrimination on the basis of disability’ as ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms’ and as ‘including denial of reasonable accommodation’. Article 5 (paragraph 2) of the CRPD obliges states to ‘prohibit all discrimination on the basis of disability’ thus carries with it a requirement to impose reasonable accommodation duties on employers, educators, transport providers, prisons, police, and all other social actors whose behaviour affects access to any of the substantive rights protected by the Convention.[[2]](#footnote-2)

The government is missing an opportunity to lead on making reasonable accommodation the norm rather than the exception. Under EU law, employers must make efforts to provide reasonable accommodation for employees under Article 5 of the Framework Employment Directive (FED)[[3]](#footnote-3). The same standard for the provision of reasonable accommodation should apply in relation to provision of services, as is required by the CRPD. The CRPD does not provide for any distinction in standards of reasonable accommodation between employers and providers of goods and services, or between public and private entities. Further, no distinction is made in the Equal Employment Act (1998-2011) or the Framework Employment Directive between state and other employers – the distinction is inherent in the ‘disproportionate burden’ test, insofar as what might be disproportionate for a small employer/business might not be disproportionate for the State. The same should apply to service providers.

The equality guarantee in the Irish Constitution has been interpreted to incorporate a right to reasonable accommodation to ensure that all people are equal before the law. In *D.X. v. Judge Buttimer,*[[4]](#footnote-4)for example,the Irish High Court reviewed the decision of a District court in refusing the applicant a reasonable accommodation. The applicant had a speech difficulty which meant that the court found him difficult to understand. Normally he relied on the assistance of a friend in order to communicate, but his friend's support was denied to him in the courtroom. However, this initial denial was judicially reviewed and the High Court held that all persons are equal before the law, and stated:

In practical terms, this means that the courts must see to it that, where this is practical and feasible in the circumstances, litigants suffering a physical disability … are not placed at a disadvantage as compared with their able bodied opponents by reason of that disability, so that all litigants are truly held equal before the law …[[5]](#footnote-5)

It is clear from this decision that the courts are bound to ensure that all are treated equally before the law and that where an achievable or attainable accommodation exists that could ensure a person with a disability is not disadvantaged, the courts should consider such an accommodation.[[6]](#footnote-6) It is worth noting that the courts, and other public bodies under the remit of various government departments, including the Health Service Executive, Intreo, FÁS, etc. have not been included within the list of service providers set out in Head 1. The rationale for selecting the providers listed in Head 1 has not been made clear by the Department, and at a minimum, expansion of this list to include other providers of essential goods and services to persons with disabilities is required. Further consultation with persons with disabilities and their representative organisations on this issue, and indeed the General Scheme as a whole, is vital to ensure that the State meets its obligations under Article 4(3) CRPD.

Finally, since the Department is committing to reforming the reasonable accommodation standards set out in equality legislation, it could also use this opportunity to address another discrepancy in the conceptualisation of reasonable accommodation between the Equal Status Acts and Employment Equality Acts. Under Section 4(1) of the Equal Status Acts, a failure to provide reasonable accommodation itself amounts to unlawful discrimination, where it means that a person with a disability is unable to access a service. However, there is no equivalent provision under the Employment Equality Acts. Section 16 of the Employment Equality Acts simply provides that a person cannot be considered incapable of doing a job if they could do so with reasonable accommodation (“appropriate measures”). An employer then has the duty to provide such accommodation unless this would constitute a disproportionate burden. However, it seems that a refusal to provide reasonable accommodation would not itself be actionable, even if this deprived an employee of an opportunity to work. This is a clear breach of Article 2 of the CRPD, which states that “‘Discrimination on the basis of disability’… includes all forms of discrimination, including denial of reasonable accommodation”. This could be easily addressed by amending section 16 of the Employment Equality Acts to reflect the position of section 4(1) of the Equal Status Acts.

## Further Comments

### Intersectional claims

Since the Department is taking this opportunity to reform existing equality legislation as it applies to persons with disabilities, recognition of intersectional discrimination experienced by persons with disabilities could also now be included within Ireland’s legislative framework. Intersectional discrimination (sometimes referred to as “multiple discrimination”) refers to situations where an individual is disadvantaged, not because of a single characteristic, but because of a combination of characteristics. For instance, women with disabilities might suffer disadvantages that do not apply to women in general or to disabled men. Such disadvantages might include institutional barriers to employment, or the inability to access services. Other common intersectionalities might include race/gender, race/disability, gender/disability/age, race/sexual orientation/disability.

In the disability context, Article 6 of CRPD refers specifically to the particular disadvantages that may be faced by women with disabilities, stating:

1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

A General Comment (No.3) on Article 6 has recently been adopted. Paragraph 12 of the General Comment notes that “Article 6 is a cross-cutting article related to all articles of the Convention to remind States parties to include the rights of women and girls with disabilities in all actions aimed at implementing the Convention. In particular, positive action measures need to be taken in order to ensure that women with disabilities are protected against multiple discrimination and can enjoy human rights and fundamental freedoms on an equal basis with others”.[[7]](#footnote-7)

Article 6 is highly significant. However, current Irish law does not permit intersectional claims, or in any way recognize the specific barriers that may apply to women with disabilities in particular. Both section 3(1)(a) of the Equal Status Acts 2000-2004 and Section 6(1)(a) of the Employment Equality Acts 1998-2011 specify that discrimination occurs where a person is treated less favourably “on any of the grounds specified” in the legislation.

As interpreted to date, this appears to allow only single-ground comparisons, rather than intersectional claims. However, as Art 6 of the CRPD notes, there may be many situations where women with disabilities are particularly disadvantaged. Likewise, intersections between disability and age, or disability and race/ethnicity may be particularly important in some contexts. This applies to both service provision and employment. As things stand, persons who are disadvantaged because of a combination of grounds have no legal remedy. For instance, women with disabilities may have no redress for disadvantages they suffer, because they cannot succeed under the gender ground alone (since women generally are not disadvantaged) or under the disability ground alone (since men with disabilities are not disadvantaged).

This appears to be a clear breach of Article 6 CRPD. However, it would be a very simple matter to address this gap in the legislation. This could easily be done by amending the Equal Status Acts and the Employment Equality Acts to provide that discrimination occurs where a person is treated less favourably “on any of the grounds specified, *or because of a combination of such grounds*”.

### Employment Equality Act 1998-2011

Under Article 27 of the CRPD, States Parties explicitly recognize “the right of persons with disabilities to work, on an equal basis with others”. This right includes “the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities”. For this reason, States Parties must take “appropriate steps” to prohibit employment discrimination and “protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work”. Among other requirements, States Parties must also ensure that people with disabilities have effective access to training and employment support services, reasonable accommodation in the workplace, access to work experience in the open labour market, and employment opportunities in the public sector. States Parties must also promote private sector employment opportunities through “appropriate policies and measures”.

These requirements are only partly satisfied by the Employment Equality Acts. The Acts prohibits discrimination (including indirect discrimination and by imputation and association) in both the public and private sectors on nine discriminatory grounds, including disability. The scope of the Acts is very broad and covers employees, trainees, as well as applicants for employment and training in all aspects of the working relationship, starting with the recruitment process, including selection arrangements, pre-employment medical screening and occupational health assessments, job adverts and the conduct of interviews. Nevertheless, some problems remain.

#### Rates of pay for employees with disabilities

First, we would highlight section 35 (as amended), which establishes special provisions for workers with disabilities that we flag as problematic. Essentially, this section permits pay discrimination on the basis of disability, as it permits employers to pay a disabled employee less than an employee without that disability, on the basis that the employee with the disability in question is less productive. The only caveat is that the rate of remuneration paid to the worker with the disability cannot fall below the minimum rate to which the employee concerned is entitled under the National Minimum Wage Act 2000):[[8]](#footnote-8)

*(1) Nothing in this Part or Part II shall make it unlawful for an employer to provide, for an employee with a disability, a particular rate of remuneration for work of a particular description if, by reason of the disability, the amount of that work done by the employee during a particular period is less than the amount of similar work done, or which could reasonably be expected to be done, during that period by an employee without the disability.*

Section 35(1) is not limited in its application to segregated settings. It applies to all workers with disabilities, both intellectual and physical. There are a number of problems with this section from a disability equality perspective. First, there is no requirement that the reduced rate of pay should be proportionate to the reduced productivity. Thus, a disabled employee who is 10% less productive could legally be paid 50% or 90% less than an employee without the disability in question, so long as the rate of pay does not fall below the minimum wage. This is obviously completely unjustifiable and may lead to exploitation.

Second, the criteria for establishing the supposed lower rate of productivity are extremely loose. References to a time framework (“a particular period”) of work, as well as an estimation of productivity “which could reasonably be expected” are problematic as these are arguably subjective terms that will rely on their interpretation. The section states that the disabled employee can be paid less than the employee without that disability if they are less productive in a “particular period”, however, there is no definition of what this period is or how it must be assessed (for instance, does it refer to the work conducted between certain stated hours, or the work completed over a given number of hours, days or weeks?) Given that reasonable accommodation may entail changes to the working pattern, how the period of assessment is determined may be vitally important.

The provision does not include any specifications on how the reduced productivity of the employee with a disability is to be measured. No guidance in the form of a Regulation or Code has been adopted. Consequently, the methods of assessing lower rates of productive capacity or the ability to work for a lesser amount of time, are unclear. The potential use of a hypothetical non-disabled comparator, alluded to in the section, is also problematic. The evaluation of the comparison of a “similar amount of work done, or which could reasonably expected to be done in the same period by a non-disabled worker” would be difficult. This is particularly the case if the work is conducted in a segregated setting, social enterprise or alternative training or work setting where, by definition or eligibility, all workers have a disability.

Permitting an employer to use a defence based on hypothetical comparisons is also unjust because workers making equal pay claims under the Employment Equality Acts are not permitted to make such comparisons. Instead, such workers must point to a specific comparator who is being paid more than them, in order to show a claim of discrimination (see section 19 Employment Equality Acts (gender pay claims) and section 29 Employment Equality Acts (claims on other discriminatory grounds)). It is therefore unfair that employers can use hypothetical comparators for defence purposes, particularly given the difficulties outlined above in relation to establishing productivity rates, even where comparators are not hypothetical.

Considering the obligations on employers to provide (appropriate measures) reasonable accommodations for workers with disabilities, it is important to consider how the provision contained within section 35 may offset the obligation to provide reasonable accommodation in the workplace, another important principle of the CRPD (Article 5(3)).[[9]](#footnote-9) Finally, we note that the inclusion of a disability-specific ‘productivity’ defence to equal pay claims is unnecessary. This is because there is already a standard defence, applicable to all the protected grounds, whereby employers may pay different rates of pay on grounds other than the protected grounds (see section 29(5) Employment Equality Acts). This would include productivity.

#### Special facilities for employees with disabilities

Section 35(2) of the Employment Equality Acts states:

Nothing in this Part or Part II shall make it unlawful for an employer or any other person to provide, for a person with a disability, special treatment or facilities where the provision of that treatment or those facilities—

(a) enables or assists that person to undertake vocational training, to take part in a selection process or to work, or

(b) provides that person with a training or working environment suited to the disability, or

(c) otherwise assists that person in relation to vocational training or work.

Section 35(3) states:

Where, by virtue of subsection (1) or (2), D, as a person with a disability, receives a particular rate of remuneration or, as the case may be, special treatment or facilities, C, as a person without a disability, or with a different disability, shall not be entitled under this Act to that rate of remuneration, that treatment or those facilities.

At first reading, this may have been intended as an affirmative action measure, as it establishes that only people with disabilities are entitled to benefit from and have access to training or facilities under these special criteria. If, on the other hand, these provisions are intended to outline the obligation of employers to provide reasonable accommodation, then these sub-sections are superfluous and may be removed as section 16(3)(b) already provides that employers shall reasonably accommodate the needs of a person who has a disability by providing special treatment or facilities. Otherwise, these sub-sections arguably establish a legal basis for continued use of segregated employment/workshops, where some work and work-like activities are undertaken, yet the workers are paid a different rate of remuneration to other persons, who may be excluded from that setting. In this way, the Act justifies separate training, treatment and work settings/facilities which are targeted at disabled persons only.

The inclusion of the above provisions in Irish employment legislation aimed to regulate the entire Irish workforce is indeed unfortunate. These provisions need to be reconsidered in light of Ireland’s ratification of the CRPD as they justify discrimination against people with disabilities, contrary to the principles of the CRPD. However, this is not currently addressed in the Department’s Roadmap to Ratification or in the General Scheme of the present Bill.

## Head 2 National Mechanisms

We welcome the identification of the Department of Justice and Equality as the designated focal point for Article 33 CRPD, and invite the Department of Justice and Equality officials to transparently engage with the disability community of Ireland. We also welcome the establishment of an independent monitoring mechanism under the remit of the Irish Human Rights and Equality Commission. The Centre for Disability Law and Policy recently completed a research report for the Irish Human Rights and Equality Commission on the comparable benefits of approaches used by six countries (Sweden, Spain, Malta, New Zealand and Germany) to address their monitoring frameworks.[[10]](#footnote-10) This research provides useful insights into the efforts in other countries to establish monitoring mechanisms, and the CRPD Committee’s response to the various mechanisms.

The inclusion of a national human rights institution like the Irish Human Rights and Equality Commission within the monitoring framework goes a significant way to enabling a state to meet its obligations under the CRPD. However, the CRPD Committee has criticised the designation of a national human rights institution as the independent mechanism if that body is not also provided with the resources it needs to undertake that role.[[11]](#footnote-11) It is instructive to explore what the CRPD has determined in the case of examining Sweden's arrangements for their national monitoring network. Sweden established a two body monitoring system that included their Equality Ombudsman and Handisam – the government agency for disability policy coordination (with functions similar to Ireland’s National Disability Authority).[[12]](#footnote-12) In its examination of Sweden the CRPD Committee asked the state to clarify the powers and independence of the monitoring mechanism.[[13]](#footnote-13) The CRPD Committee also requested more information, including what resources the framework had been given to do its work, and how Sweden was ensuring the ‘meaningful involvement’ of persons with disabilities. This indicates that the CRPD Committee will question the independence of a monitoring mechanism where it includes a statutory body which acts as an advisor to government on disability issues, such as the National Disability Authority. Further, the current Programme for Partnership Government includes a commitment to ‘review the role of the National Disability Authority.’ In light of this commitment, and given the jurisprudence of the CRPD Committee, it would in our view be more appropriate to consider the National Disability Authority as a component of the focal point under Article 33, or as the hub for a co-ordination mechanism which the State may also establish under Article 33(1).

Given the importance of the inclusion of civil society in Article 33 we consider that the establishment of an independent advisory board comprising persons with disabilities as part of the monitoring framework under Article 33(2) is a positive step. However, we stress that the resources, structures and mechanisms to support the functioning of this body must be provided to ensure it is genuinely independent. Further, the supports and reasonable accommodations required to ensure meaningful participation of a wide diversity of persons with disabilities. We suggest that the Irish Human Rights and Equality Commission develop an independent advisory committee in a transparent way and consisting of a diverse group of people with lived experience of disability. This approach was taken in Spain, New Zealand and Malta and received favourable comment from the CRPD Committee when they reviewed Spain[[14]](#footnote-14) and New Zealand[[15]](#footnote-15).

The CRPD places a responsibility on the State to build the capabilities of the representative organisations of people with disabilities and to ensure that individuals with disabilities and disabled peoples’ organisations (DPOs) fully participate in the monitoring of the Convention at national level. New Zealand’s success in facilitating the participation of DPOs and people with disabilities in the monitoring can probably be partly attributed to the training and funding provided to their umbrella DPO specifically for CRPD monitoring.[[16]](#footnote-16) In addition to the creation of a new advisory committee of people with disabilities, further mechanisms for the engagement of existing DPOs, of individuals with disabilities and of broader civil society would also need to be put in place to ensure compliance with best international practice in implementing Article 33. In Ireland currently there is no umbrella DPO which represents the diversity of the disability community and a strategy to develop civil society capacity in this direction would, on past evidence, be regarded favourably by the CRPD Committee.[[17]](#footnote-17)

## Head 3 Deprivation of Liberty

Disability-specific forms of deprivation of liberty (including those based on a perceived lack of mental capacity) represent a key human rights issue, which has remained unaddressed in Ireland for many years. We welcome all efforts to recognise and redress the fact that persons with disabilities are unlawfully deprived of their liberty in a variety of settings, including nursing homes and other residential or long-term care facilities, such as smaller group homes as well as large institutions. Now that Ireland is undertaking to address this issue it is critical that any response fully protects the human rights of persons with disabilities in compliance with both the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities.

While the General Scheme of this Bill has not included any text for Head 3 on deprivation of liberty it indicates that this head will “provide legislative clarity with regard to who has statutory responsibility for a decision that a patient in a nursing home or similar residential care facility should not leave for health and safety reasons.” As deprivation of liberty was originally to be addressed in the Assisted Decision-Making Capacity Act 2015, we anticipate that a perceived lack of mental capacity will be one of the grounds for authorizing deprivation of liberty in the new Bill. Based on this information, we outline some concerns from a human rights perspective with the proposed approach. However, it is difficult to comment fully on the required reforms to achieve compliance with human rights norms until the full text of the Bill is published. We look forward to the opportunity to provide more in-depth comments upon publication of the full text of Head 3.

We first set out the position on deprivation of liberty in Article 14 of the UN Convention on the Rights of Persons with Disabilities (CRPD), as the Equality/Disability (Miscellaneous Provisions) Bill is one of the final legislative steps required to ensure that Ireland has brought its laws into conformity with the Convention. We then present the position of the European Convention on Human Rights (ECHR) and relevant jurisprudence of the European Court of Human Rights (ECtHR) which is increasingly relying on the CRPD in its judgments concerning persons with disabilities. We conclude with some recommendations about safeguards to prevent deprivation of liberty and to challenge unlawful deprivations of liberty for consideration in Irish legislation.

### UN Treaty bodies

Article 14(1)(b) CRPD requires States Parties to ensure “that the existence of a disability shall in no case justify a deprivation of liberty.” This wording was initially put forward by the Ad Hoc Committee which developed the first draft of the Convention text. During the negotiation of the CRPD, States and civil society debated whether this provision should be framed to ensure that disability could not be the sole or exclusive basis for a deprivation of liberty. Canada, Australia, Uganda, China and New Zealand suggested adding the term ‘solely based on disability’ and the EU favoured the term ‘exclusively based on disability’ to this provision. Such an approach would have meant that the existence of a disability combined with the risk of harm to self or others could justify a deprivation of liberty. Many states, including Mexico and South Africa[[18]](#footnote-18) and civil society organisations, including the International Disability Caucus and the World Network of Users and Survivors of Psychiatry[[19]](#footnote-19) strongly opposed the proposal to include the term ‘solely’ or ‘exclusively’ in Article 14, and as a result, the final wording is as above. This wording, and the fact that other options were considered and ultimately rejected, means that Article 14 must be read to prohibit all deprivations of liberty where the existence of disability is a factor in justifying the detention.

The majority of the literature published since the Convention entered into force has acknowledged that Article 14 represents a prohibition on forms of detention where disability is one of the grounds for the deprivation of liberty.[[20]](#footnote-20) From the time the CRPD was adopted, this is the interpretation favoured by scholars who were actively involved in the negotiations,[[21]](#footnote-21) as well as the UN Office of the High Commissioner for Human Rights,[[22]](#footnote-22) and the UN Committee on the Rights of Persons with Disabilities,[[23]](#footnote-23) the treaty body responsible for monitoring the Convention. In all dialogues which the Committee has undertaken to date with States Parties, it has urged States to repeal existing laws which provide for preventative detention on the basis of disability, including laws which permit institutionalisation and forced treatment. For example, in the Committee’s concluding observations on Australia, it recommended as a matter of urgency that the State “review its laws that allow for the deprivation of liberty on the basis of disability, including psychosocial or intellectual disabilities, repeal provisions that authorize involuntary internment linked to an apparent or diagnosed disability.”[[24]](#footnote-24)

The most recent expression of the Committee’s interpretation of Article 14 is its guidelines, published in September 2015. These guidelines make clear that the Committee understands Article 14 to include an absolute prohibition of detention on the basis of ‘perceived or actual impairment.’ The Committee’s guidelines also go further than previous interpretations of Article 14, for example, that put forward by the UN High Commissioner for Human Rights, who had suggested in 2009 that it would be in conformity with the CRPD to have disability-neutral laws on preventative detention.[[25]](#footnote-25) Instead, the Committee’s guidelines state that “[t]he involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty.”[[26]](#footnote-26)

This approach is also supported by the UN Working Group on Arbitrary Detention, which revised its Basic Principles in May 2015. This document references: “the State’s obligation to prohibit involuntary committal or internment on the ground of the existence of an impairment or perceived impairment, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, as well as [the] obligation to design and implement de-institutionalization strategies based on the human rights model of disability.”[[27]](#footnote-27) Therefore, it is clear that the two most recent expressions of this right as applied to persons with disabilities – by the CRPD Committee and the Working Group on Arbitrary Detention, favour an absolute prohibition of disability-specific deprivations of liberty.

In order to comply with the text of Article 14 therefore, disability or impairment cannot form part of the justification for depriving a person of liberty in national law. While some have argued that a functional assessment of decision-making capability can serve as the basis for detention if it is undertaken in a disability-neutral manner,[[28]](#footnote-28) such an approach conflicts with the interpretation of Article 12 by the CRPD Committee in General Comment 1. The General Comment states: “The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates Articles 12 and 14 of the Convention.”[[29]](#footnote-29) Further, General Comment 1 makes clear that functional assessments of mental capacity cannot be used as justifications for denials of legal capacity which discriminate in purpose or effect against persons with disabilities.[[30]](#footnote-30) This means that the authorization of deprivation of liberty on the grounds that the person lacks mental capacity to consent to a particular living arrangement or medical treatment, is prohibited under Article 12 CRPD.

Recommendation: To ensure consistency with the text of the CRPD, no new legislative regime authorising deprivation of liberty of persons with disabilities, or persons lacking mental capacity, can be introduced. To address understandable concerns about those living in poverty or without appropriate assistance, who might in the current system ultimately be moved to nursing homes, designated centres, or other residential settings without their consent, provision of community-based supports and services should be strengthened to ensure that the person can choose where and with whom to live on an equal basis with others, and can choose what supports and treatment to avail of. The failure of governments to address the above is we think centred around fiscal constraints.  We beleive it is critical that statutory bodies be encourageg and funded to research cost effective and more humane models of community care e.g. Open Dialogue[[31]](#footnote-31), Western Lapland, Finland. Efforts are already underway to introduce a legislative right to community care in Ireland, and this would better address the need for care and support for persons with disabilities and older people, while respecting the individuals’ will and preferences.[[32]](#footnote-32)

### European Court of Human Rights position

Article 5 sets out the right to liberty under the European Convention on Human Rights, stating 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.” The exception provided for in subsection (e) 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.” Bearing in mind that the Convention was adopted in 1950 and came into force in 1953, its language and approach must be placed in the context of its time. It is worth noting that while this Article allows for the detention of ‘drug addicts or vagrants’ most States in the Council of Europe (including Ireland) do not currently authorise detention on these grounds.

In determining when a deprivation of liberty has in fact occurred under Article 5, the European Court of Human Rights (ECtHR) does not rely on national authorities’ conclusions as to whether a person has been deprived of liberty but rather undertakes its own autonomous assessment. The ECtHR has determined that people subjected to “complete and effective control over [their] treatment, care, residence and movement”, who are under constant supervision and unable to leave an institution without permission are deprived of their liberty.[[33]](#footnote-33) Therefore any proposal to limit the deprivation of liberty provisions to people who actively object or who seek to leave the setting is not adequate under human rights standards and has been found inadequate in cases before the ECtHR.[[34]](#footnote-34) In its jurisprudence, the Court has distinguished between a deprivation of liberty subject to Article 5 and a mere restriction on liberty of movement, subject to Article 2 of Protocol 4.[[35]](#footnote-35) The difference between these two situations is one of degree, and the court has interpreted a wide range of situations as constituting deprivation of liberty, including detention by police, involuntary confinement in hospitals, psychiatric institutions or social care homes.

The court has determined that both objective and subjective criteria must be established to determine that a deprivation of liberty has occurred. The objective element seeks evidence that the person has been confined in a particular restricted space for a certain length of time. In determining whether a person was confined, the Court will examine whether the individual was free to leave the restricted area, the degree of supervision and control over the person’s movements, the extent of isolation or segregation from others and contact with the broader community.[[36]](#footnote-36) Once this has been established, the additional subjective element, that the person has not validly consented to the confinement in question, must be proven.[[37]](#footnote-37) In terms of what the Court considers ‘valid’ consent, the case law has held where a person who is ‘incompetent’ to give consent, the fact that he or she did not object to the deprivation of liberty should not be regarded as equivalent to consent.[[38]](#footnote-38)

In short, the Court’s position on the deprivation of liberty of persons of unsound mind has been to accept it as necessary (and not a de facto human rights violation), to tightly control such measures and review the resulting deprivation of liberty to determine its ongoing necessity. This differs significantly from the most recent expression of the right to liberty and security in international human rights law, Article 14 CRPD. However, it is important to state here that the ECtHR is permissive towards this kind of deprivation of liberty, rather than requiring all States to guarantee that they will in fact deprive persons of unsound mind of their liberty. This may seem like an obvious point, but it is worth restating. In efforts to reconcile State obligations under European and international human rights law, some commentators, especially those who have incorporated the ECHR into their domestic law, have argued that the ECHR requires the deprivation of liberty of certain persons with disabilities.[[39]](#footnote-39) This is simply incorrect. While Article 5 allows for deprivations of liberty for this population it certainly does not require it. Neither does it require deprivations of liberty for ‘drug addicts and vagrants’, and indeed, in most States Parties to the Convention, it is no longer permissible to detain individuals just by labelling them an addict or a vagrant. Therefore, a State Party which has ratified the ECHR may be perfectly compliant with Article 5 if it does not permit the deprivation of liberty of persons of unsound mind who are perceived to be a danger to themselves or others.

The ECtHR has consistently required certain minimum regulatory safeguards. Article 5(2) stipulates that a person who is deprived of their liberty must be informed of their rights to appeal against it.[[40]](#footnote-40) Under the Deprivation of Liberty Safeguards in England and Wales, there are various mechanisms by which this is achieved - the duty falls to the care home to inform a person of this right, but their understanding is also supported by their representative and advocate. A person who is deprived of liberty on mental health or disability related grounds may need assistance in exercising their rights of appeal.  The ECtHR has consistently emphasised the importance of 'special procedural safeguards' to this end, since *Winterwerp v Netherlands* in 2008.[[41]](#footnote-41)  In *MH v UK* the ECtHR ruled that a representative or other person be appointed whose role would be to assist a person in exercising these rights if they were unable to do so independently.  In the Deprivation of Liberty Safeguards in England and Wales the relevant person must be supported in exercising these rights by the appointment of a representative who should be *willing and able* to help the person to appeal if they want to do so, and also be an advocate.[[42]](#footnote-42) Therefore the various forms of advocacy which could assist the relevant person to develop, express and communicate his or her will and preferences; including self-advocacy, citizen advocacy, peer advocacy, and representative advocacy are necessary requirements for ECHR standards and must be provided for in situations of deprivation of liberty.

The right of appeal guaranteed by Article 5(4) is to a *court*, and not to the detaining authorities (which would not have the requisite characteristics of independence)[[43]](#footnote-43).  Requiring people to submit a complaint to the detaining authorities before it can be referred to the court would interfere with the right of 'speedy' review guaranteed by Article 5(4) - this is why the UK government decided to abandon plans for a first tier 'appeal' to the local authority in cases of deprivation of liberty.  Moreover, access to a court should not be subject to the discretion of third parties.[[44]](#footnote-44)  Rights of access to a court are not contingent upon somebody proving they have any particular prospects of success, however 'unfounded or vexatious' they may appear.[[45]](#footnote-45)

### Concerns about Deprivation of Liberty Safeguards

It is clear from the jurisprudence of the ECtHR as described above that a person can be deprived of their liberty as long as they are under “complete and effective control over [their] treatment, care, residence and movement” and have not provided free and informed consent. Whether or not a person is actively objecting or attempting to leave is irrelevant to the issue of whether a deprivation of liberty, according to the ECHR, has in fact occurred.[[46]](#footnote-46) There may be many reasons someone does not actively object or try to leave a setting. These can include: fear of the consequences; lack of alternatives; lack of support to challenge their placement; lack of awareness of any potential human rights violation[[47]](#footnote-47); fear of losing all necessary support if they object or leave the setting and also pressure from family and service providers.[[48]](#footnote-48) People can be de facto detained if they are afraid to object to moving into a nursing home, or if they move into such a setting for fear of the consequences of not being adequately supported to live independently in their own home. They may be unaware they have rights to be free from arbitrary detention, or lack support to resist pressure from family and/or service providers to move into a setting they do not want to live in. Another factor of grave concern is the widespread use of psychiatric medications to sedate people living in nursing homes and residential settings in order to make people more pliable.[[49]](#footnote-49) Under any or all of these conditions free and informed consent cannot be said to be present, therefore people are effectively deprived of liberty.

Therefore, to mitigate all these factors which remove the possibility of free and informed consent, all necessary community supports which offer people alternative choices must be available. This must include restoring and improving home help services for older people and personal assistance supports for people with disabilities. In addition, there must be a strong and well-resourced information and educational campaign about the right to be free from unlawful deprivation of liberty. Accessible information about their rights and available meaningful supports must be made available to people. There must also be a robust independent advocacy service which is adequately resourced and with statutory powers to support people to exercise all their options as alternatives to placement in settings not of their choosing. In addition, standards for advocacy services should be established and funding should be provided from a statutory body independent to the one within which the advocacy service operates.

In our view, the most appropriate safeguards for deprivation of liberty are preventative measures to ensure that detention does not occur in the first place. The resources which will be spent on establishing and maintaining a system which legitimises deprivation of liberty could be much better spent on improving community-based supports. With greater access to community supports, fewer people would be in situations where a deprivation of liberty would be deemed necessary. No other population group, apart from those deemed to lack mental capacity (predominantly people with disabilities and older people), are subject to deprivations of liberty outside the criminal justice system, authorised by law, in order to protect them from a perceived risk of harm. If the proposed deprivation of liberty scheme revolves around a determination of a lack of mental capacity to consent, this implies that those who have capacity to consent will not be deprived of their liberty if they refuse a placement in a nursing home or other residential facility, no matter how great the risk of harm arising from this refusal might be. If respect for the ‘will and preference’ paradigm introduced in the Assisted Decision-Making (Capacity) Act 2015 is to be ensured, then deprivation of liberty on the basis of a lack of mental capacity, should never occur, where placement in the relevant facility is known to be contrary to the person’s will and preferences.

However, we acknowledge that no matter how robust community services and supports are, many people with disabilities, mental health experience and older people remain at risk of becoming de facto detained and deprived of their liberty. Deprivations of liberty based on a label or diagnosis of disability, or a perceived risk of harm, are inherently arbitrary and contrary to human rights norms, as demonstrated above. Where de facto detention of people with disabilities, mental health experience and older people continues to occur, this must be recognised as a deprivation of liberty and those affected must have the opportunity to challenge their detention. Legislative provisions are required which recognise those in this situation as being deprived of liberty and provide effective remedies to restore the individual’s right to liberty, rather than the introduction of paternalistic safeguards which merely justify or ‘rubber-stamp’ the deprivation of liberty. The Mental Health Act (2006), in particular the operation of mental health tribunals, will require significant amendments to make it compliant with the CRPD.

We are gravely concerned that the proposed deprivation of liberty scheme will indirectly discriminate against persons with disabilities and older people, who are disproportionately found to lack mental capacity. Clinical professional experience demonstrates that people with impaired cognition inevitably do much better in their own environment and with their usual routine.[[50]](#footnote-50) Hence, moving them to a new environment usually results in a worsening of symptoms. Quality of life is as important to many people as duration of life. Surveys indicate that many people regard the prospect of admission to extended nursing care as a fate worse than death. It is unlikely that admitting someone to extended nursing care against their wishes will enhance their quality of life. It is even uncertain whether such an admission to a ‘safer’ environment will actually prolong life. Older people who make their own choices about events in their life enjoy better health and suffer less from stress. These arguments apply irrespective of mental capacity.

The Assisted Decision Making Act has some principles that are applicable to any decision to deprive someone of their liberty. The most important of these is the replacement of paternalistic ideas about 'best interests', with determining the person's will and preference. Decision-making representatives appointed under the Assisted Decision Making Capacity Act 2015 would not be able to make a decision to deprive a person of their liberty since they have to adhere to the guiding principle of ‘respect for the person’s will and preferences.’ However, if the person’s will and preference is to go to a nursing home, then this would constitute consent, and such a placement would not amount to a deprivation of liberty. Since best interests was not included as a principle under the 2015 Act, to include it, or an equivalent such as ‘health and safety[[51]](#footnote-51)’ or ‘risk of harm’, in legislative provisions on deprivation of liberty would undermine and contradict the spirit and purpose of the 2015 Act.

The importance of public education campaigns to make people aware of the possible safeguards available to them cannot be over-stated. Public awareness of these proposals by the Department of Health and Children is likely to trigger widespread concern among the public, especially people (including but not limited to people with disabilities and elderly people) who have reason to fear they may be subject to deprivation of liberty in settings not of their choosing in the future. Families and supporters of people currently resident in such settings must also be alarmed at such grave proposals to legitimise deprivation of liberty. A robust rebuttal of these concerns must address the issues outlined above.

### Recommendations

At a minimum, any provisions on deprivation of liberty in the new Bill should incorporate the following principles:

1. A clear statement of the Government Policy not to allow new entrants into congregated settings.[[52]](#footnote-52)
2. Principles for deprivation of liberty in *any* setting must comply with the ECHR and the CRPD.[[53]](#footnote-53)
3. A clear definition of deprivation of liberty is required. In our view, this must include all situations in which a person has not provided free and informed consent to be in the relevant setting, or where the decision is not made in accordance with the person’s will and preferences, or where the person’s will and preferences are unknown.
4. The relationship between free and informed consent and the requirement in the Assisted Decision-Making (Capacity) Act to give effect to the person’s will and preferences must be clarified.
5. Decision-making representatives, co decision-makers, holders of a power of attorney and decision-making assistants are not authorized to deprive a person of liberty as such decisions conflict with the guiding principles of the Act, particularly section 8(7)(b), to give effect to the person’s will and preferences.
6. Safeguards must provide for *accessible* individual redress, to seek review of any possible unauthorized or authorized deprivation of liberty in accordance with Article 5(4) ECHR, with provisions for compensation in the event of unlawful deprivation of liberty in accordance with Article 5(5) ECHR. These must include direct access to a court to challenge the deprivation of liberty and effective assistance to enforce this right (e.g. independent advocacy and legal representation).
7. The state must ensure that any places where people may be deprived of their liberty are subject to independent monitoring in accordance with OPCAT and Article 16 CRPD.
8. Independent statutory advocacy must be made available to all residents of nursing homes and other residential settings.
9. Any bodies charged with commissioning or oversight of nursing homes and other settings where people can be detained (especially HIQA), must be under a general obligation to alert the appropriate authorities to any possible unauthorized deprivation of liberty. It is suggested that reports of suspected deprivations of liberty could be made to the Director of the Decision Support Service who could bring a case to court if required to determine whether a deprivation of liberty is in fact occurring and challenge whether placement in a given setting is contrary to the relevant person’s will and preferences.

In order to achieve compliance with the ECHR and CRPD, the best approach for the Bill would be to recognise when deprivation of liberty occurs, and provide an effective remedy for anyone who is deprived of liberty. This can be achieved through providing a broad definition of deprivation of liberty wherever a person is subject to “complete and effective control over [her] treatment, care, residence and movement.”[[54]](#footnote-54) which does not require the person to demonstrate active resistance to placement in a residential setting. If a person provides free and informed consent to reside in such a setting and undergo treatment, then this must be respected, and will not amount to a deprivation of liberty. Similarly, we suggest that if a person uses the one of the mechanisms under the Assisted Decision-Making (Capacity) Act to provide support in making such a decision, it should also be respected and will not amount to a deprivation of liberty.

The only situation in which an appointee under the Assisted Decision-Making (Capacity) Act could make a decision which results in a deprivation of liberty is where the decision does not respect the will and preferences of the relevant person. In these situations, there must be an opportunity to challenge the decision-maker and a process to discover the person’s will and preferences must be commenced. In some cases, it will not be possible to determine with absolute certainty the true will and preferences of the relevant person, and in these circumstances, a court must make the best interpretation possible at that time, based on all available information, of what the relevant person’s will and preferences would be concerning the decision to enter or remain in a relevant facility. Where a court determines that the person would ultimately have refused to enter or remain in such a facility, this decision must be respected. This approach is designed to protect the individual’s right to autonomy and equal recognition before the law, as set out in the CRPD.

## Head 4 Amendment of Electoral Acts

We welcome the effort to remove discriminatory terminology such as that of 'unsound mind' from Irish statute law. The term 'unsound mind' is discriminatory, offensive and out-dated. It implies a permanent disbarment or exclusion due to mental/cognitive disability and as such is contra-indicated by the provisions of the CRPD. It will be a positive step to remove this obstacle to an individual holding a role as an elected representative in Dáil Eireann. While the exact wording of this head has not been included in the General Scheme, we wish to make some general recommendations on the approach to be adopted in the final Bill.

An international study by the UN Office of the High Commissioner on participation in political and public life by persons with disabilities has found the exclusion of people with disabilities from eligibility as election candidates is often connected to legal capacity, and that even where this has been relaxed to ensure the right to vote, as in France for example, where people under guardianship or curatorship can retain the right to vote, they do not retain the right to stand for election.[[55]](#footnote-55) This study found only a few examples internationally where persons with disabilities were universally recognised as eligible to stand for election, including in the UK,[[56]](#footnote-56) although a number of countries, including Mexico and Burkina Faso, were considering the introduction of quotas to incentivise political parties to be more inclusive of people with disabilities and to ensure greater representation of people with disabilities in parliament.[[57]](#footnote-57)

In 2004, the Liberal Party in Canada removed a question from its application form for party candidates which required potential electoral candidates to disclose whether or not they had a mental health condition, and the Prime Minister issued an apology to the Canadian Mental Health Association for the stigma this may have caused.[[58]](#footnote-58) Similar progress was made in the UK when the House of Commons passed the Mental Health (Discrimination) Act 2013, repealing section 141 of the Mental Health Act 1983, which allowed for the removal of a Member of Parliament or members of devolved bodies (such as the Scottish, Welsh and Northern Ireland Assemblies) on the grounds of mental illness after a period of 6 months.[[59]](#footnote-59) The 2013 Act also repealed any common law provisions which disqualified an individual from becoming a member of parliament due to mental illness.[[60]](#footnote-60) These provisions were not replaced with any alternative wording in the UK, and we would urge the Department to follow a similar approach in the Irish context. If it is deemed necessary to replace the existing provision in section 41 with alternative wording, then we would recommend a disability-neutral provision that allows for removal of any parliamentarian from their position on the grounds that they are not capable, despite provision of reasonable accommodation, of effectively performing the functions of their office.

## Head 5 (Juries Act 1976)

We welcome the proposal to make the Juries Act 1976 compatible with the CRPD. However we have significant concerns about the current proposed wording, in particular the suggestion that the existence of an arrangement under the Assisted Decision-Making (Capacity) Act 2015 could be used as evidence that a person lacks capacity to understand and discharge the duties of a juror. Section 3 of the Assisted Decision-Making (Capacity) Act sets out that a person’s capacity should be construed ‘functionally’ – meaning that the determination of whether the person has mental capacity is decision-specific and time-specific. We have previously outlined how the functional test of mental capacity contravenes the right to legal capacity in Article 12 CRPD. Nevertheless, we recgonise that this is the standard currently applied in Irish law under the 2015 Act, and we view the wording of Head 5 as incompatible with the principles of the new Act. For example, the fact that a person uses a decision-making assistance agreement for financial decisions, or has a decision-making representative appointed to them for medical treatment decisions, cannot automatically mean that this individual is incapable of performing the functions of a juror in a criminal trial.

Further, in order to protect the individual juror’s right to privacy, she should not be obliged to disclose whether she is the subject of an arrangement under the Assisted Decision-Making (Capacity) Act where this is of no relevance to the case at hand. Instead, we recommend that there should be no general exclusion from jury service for those who have arrangements under the Assisted Decision-Making (Capacity) Act 2015, but rather that jurors who would be unable to perform their functions after reasonable accommodation has been provided should not be eligible for jury service. Such an approach is consistent with the proposals of the Law Reform Commission, and international best practice, as discussed further below.

The proposed wording of Head 5 does not currently explicitly address the situation of persons with sensory disabilities, especially visual or hearing impairments (unless these are considered ‘physical disabilities’ in the current wording. This issue, particularly concerning deaf jurors, has been the subject of litigation in the Irish courts, and was addressed in the Law Reform Commissions’ report on Jury Service. The provisions of the 2008 Act which the General Scheme seeks to replace were challenged in a 2010 case by a deaf woman who was deemed ineligible for jury service, and the Judge in that case found that the use of a sign language interpreter could violate the prohibition in common law against the inclusion of a 13th person in the jury room.[[61]](#footnote-61) However, subsequent cases in the Irish courts have taken a different perspective, with Judge Carney finding in 2010 that requiring sign language interpreters to swear an oath of confidentiality similar to that sworn by jurors would be sufficient to preserve the integrity of the jury process.[[62]](#footnote-62) In comparative jurisdictions, varying approaches have been taken to this issue, with the English courts maintaining the prohibition against ‘strangers’ in the jury room,[[63]](#footnote-63) whereas the US courts have acknowledged that the use of a sign language interpreter is appropriate to facilitate the participation of a deaf juror,[[64]](#footnote-64) and since the passage of the Americans with Disabilities Act, it has not been permissible to explicitly exclude people with disabilities from eligibility for jury service. On a global scale, while challenges to the exclusion of jurors with physical and sensory disabilities have been somewhat successful, fewer challenges to ineligibility of individuals for jury service on the grounds of intellectual or psycho-social disability, or levels of literacy, appear to have been taken.

The Irish Law Reform Commission has critiqued the current system of ineligibility for jury service in Ireland in light of the CRPD and made a number of recommendations for reform. With respect to jurors with physical and sensory disabilities, the Commission recommended amending the 2008 Act to state that ‘a person is eligible for jury service unless the person’s physical capacity, taking account of the provision of such reasonably practicable supports and accommodation that are consistent with the right to a trial in due course of law, is such that he or she could not perform the duties of a juror.’[[65]](#footnote-65) Similarly, in the context of mental health and intellectual disability, it recommended that the 1976 Act be amended to reflect that ‘a person is eligible for jury service unless, arising from the person’s ill health, he or she is resident in a hospital or other similar health care facility or is otherwise (with permissible and practicable assisted decision-making supports and accommodation that are consistent with the right to a trial in due course of law) unable to perform the duties of a juror.’[[66]](#footnote-66) Finally, in the context of reading and linguistic ability, the Commission suggested that ‘in order to be eligible to serve, a juror should be able to read, write, speak and understand English to the extent that it is practicable for him or her to carry out the functions of a juror.’[[67]](#footnote-67)

The Law Reform Commission suggested that no individual assessment of capacity would be required as a rule for any juror but that jurors would be informed of their obligations and encouraged to come forward if they felt that due to their disability they would be unable to carry out the functions of a juror.[[68]](#footnote-68) In all cases, it would be the responsibility of the Judge to ultimately determine whether an individual juror could adequately perform her duties, and in so doing, the Judge should apply the presumption of capacity and the requisite standard of juror competency expected of all who are eligible for jury service.[[69]](#footnote-69) The report also acknowledged that having a disability that requires extensive accommodation and support to carry in order to perform jury service could constitute ‘good cause’ for a juror to request to be excused.[[70]](#footnote-70) The Commission also recommended that, where there was a conflict between the obligation to provide a fair trial and the principles contained in the CRPD, fair trial duties would take precedence.[[71]](#footnote-71)

In opening up jury service to accommodate persons with disabilities, questions will inevitably be raised about the impact which this might have on fair trial rights – especially for defendants in criminal cases. However, Bleyer, McCarty and Wood argue that in light of the disability equality imperative:

Courts must open their doors as well as their jury boxes and consider with care how to accommodate a range of impairments while ensuring a fair trial. Judges must make sensitive determinations about each individual's ability to serve, based on a thorough knowledge of accommodations and the nature of the case at hand. They must weigh the competing rights of people with disabilities to serve against the rights of defendants and litigants to a fair and impartial jury trial.[[72]](#footnote-72)

These authors suggest five possible ways for developing a more inclusive jury. The first requires checks and balances to ensure that disabled people are not excluded from the lists where potential jurors are sourced.[[73]](#footnote-73) This can pose a problem since many of these types of databases (e.g. electoral lists, census data, tax registries) do not include all people with disabilities who might be eligible to serve on a jury. Another approach is to include non-discrimination statements in the legislative and regulatory frameworks governing jury service – to prevent any blanket exclusions of potential jurors on the basis of a specific disability.[[74]](#footnote-74) This would seem to echo the approach suggested by the Irish Law Reform Commission. The third route proposed is to clarify what eligibility for jury service involves, and to make juror qualifications transparent and easily attainable, while meeting the requirement for a fair trial.[[75]](#footnote-75) Fourthly, exemptions from jury service must be clearly outlined, and should be sufficiently flexible to allow people with disabilities to opt out of jury service if it would impact negatively on their health, while maintaining the desired representativeness in the jury system.[[76]](#footnote-76) Finally, it is suggested that introducing legislative mandates to reasonably accommodate jurors with disabilities is necessary to achieve substantive equality and to incentivise greater participation by people with disabilities in jury service.[[77]](#footnote-77)

The introduction of a requirement of reasonable accommodation for persons with disabilities in order to perform their functions as jurors is welcome, but must be universally applied to all persons with disabilities – regardless of whether the person’s impairment is physical, sensory or cognitive in nature. Finally, clarity is required on the relevant standard of reasonable accommodation to be applied for jury service – and we would argue, as above, that ‘disproportionate burden’ is the correct standard, as this reflects the language used in Articles 2 and 5 CRPD.

## Head 6 Criminal Law (Insanity) Act 2004

This text suggests that the government is offering a technical modification in response to the case of B.G. v District Judge Catherine Murphy and Others.[[78]](#footnote-78) The position of the Centre for Disability Law and Policy is that this is not sufficient to address the incompatibility of the insanity defence and determinations of unfitness to plead with the provisions of the CRPD.

In the case of B.G., the applicant was a 49 year old man with significant ‘mental disabilities and intellectual deficits’ who was charged with sexual assaulting a woman. His consultant psychiatrist deemed him unfit to stand trial under the Criminal Law (Insanity) Act 2006. The issue first came to court as a result of the Director of Public Prosecution’s contention that the case would only be disposed of if the applicant pled guilty. Since the applicant was declared unfit to plead, the trial judge sought clarity from the High Court on how to proceed and which court should resolve the fitness to plead issue.[[79]](#footnote-79) In the second judgment, the substantive issue of the constitutionality of proceedings under the 2006 Act was considered. Hogan J held that the application of the 2006 Act to the applicant in this case, could result in him facing a higher penalty than a similar person without a disability and that were this to happen it would violate the Constitutional principle of equality. The Court held that this ‘unforeseen consequence’ of the drafting of the law, ‘violated the constitutional requirement of equality before the law’ as required by Article 40.1 of the Constitution.[[80]](#footnote-80)

We agree that the determination of fitness to plead is a serious issue which has the potential to violate the constitutional requirement of equality before the law enshrined in Article 40.1 of the Constitution. However we do not agree that the proposed language in Head 6 resolves this situation. Rather, we recommend that the Department consider further reforming section 4 of the 2006 Act to ensure that a disability-neutral approach to fitness to stand trial is adopted. Section 4(2) currently provides that: ‘An accused person shall be deemed unfit to be tried if he or she is unable by reason of mental disorder to understand the nature or course of the proceedings so as to— (*a*) plead to the charge, (*b*) instruct a legal representative, (*c*) in the case of an indictable offence which may be tried summarily, elect for a trial by jury, (*d*) make a proper defence, (*e*) in the case of a trial by jury, challenge a juror to whom he or she might wish to object, or (*f*) understand the evidence. In our view, this provision could be rendered compatible with the CRPD simply by removing the phrase ‘by reason of mental disorder.’ If any defendant is unable to fulfill these criteria, we would argue that it is not possible for a fair trial to proceed and no criminal prosecution should follow. Importantly, we also argue that the person who is deemed unfit to stand trial should not be compelled to undergo forced psychiatric or other medical treatment, as this would constitute a violation of Articles 12 and 14 CRPD as interpreted by the CRPD Committee.

Beyond the issue of fitness to plead, greater reform of Ireland’s insanity defence is required to ensure conformity with the principles of the CRPD. The CRPD Committee has made clear in its Guidelines on Article 14 that ‘security measures’ such as compulsory psychiatric treatment imposed on persons found not responsible due to “insanity” or incapacity to be held criminally responsible, violate the norms of the Convention. The Committee has recommended eliminating such measures,[[81]](#footnote-81) including those which involve forced medical and psychiatric treatment in institutions.[[82]](#footnote-82) It has also expressed concern about security measures that involve indefinite deprivation of liberty and absence of regular guarantees in the criminal justice system.[[83]](#footnote-83)

The finding of an individual to be not guilty by reason of insanity can bring, by judicial order, consequences that ordinary criminal offenders would not face. For example, while the criminal court would impose an exact sanction on the offender proven to be guilty that may be lower than the maximum sanction prescribed by the law for that offence, a person subject to the insanity defence can be incarcerated in a psychiatric facility up to, and even beyond, the maximum sentence for the relevant crime. Therefore, persons not guilty by reason of insanity do not have exact clarity on the duration of their incarceration. While prisoners in general cannot be subjected to any kind of medical treatment without their previous informed consent, people incarcerated in psychiatric facilities are often forcefully treated with various kinds of pharmacological and psychotherapeutic interventions which may have different side effects on their health and social functioning.

At a minimum we call on the government to closely consult with and actively involve the representative organisations of persons with disabilities to examine how the Criminal Law (Insanity) Act 2006 can be amended in light of the requirements of the CRPD and the need to ensure people with intellectual, psychosocial and other cognitive disabilities are provided with support and reasonable accommodation to face trial to determine their guilt or innocence in a way that does not discriminate against them. The amendment suggested by the Head of this Bill does not sufficiently address our grave concerns with how the current criminal law fails to meet the needs of defendants with disabilities.

## Head 7 Replacement of 'persons of unsound mind' and 'lunatics' in statute law

While we welcome the commitment to remove these terms from various aspects of statute law, we are concerned about the proposal to replace these with a blanket reference to persons who lack mental capacity, particularly when such reference lists all available options under the Assisted Decision-Making (Capacity) Act. It is important to emphasise that a person who enters a decision-making assistance agreement retains her capacity to make decisions, and the existence of such an agreement should not be equated with a lack of mental capacity. Further, as noted above in relation to Head 5, the existence of one or more arrangements under the Assisted Decision-Making (Capacity) Act, may be entirely irrelevant to the individual’s abilities to perform certain legal duties. For example, we cannot presume that a person who has a decision-making agreement for particular medical decisions is incapable of performing his or her functions as a company director in a context which does not involve making medical decisions.

In situations where the existing statute uses terminology such as ‘person of unsound mind’ or ‘lunatic’ to exclude an individual from certain legal obligations or duties, the language should be reformed to take a disability-neutral approach, and presume that an individual is capable of performing the relevant legal obligations (including where the person would be capable of performing these duties with support or reasonable accommodation). At a minimum, the mere existence of an arrangement under the Assisted Decision-Making (Capacity) Act cannot be definitive proof that the person lacks the capacity to adhere to fulfil her legal duties or obligations. Alternatively, some statutes use the terminology of ‘person of unsound mind’ to provide for situations where an individual would require support to litigate or pursue a claim in their own right (e.g. the Personal Injuries Assessment Board Act 2003 or the Residential Institutional Redress Board Act 2003). In these instances it would be more appropriate to replace this terminology with reference to a relevant person who would be unable to pursue a legal claim in their own right. In some instances these individuals might be subject to a decision-making representative order or an enduring power of attorney under the Assisted Decision-Making (Capacity) Act, although not all of those who need support to litigate would be subject to an arrangement under the Act.

In our view, the most appropriate approach to this issue is simply to repeal the legislative provisions which use this discriminatory terminology and not to replace them with provisions such as the proposed wording which might have the unintended consequence of enabling further discrimination against people who use support in making certain kinds of decisions. Rather, the eligibility criteria for the relevant legal responsibilities or opportunities should be clearly outlined in the relevant statute, and where persons fail to meet this eligibility criteria they will not be permitted to perform the relevant legal function. Separate legislation is likely also required to address the issue of how people who are unable to pursue a legal claim in their own right could be supported to do so.

## Head 13 (Amendment of Taxes Consolidation Act 1997)

Our arguments about Heads 4, 5 and 7 apply here. In addition, we argue that in order to be congruent with the guiding principles of the Assisted Decision-Making (Capacity) Act 2015 the amendment must replace the text 'trustee' and 'guardian' with decision making representative, not simply to add on the role of ‘decision-making representative’, leaving trustee and guardian in the text. The intention behind the Assisted Decision-Making (Capacity) Act 2015 is to remove out-dated concepts like guardianship from Irish legislation.

## Concluding Comments

While we welcome the Government's commitment to ratifying the CRPD, we have grave concerns that the provisions as outlined in the General Scheme will fail to pass scrutiny by the CRPD Committee. We are concerned that if this vital legislation is rushed through the Dáil and Seanad without sufficient time for the meaningful participation of persons with disabilities and their representative organisations, it will not suffice to make the State (and Statue Book) compliant with the CRPD. It would be far preferable to give due time for adequate consultation with civil society, including the representative organisations of persons with disabilities, to ensure that Bills are drafted that meet the needs of the community. Pursuing such a participatory approach is far more likely to be well received by the Committee than the current rushed approach which is producing drafts that utterly fail to meet the Committee's standards, as evidenced by their concluding reports on examination of other countries. The Centre for Disability Law and Policy remains at the disposal of the Department of Justice and Equality and is eager to provide further research on international best practice which could inform the final text of the Equality/Disability (Miscellaneous Provisions) Bill.

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2. Lawson, A. 2012. Disability equality, reasonable accommodation and the avoidance of ill-treatment in places of detention: the role of supranational monitoring and inspection bodies. The International Journal of Human Rights, 16, 845–864. [↑](#footnote-ref-2)
3. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (European Union|EUINT). [↑](#footnote-ref-3)
4. DX v Buttimer [2012] IEHC 175. [↑](#footnote-ref-4)
5. ibid [14]. [↑](#footnote-ref-5)
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7. UN Committee on the Rights of Persons with Disabilities, General Comment No. 3, available online at http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx. [↑](#footnote-ref-7)
8. Employment Equality Act 1998 with Annotations, Revised March 2016, available at: <http://www.lawreform.ie/\_fileupload/RevisedActs/WithAnnotations/EN\_ACT\_1998\_0021.PDF> (accessed 7 June 2016). [↑](#footnote-ref-8)
9. Article 27(1), UNCRPD. [↑](#footnote-ref-9)
10. Centre for Disability Law and Policy, NUI Galway Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities, 2016 [available at https://www.ihrec.ie/publications/] [↑](#footnote-ref-10)
11. Committee on the Rights of Persons with Disabilities, List of Issues in Relation to the Initial Report of Sweden, adopted by the Committee at its tenth session, paragraph 46, U.N.Doc. CRPD/C/SWE/Q/1. [↑](#footnote-ref-11)
12. Committee on the Rights of Persons with Disabilities, Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Sweden, paragraphs 350–353, U.N.Doc. CRPD/C/Swe/1. [↑](#footnote-ref-12)
13. Committee on the Rights of Persons with Disabilities, List of Issues in Relation to the Initial Report of Sweden, adopted by the Committee at its tenth session, paragraph 46, U.N.Doc. CRPD/C/SWE/Q/1. [↑](#footnote-ref-13)
14. Committee on the Rights of Persons with Disabilities, Consideration of reports sub- mitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities, Spain, paragraph 7, U.N.Doc CRPD/C/ESP/CO/1 (19 October, 2011). [↑](#footnote-ref-14)
15. Committee on the Rights of Persons with Disabilities, List of Issues in relation to the Initial Report of New Zealand, U.N.Doc. CRP- D/C/NZL/Q/1 (2014); Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of New Zealand, paragraph 4, U.N.Doc. CRPD/C/NZL/CO/1 (31 October 2014). [↑](#footnote-ref-15)
16. New Zealand Human Rights Commission, Making Disability Rights Real [Available at http://www.dpa.org.nz/making-disability-rights-real]. [↑](#footnote-ref-16)
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19. Ad Hoc Committee, Fifth Session, Daily summary of discussions, January 26, 2005. [↑](#footnote-ref-19)
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21. See Minkowitz, Tina, ‘The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from nonconsensual psychiatric interventions’ (2007) 34(2) *Syracuse Journal of International Law and Commerce* 405; Minkowitz, Tina, ‘Why Mental Health Laws Contravene the CRPD–An Application of Article 14 with Implications for the Obligations of States Parties’ (2011) *SSRN Working Paper Series*, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1928600> (last accessed 25 June 2016); Kanter, Arlene S., *The Development of Disability Rights under International Law: From Charity to Human Rights* (Routledge, 2014). [↑](#footnote-ref-21)
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35. Creangă v. Romania GC], no. 29226/03 ECHR-23-Feb-2012; Engel and Others v. the Netherlands, judgment 6\8\1976, Series A, No. 22. [↑](#footnote-ref-35)
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41. Winterwerp v Netherlands 6301/73 (1979) ECHR 4 [↑](#footnote-ref-41)
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43. Weeks v The United Kingdom; ECHR 5 Oct 1988; Reid v UK 50272/99 (2003) ECHR 94 [↑](#footnote-ref-43)
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