

*Capacity and
capacity
assessments as a
barrier to
accessing justice*

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Scope of Presentation

- In this presentation I am going to speak about the denial of legal capacity as a significant barrier in realising the right of access to justice for persons with disabilities.
- I am going to focus on article 12 of the CRPD, which is known as the right to legal capacity or equal recognition before the law and Article 13 the right on access to justice.
- I will also speak about the types of accommodations that can facilitate access to justice and the barriers to law reform and policy development.

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From Civil Death to Full Personhood (1)

We had the great privilege of having Professor Gábor Gombos present at a conference in Dublin 2013, which was lobbying on the need for a human rights approach in the then draft law on decision-making.

Gábor in his presentation made the case that "[l]egal capacity is a right in and of itself as well as a precondition of many other rights".

He also spoke of legal capacity as a tool of accessibility and that recognition of a person's legal capacity was a paradigm shift that meant that persons with disabilities could enjoy full personhood.

Without recognition of legal capacity people are effectively sentenced to civil death.

See Gábor Gombos, "From civil death to full personhood: Ireland's challenges to implement the CRPD" (Dublin: Amnesty International, Seminar on "Supported Decision-Making in Theory & Practice: Ireland's Capacity Bill", 29th of April 2013).



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From Civil Death to Full Personhood (2)

- As you have heard throughout the series of events this week the CRPD seeks to ensure that States moves beyond the discriminatory approaches in its "mental capacity laws" to a system which can be described as realising universal legal capacity and provide supported decision-making where needed.
- However, as we have seen throughout the world where Sates have sought to reform the law in this area it is challenging as the implementation takes place within different legal, political and regulatory environments.
- The existing legal structures throw up many challenges in the prosecution of crimes against persons with disabilities.
- These include stereotypes with regards to the persons disability, concerns about the persons credibility and reluctance to provide accommodations.

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Accessing Justice (1)

- The right of access to justice is a gateway right, which is essential for the enjoyment and exercise of other human rights.
- As mentioned throughout these proceedings the CRPD enumerated access to justice in Article 13 as a stand-alone right.
- This is an innovative aspect of the CRPD as it was the first time this was done in international human rights law.

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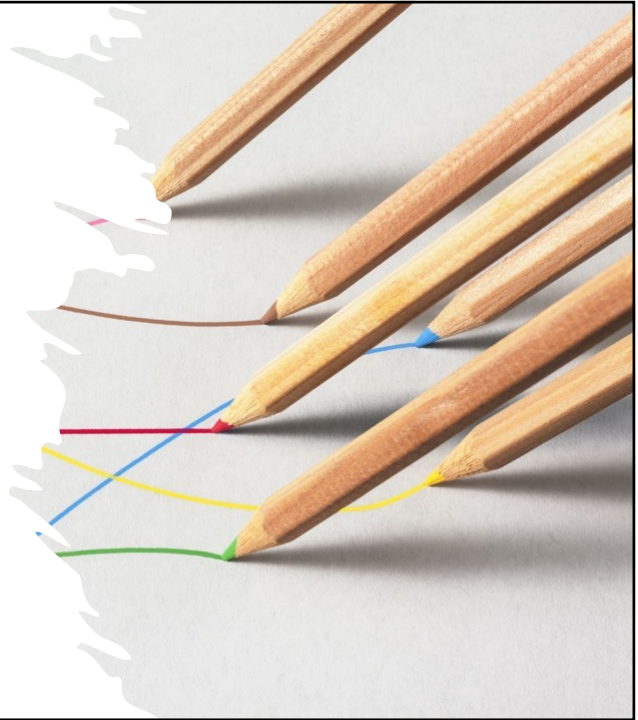
Accessing Justice (2)

- However, despite the recognition of the right as a key right for persons with disabilities successive UN Special Rapporteurs on the Rights of Persons with Disabilities and the UN Committee on the Rights of Persons with Disabilities have highlighted the difficulties in the implementation of this right.
- When you look at the challenges to realising the right to access to justice a recurrent theme in the literature is the failure of State Parties to recognise “legal capacity leading to restrictive practices on rules of legal standing and opportunities to participate in proceedings through which access to justice is delivered”. See Eilionóir Flynn, Catriona Moloney, Janos Fiala-Butora & Irene Vicente Echevarria “Final Report Access to Justice of Persons with Disabilities” (Galway: Centre for Disability Law & Policy, December 2019).

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Accessing Justice (3)

- The story here is a familiar one in that the law and its application involve the blending of mental capacity and the right to hold and exercise legal capacity.
- The failure to meet the bar of mental capacity results in restriction or denial of access to justice.
- Often medical evidence is used to justify the deprivation of legal capacity.
- It is in this regard that the assessment of mental capacity compounds existing discrimination and results in what Professor Gombos has referred to as civil death.



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Accessing Justice (4)

- Article 13 of the CRPD on access to justice effectively means that persons with disabilities have the right to participation in all legal proceedings that are relevant to them.
- The provision of accessibility and procedural accommodations are key in accommodating the participation of persons with disabilities in proceedings.
- Article 13 in conjunction with article 12 also recognises the legal capacity of persons with disabilities, especially persons with intellectual and psychosocial disabilities.
- This extends to litigants, defendants, witnesses or victims of crime.
- Their testimony cannot be dismissed and discredited on discriminatory grounds.
- Article 12(3) requires supportive measures and fair procedures.

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Accessing Justice (5)

- An entrenched key barrier to implementation of article 13 is the deprivation of legal capacity and the resultant denial of a right to litigate or be a witness before courts in both civil and criminal matters.
- As mentioned, the use of mental capacity as a prerequisite to the right to hold and exercise legal capacity is prevalent.
- The outcome of the assessment of the person's mental capacity will determine whether their journey for justice can continue.
- Laws that permit for the assessment of a person's mental capacity perpetuate discrimination and inequality experienced by persons with disabilities in justice systems throughout the world.
- The CRPD requires State Parties to change law and policy to ensure access to justice by removing capacity assessments.

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Problems in Assessing Mental Capacity

- The literature as it relates to assessments of mental capacity shows that the process of assessing a person's "mental capacity" is highly subjective.
- This is even the case where a functional assessment of capacity is undertaken.
- As such assessments of mental capacity either restrict or deny legal capacity.
- Capacity assessments are discriminatory and are essentially an assessment of the persons credibility as a victim.
- This is at odds with human rights obligations.

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Examples of Accommodations (1)

- It might be useful to consider very briefly some examples of accommodations.
- Expert witness who provide the court with information about the witness's disability and its potential implications on their evidence / testimony.
- Dispensing with the requirement to caution the witness.
- Allowing a person to provide testimony behind a partition.
- Allowing a persons to provide testimony outside the courtroom.
- The use of experts to provide guidance on how to question the person during proceedings.

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Examples of Accommodations (2)

- Accommodating different forms of communication in court proceedings. For example, through sign-language interpretation, intermediaries or assistive technology.
- The use of an independent statutory advocate. See Eilionóir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge, 2015).
- Some States have changed their laws in order to ensure recognition of legal capacity and supported decision-making.
- The reform of legal capacity legislation in Colombia provides for a presumption of legal capacity for all adults with disabilities.
- This includes support to exercise legal capacity and recognition of the person's will and preferences in availing of support.

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The Limits of Procedural Accommodations?

- The Office of the United Nations High Commissioner for Human Rights in its 2016 study of the standards on equality and non-discrimination of person disabilities under article 5 of the CRPD provided a crucial clarification of the meaning of accommodation in Article 13.

"Similarly, reasonable accommodation should not be confused with procedural accommodations in the context of access to justice, as this would fall short of the full provisions enshrined in the right. During the negotiations on the Convention, the term "reasonable" was intentionally left aside in the framing of article 13. Article 13 requires "procedural accommodations", which are not limited by the concept of "disproportionate or undue burden". This differentiation is fundamental, because the right of access to justice acts as the guarantor for the effective enjoyment and exercise of all rights. Failure to provide a procedural accommodation therefore constitutes a form of discrimination on the basis of disability in connection with the right of access to justice."

- This clarification is essential, in that the duty to provide procedural accommodations in the justice systems is not optional and the cost associated with accommodations cannot be used to deny requests for accommodation.

See "Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities" (Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/34/26, 6 December 2016).



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The CRPD Committee on Barriers to Access to Justice

- The Committee in its Concluding Observations to State Parties have consistently highlighted the barriers that restrict and deny access to justice.
- In its Concluding Observations to South Africa that Committee expressed its concerns about "the barriers, including physical and legislative ones, that prevent the effective participation of all persons with disabilities, especially women and children, persons with psychosocial or intellectual disabilities, and deafblind persons, in accessing the justice system due to lack of procedural accommodations, including accessibility, in the judicial system".
- It also expressed concern about "[t]he absence of information about the justice system and its proceedings in accessible formats provided to blind and visually impaired persons (Braille and audio), deaf persons (sign language interpretation) and persons with psychosocial or intellectual disabilities (Easy Read); [and] [t]he limited knowledge about the human rights of persons with disabilities within the judicial system and the inadequate number of trained professional and certified sign language interpreters, Braille transcribers and Easy Read producers to convey judicial information to persons with disabilities that require it".

"Committee on the Rights of Persons with Disabilities Concluding observations on the initial report of South Africa" (Geneva: CRPD/C/ZAF/CO/1, 23rd of October 2018).



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Participation in Jury Service

- Strategic litigation has been used in both Ireland and Australia to challenge the exclusion of persons who experience hearing loss and deafness from jury service.
- The judgments from the Irish court and the Australian tribunals / courts indicate a lack of appreciation for the concept of reasonable accommodation.
- There has been an unwillingness to amend law and procedures to allow sign language interpreters facilitate persons who experience hearing loss from exercising their civic obligations.
- Exclusion has been justified based on the right to a fair trial of a defendant and the jury secrecy rule.
- Law reform is hard fought in this area.

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Unfitness to Plead (1)

- The laws on unfitness to stand trial are a worrying example of the use of capacity assessments to deny access to justice.
- The law on unfitness to stand trial serves to exempt an accused from a criminal trial, permanently or temporarily, because the person is considered unable to comprehend and meaningfully participate in the trial
- Terminology differs from jurisdiction to jurisdiction with variations of the term including 'fitness to plead' or 'unfitness to plead'.
- The law on unfitness to stand trial is designed to address the specific needs of defendants considered vulnerable due to their inability to meaningfully participate in court proceedings.

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Unfitness to Plead (2)

- However, a person deemed unfit to stand in a criminal trial may end up being detained in secure settings longer than if they had been convicted and received the maximum sentence for the alleged crime.
- The recent law reform reviews of this area of law range from calls to strengthen procedural safeguards in the application of unfitness to stand trial laws by introducing functional assessments of mental capacity in order to *expand* the number of people responded to under this provision.
- To comply with the CRPD deprivations of liberty following unfitness to stand trial determinations should be ended and functional assessments of mental capacity should be abandoned altogether.

See O'Mahony & Gooding "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" (International Journal of Law, Crime and Justice Volume 44, March 2016, Pages 122-145).

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Reforming the Criminal Justice System (1)

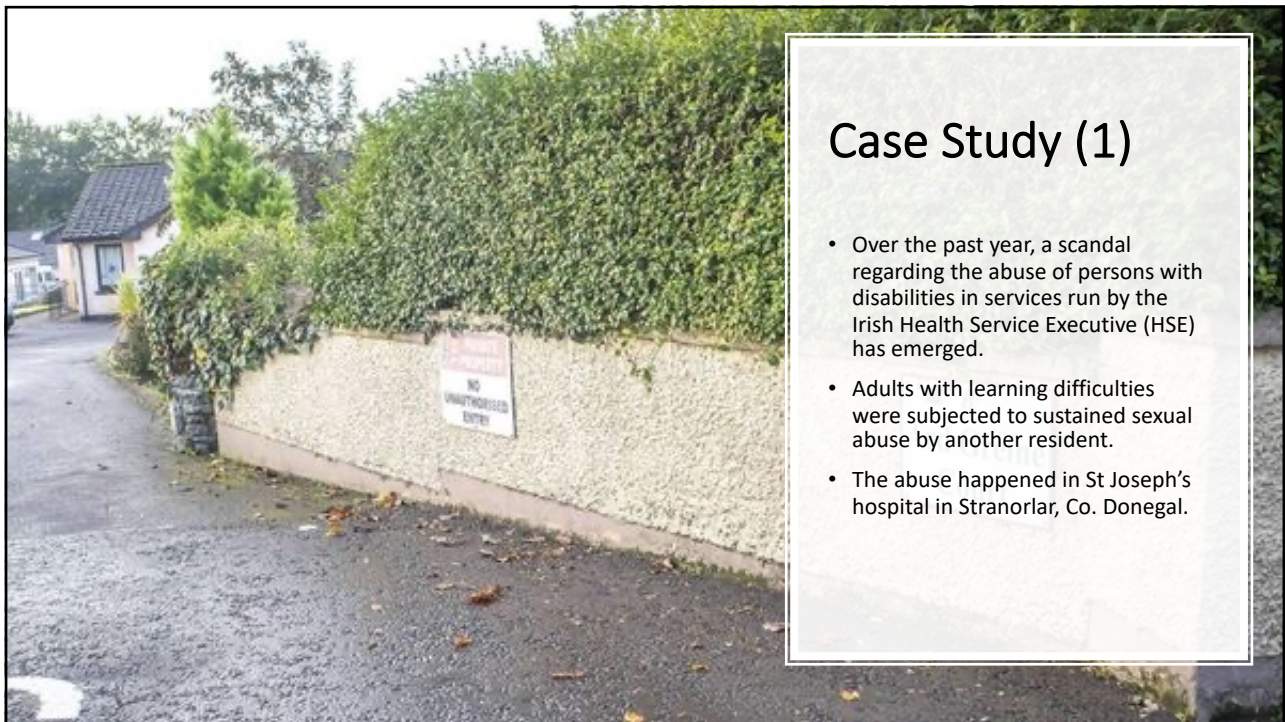
- The Law Commission for England and Wales sought to reconcile unfitness to stand provisions in England and Wales with the CRPD.
"The ramifications of the UNCRPD for several areas of criminal law have yet to be fully analysed and assimilated by government and policy-makers. Giving full effect to some of the principles of the UNCRPD would require much more fundamental change to the criminal justice system than is likely to be achievable at this time, or within the scope of this project. We take the approach in this report that our recommendations should be compatible as far as possible with the aims of the UNCRPD, whilst observing our other obligations under the ECHR. In particular we consider it important to put in place as far as possible the safeguards and procedural accommodations that articles 12 and 13 require." See "Report Unfitness to Plead" (London: Law Commission, 2016, Report No 364) page 101.
- Ultimately, the Commission placed greater effort was placed on compliance achieving compliance between domestic law and the ECHR.

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Reforming the Criminal Justice System (2)

- It is important to note that procedural accommodations as required by article 13 are not concerned with the outcome of civil or criminal proceedings.
- Rather the purpose or rationale for procedural accommodations is to remove barriers and guarantee equality in terms of accessing justice for persons with disabilities.
- There is a perception that procedural accommodations confer persons with disabilities additional rights.
- This is not the case the requirement for procedural accommodations is the level the playing field and ensure equal opportunities for access to justice and remove barriers faced by persons with disabilities.
- These attitudinal barrier may hinder law reform and policy development in this area.

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Case Study (2)

- A review was recently published that examined serious incidents involving a resident known as “Brandon”.
- The Review identified **18 “residents”** who were sexually assaulted in incidents that occurred between 2003 and 2016.
- The Review identified “**108 occurrences** of sexually inappropriate behaviours”.
- The first incident of sexual assault by Brandon was recorded on 28th of January 1997.
- A further three incidents of inappropriate sexual behaviour were noted from 1997 to December 2003.
- From 2003 onwards the number of incidents involving sexually inappropriate behaviour increased.
- The review found that a “common management strategy” was to move the perpetrator to different wards.
- Brandon was moved a total of 9 times in the 15-year period covered by the review.
- He has since died.



Independent Review of the Management of Brandon

The National Independent Review Panel – Brandon Report for Publication

This report has been pseudonymised to protect the identity of the residents and the service

National Independent Review Panel
Version as of 26th November 2021

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Case Study (3)

- The review was marked with secrecy with the Department of Health & HSE reluctant to provide information to the relevant Minister.
- The failure to report the sexual violence to the Irish police has not been fully explained.
- Nor has the seeming failure of the police to investigate the earliest reports of abuse.
- There appears to be an assumption that both the victims and the perpetrator lacked the mental capacity to participate in the criminal justice system.
- This is a clear breach of the victims' rights, denial of legal capacity, access to justice and the right to be free from exploitation, violence and abuse under article 16 of the CRPD.
- Yet this has not featured in the discussion around this scandal.




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Conclusions

- Article 13 of the CRPD as a stand-alone right of access to justice for persons with disabilities seeks to address the invisibility of persons with disabilities as participants in the justice system.
- It is clear from the literature and the jurisprudence of the CRPD Committee that State Parties are falling short of their obligations to remove barriers in accessing justice.
- A recurrent theme throughout the world is that legal systems use assessments of persons mental capacity as a determinant as to who gets to access justice.
- This is discriminatory, denies the right to equal recognition before the law and restricts access to justice.
- A General Comment on Article 13 would be very welcome in unpacking procedural accommodations and explaining in clear terms to State Parties their obligations in ensuring meaningful access to justice.
- Law reform and policy development is complex and faces many challenges.

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References (1)

- Gábor Gombos, "From civil death to full personhood: Ireland's challenges to implement the CRPD" (Dublin: Amnesty International, Seminar on "Supported Decision-Making in Theory & Practice: Ireland's Capacity Bill", 29th of April 2013).
- "Committee on the Rights of Persons with Disabilities Concluding observations on the initial report of South Africa" (Geneva: CRPD/C/ZAF/CO/1, 23rd of October 2018).
- "International Principles and Guidelines on Access to Justice for Persons with Disabilities" (Geneva: UN Special Procedures, August 2020).
- O'Mahony & Gooding "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" (International Journal of Law, Crime and Justice Volume 44, March 2016, Pages 122-145).

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References (2)

- See Eilíonóir Flynn, Catríona Moloney, Janos Fiala-Butora & Irene Vicente Echevarría "Final Report Access to Justice of Persons with Disabilities" (Galway: Centre for Disability Law & Policy, December 2019).
- "Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities" (Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/34/26, 6 December 2016).
- Eilíonóir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge, 2015).
- "Report Unfitness to Plead" (London: Law Commission, 2016, Report No 364).
- "Independent Review of the Management of Brandon The National Independent Review Panel – Brandon Report for Publication" (Dublin: Health Service Executive: National Independent Review Panel, 26th November 2021).