



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

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Abstract

The laws on unfitness to stand in criminal trials have not been examined in great detail by scholars since the coming into force of the United Nations Convention on the Rights of Persons with Disabilities ('CRPD') in 2008. This is perhaps surprising given the considerable law reform activity on unfitness to stand trial laws in a number of common law countries during this period. After all, persons with disabilities are more likely to be deemed unfit to stand trial. Indeed the aim of rules on unfitness to stand trial is to prevent disadvantage flowing from mental impairments. However, the consequence of an unfitness determination in criminal trials can result in a person being detained in a prison, psychiatric setting or being subject to a coercive supervision order for longer periods than if there had been conviction and maximum sentencing. Equally, there remain defendants who do not meet the definition of unfit to stand trial yet still appear neither to understand or meaningfully participate in proceedings against them. A key recommendation of law reform agencies to prevent this discrimination in recent years is to introduce functional assessments of mental capacity to replace out-dated standards for judging unfitness to stand trial. Yet paradoxically, this conclusion runs counter to the CRPD, as interpreted by the UN Committee on the Rights of Persons with Disabilities ('CRPD Committee'), which calls for the introduction of alternative frameworks for ensuring equal recognition before the law, access to justice and the right to liberty and security of the person for people with disabilities. Law reform activity in England, Wales, Northern Ireland and Australia will be drawn upon to support the discussion.

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This paper seeks to clarify the major issues as a first step in reconciling the sometimes conflicting reform trends in domestic and international human rights law regarding unfitness to plead laws.

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1. Introduction

The law on unfitness to stand trial¹ 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 (Loughnan, 2012, 67). The rules of unfitness to stand trial are designed to safeguard against disadvantage flowing from impairment or disability and to guarantee the right to a fair trial. In part, such rules aim to uphold the integrity of the criminal trial, which would be discriminatory if the defendant could not understand and participate meaningfully in proceedings against them.

Yet the application and validity of laws on unfitness to stand trial have been criticised on a number of fronts (Law Commission of England and Wales, 2010; Grisso, 2003; James et al., 2001; Winick, 1995). This includes the claim that such laws are discriminatory against persons with disabilities (CRPD Committee, 2014a; Dhanda, 2006–2007). Certainly, cases of prejudicial outcomes stemming from unfitness to stand trial determinations, are readily available (ALRC, 2014a; Bartlett, 2012; Peay, 2012). A number of cases also show that a person deemed unfit to stand in a criminal trial may end up being detained in secure settings longer than if he or she had been convicted and received the maximum sentence for the alleged crime (ALRC, 2014a, 196). Other people deemed unfit to stand trial may be subjected to supervision orders and coercion in the community on an unequal basis with others (ALRC, 2014a; Law Commission of England and Wales, 2010). These apparently overt discriminatory outcomes could be explained, on the one hand, by poor implementation. Yet recent developments in international human rights law have been interpreted so as to view rules on unfitness to stand trial as an *inherently* discriminatory barrier to achieving human rights to liberty, equality before the law and access to justice for people with disabilities (see CRPD Committee, 2014a; Minkowitz, 2015).

The United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006,² has been interpreted as requiring significant domestic law reform in a number of areas of substantive criminal law and criminal procedure (Flynn, 2015; Quinn and O'Mahony, *forthcoming*). This article will specifically consider the implications of the CRPD

¹For the purposes of this article the term used is 'unfitness to stand trial'. Terminology differs from jurisdiction to jurisdiction with variations of the term including 'fitness to plead' or 'unfitness to plead'. As fitness to plead is presumed, it is more correct to refer to a test of 'unfitness' to stand trial. The equivalent term in United States of America and elsewhere, is 'competency to stand trial'.

²Convention on the Rights of Persons with Disabilities 2007 A/RES/61/106 Annex I.

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