IMPLEMENTING THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN CRIMINAL JUSTICE SYSTEMS

A briefing paper

July 2022

Access to Justice
Knowledge Hub

CONTENTS

01 INTRODUCTION

The international community emphatically committed to reversing centuries of discrimination against people with disabilities by joining together in the Convention on the Rights of Persons with Disabilities ("CRPD").[1] Among the CRPD's most important provisions are those which seek to ensure equality in legal systems and to enshrine concepts of equal access to justice in law.[2] Because systemic disability discrimination is so deeply rooted in criminal legal systems, reforms to laws and practices will necessarily have to be profound. Superficial change will not be enough.

This brief was prepared and written by international members of the **Access to Justice Knowledge Hub** ("Hub"). The Hub seeks to transform justice systems so that persons with disabilities can participate equally and fairly. The Hub strives to ensure that persons with disabilities enjoy equal opportunities to communicate, to be heard, and to be understood; to eliminate the exclusion of persons with disabilities from judicial and quasi-judicial proceedings, such as being denied the right to be a witness or to stand trial; and, to eliminate alternatives to trial or detention, such as treatment or institutionalization, which are based on force, coercion, or findings of incapacity; and to create alternatives to criminal justice responses which are based on the person's consent and full participation. In the context of criminal justice systems, as we explain in this policy brief, the Hub seeks to ensure that persons with disabilities are allowed the dignity of being vindicated or held accountable to the same extent as their peers.

The Hub builds on the participation and knowledge of human rights activists in the fields of disability and criminal justice from a variety of countries, including: Israel, Kenya, Mexico, South Africa, Spain, Taiwan, United Kingdom, United States, Zambia, and Zimbabwe. Members are involved in reform efforts in their respective regions and are pooling their expertise for the purposes of the Hub. This policy brief is one example of such cooperation.

This policy brief was written and edited by members of the Hub including Steven Allen, Leigh Ann Davis, Robert Fleischner, Lu Han, Timothy Fish Hodgson, Tirza Leibowitz, Tina Minkowitz, Na'ama Lerner, Ariel Simms, Diana Sheinbaum, and Jenny Talbot. All members of the Hub contributed during video discussions of the brief as it was written. The views and recommendations in the brief, therefore, represent the consensus of Hub members after considerable discussion and debate. Individual Hub members may not agree with every recommendation.

Questions, comments, concerns, and corrections are welcome and may be directed to Robert Fleischner at **bob.fleischner@fairjustice.net**.

02 OUR FOCUS, PURPOSE, AND LIMITATIONS

This policy brief addresses criminal justice matters implicating capacity (or competence) to participate in all criminal justice processes and criminal culpability. Our primary focus, then, will be on two aspects of the criminal justice system that directly impact defendants with disabilities – the insanity defence and capacity to plead. Although both of these doctrines are firmly entrenched in many legal systems, they are based on concepts of capacity which are firmly rejected by the CRPD.

Although we focus here on the rights of defendants, we acknowledge that victims, witnesses, and others with disabilities are also often denied legal capacity and, therefore, the right to participate fully and equally in legal processes.

Our hope is to provide both a justification for a global rethinking of criminal justice systems' approaches to capacity and culpability and to offer some concrete suggestions and examples of how to change such systems to ensure compliance with international human rights standards. The standards we rely on are articulated in the CRPD itself, in the jurisprudence of the Committee on the Rights of Persons with Disabilities, and in the International Principles and Guidelines on Access to Justice for Persons with Disabilities ("Principles and Guidelines").[3]

We do not assert that reimagining how criminal legal systems address legal capacity is the only reform needed to ensure equal access to justice for persons with disabilities. On the contrary, we acknowledge that most, if not all, criminal legal systems and processes are inherently unfair and unjust in a variety of ways – from how persons enter the system to if and how they ultimately re-enter society.

While this briefing paper focuses on the right of defendants with disabilities in certain aspects of the criminal legal systems, we recognize and acknowledge that persons with disabilities are often members of other marginalized groups and communities, including indigenous persons, and other people of colour, women, persons who identify as sexual and gender minorities, immigrants, refugees, persons living in poverty etc.

The intersectional nature of identities can lead to further oppression and persecution by criminal legal systems around the globe. It is, therefore, essential for states working to implement reforms to consider such reforms in larger societal contexts, taking into account the full range of communities and groups most likely to be impacted and harmed by criminal legal systems, of which, persons with disabilities will certainly be one part. The reforms we discuss cannot alone rid systems of entrenched racism, ableism, genderism, and so many other forms of intersecting oppression.

For states that wish to reimagine or reform existing criminal legal systems and processes, it is essential to include persons with disabilities and other marginalized groups at the centre of their efforts. This requires, from the outset, the full and meaningful participation of individuals with lived experience of criminal legal systems, disabled persons organizations, civil society organizations, and larger coalitions or networks. These stakeholders must be an integral part of the design, implementation, management, oversight, monitoring, and evaluation of criminal legal systems and processes. Without their input, it is highly likely that systems will continue to treat groups differently and ultimately, unjustly. The exclusion of the full and meaningful participation of persons with disabilities in criminal justice reform is not only in contravention of international human rights law, but would also render the exercise futile.

Finally, while we discuss current efforts in some states to illustrate common problems that arise globally, we acknowledge that resources, legal systems, and cultural differences vary widely. States with fewer resources may, for example, have to address some reforms differently or at a different pace than states with more significant resources. It may be easier for some states to implement reforms, given their legal systems and how they interact with international human rights norms. Cultural differences will also play a considerable role in how states approach reform. Regardless of the variations, it is clear that meaningful reform efforts to ensure equal access to justice for all must acknowledge the lived experiences of persons with disabilities and be based on international human rights law standards, including the CRPD. We begin with what we recommend.

WHAT WE RECOMMEND

- Abolish the concept of capacity to plead and replace it with processes that ensure that persons with disabilities share the same right as all citizens to fully participate in the criminal justice system.
- Provide voluntary supports and accommodations, including intermediaries, to all defendants as needed to ensure full participation in every phase of the criminal justice system.
- Abolish the insanity defence and ensure that defendants with disabilities have the same right to defend themselves and have access to all other defences on the same basis as all other citizens.
- Abolish involuntary institutionalization and forced treatment based on disability.
- Create community-based alternatives to incarceration, available and accessible to all defendants, including those with disabilities.
- Establish alternatives to the criminal justice system that are available to persons with disabilities on the same basis as all other citizens.

03 CONSIDERATIONS AND GUIDING PRINCIPLES FOR EFFECTIVE CRIMINAL JUSTICE REFORM FOR PERSONS WITH DISABILITIES

An understanding of the CRPD's doctrine of legal capacity and an understanding of international efforts to establish legal capacity in domestic law is very helpful in crafting reforms to the criminal justice system. Accordingly, the reader will find what we hope will be helpful annexes attached to this brief, and appearing before the endnotes.

These are:

- **Annex A** Incorporating CRPD principles into national law
- **Annex B** Eliminating the concept of mental capacity and replacing it with the recognition that all persons have and can exercise legal capacity
- **Annex C** Eliminating mental capacity tests and incorporating legal capacity into domestic law
- **Annex D** Mental health courts are inconsistent with the CRPD

We were mindful of the information discussed in the annexed documents as we developed our recommendations. We also proceeded pursuant to several principles which we used to guide our work. We believe they are consistent with and expand upon the legal requirements of the CRPD. They are:

GUIDING PRINCIPLES

1. **Legal capacity**
   Because persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, they cannot be denied access to justice on the basis of a perceived "incapacity" related to their disability. Having legal capacity means having both the capacity to have rights (a passive right) and the capacity to exercise them (an active right).

2. **Full participation**
   Denying persons with disabilities full and equal participation in all aspects of the criminal justice system, including the filing of complaints, arrest, detention, pretrial procedures, presenting testimony, and trial, is disability discrimination.

3. **Capacity to stand trial**
   Preventing defendants with disabilities from participating fully in trials on the basis of their disability is disability discrimination because it precludes them from participating in the justice system on an equal basis with others.

4. **Insanity defence**
   Depriving persons with disabilities of the opportunity to contest criminal charges against them based on perceptions of their disability at the time of the alleged offense is disability discrimination because it precludes them from participating in the justice system on an equal basis with others.

5. **Accommodations**
   States must provide the supports and make the accommodations that are necessary and appropriate for defendants, witnesses, and victims with disabilities to enjoy full participation in the criminal justice system. Failure to provide support and accommodation is a disability discrimination.

6. **Involuntary treatment**
   Involuntary interventions, including institutionalization, based on perceptions of incapacity and/or dangerousness, for purposes of evaluation, "restoration of capacity," training, or treatment, should not be part of any criminal legal process.

04 CAPACITY TO STAND TRIAL

Although capacity issues can arise in several contexts in criminal legal systems, as noted earlier, we address here only capacity to stand trial and what is commonly called the insanity defence.

Most legal systems require that a defendant has certain degree of "mental capacity" to be put on trial for life or liberty. Decisions about a defendant's ability to participate are based mostly on the testimony of psychiatric experts. Courts may occasionally disregard medical testimony, but in most cases a clinical opinion prevails.

The CRPD decisively rejects a medical model of disability. The medical model perceives a person with a disability through the lens of inherent limitations or impairments (for instance, "mental disease or defect") and therefore typically requires a medical diagnosis and, in many cases, intervention by health care and social welfare professionals. The medical diagnosis may provide a justification to exclude the person from full and equal participation in mainstream culture institutions, legal processes (including the right to a trial), and in the exercise of human rights.

Although the standards vary from jurisdiction to jurisdiction, in common law systems they frequently require that defendants understand the nature and purpose of the legal proceedings against them and can effectively cooperate with their lawyer.[4] In such systems, findings of incompetence to stand trial or unfitness to plead can result in the loss of procedural safeguards (including complete lack of standing to participate in legal proceedings) and can lead to long periods of institutionalization and, in some cases, indefinite detention in prisons and other secure facilities.[5] This raises significant concerns about human rights breaches, including the rights to legal capacity, a fair trial, and liberty.[6]

Such is the case in Australia, for example. Australia's fitness to plead system has been criticized by the U.N. Committee on the Rights of Persons with Disabilities ("CRPD Committee"). In *Nobel v. Australia*, the CRPD Committee found that Australia had violated the rights of a man with an intellectual disability who was deemed unfit to stand trial but was nevertheless detained in prison for more than 10 years, thereby "converting his disability into the core cause of his detention."[7]

Likewise, in Kenya's common law system, defendants of "unsound mind" may not be put on trial if they are deemed not to be able to understand, follow, and participate in the process. Thereafter, the President may order "that the accused be detained in a mental hospital or other suitable place of custody...until the President makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again."[8]

Like many other common law systems, Kenya's fitness to proceed provisions violate the CRPD as they deny the right to proceed to trial and permit indeterminate detention. It is equally problematic that the length of the detention is determined by executive discretionary fiat.

Cambodia has no provisions in their law regarding fitness to stand trial. In Taiwan, the criminal code provides that "if the accused is insane, the trial shall be suspended until he recovers."[9] However, "insane" is not defined as it is used in this context. In 2012, only two defendants in Taiwan's Taipei District Court were found to be unfit to proceed.[10]

Japan's law establishes that "insane" individuals cannot be prosecuted, indicating that "when the accused is in a state of insanity, the proceedings shall be suspended while the accused is in such a state." Japan's system of significant prosecutorial discretion may account for the infrequent use of unfitness procedures there. Apparently, "insane" defendants remain institutionalized until the prosecutor decides to bring them to trial.[11]

05 ALTERNATIVES TO INCAPACITY TO PLEAD

States should directly confront and repeal discriminatory laws, policies and practices that deny persons with disabilities the right to full participation.[12] With accommodations and support, defendants, regardless of their disability, will have an equal opportunity to stand trial and participate in their own defence. The International Principles and Guidelines explicitly state that incapacity to plead laws should be repealed. Guideline 1.2(e) is set out in the text box.

INTERNATIONAL PRINCIPLES AND GUIDELINES ON ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES

Principle 1

All persons with disabilities have legal capacity and, therefore, no one shall be denied access to justice on the basis of disability.

Guideline 1.2(e)

Repeal or amend all laws, regulations, policies, guidelines and practices that establish and apply doctrines of "unfitness to stand trial" and "incapacity to plead," which prevent persons with disabilities from participating in legal processes based on questions of or determinations about their capacity.

https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf

In the place of "incapacity to plead" laws, states should establish programs that provide supports and accommodations to people with disabilities in the criminal justice system. States should also establish or provide support to alternative justice mechanisms that are available to persons with disabilities on an equal basis without regard for any construct of capacity as a condition of participation.

Some jurisdictions have been moving forward with or considering alternatives including:

- Voluntary diversion of defendants from the criminal justice systems to fair alternatives like restorative justice.
- Wide availability and voluntary use of intermediaries, advocates, and other support persons and processes.

Also, some jurisdictions are beginning to make progress in creating and improving public defence systems.[13] Such systems should ensure access to attorneys who provide the same quality and type of legal representation to their clients with disabilities as they do to all their other clients.

Lawyers must understand the impacts of the criminal legal system on persons with disabilities, communicate effectively, and recognize and be faithful to the tenants of legal capacity.[14]

Although these reforms fall short of abolition of capacity-based processes in the criminal justice system, they are important steps which will facilitate the process of abolition.

06 INTERMEDIARIES

INTERMEDIARIES

Intermediaries (also known as “facilitators”) support persons with disabilities during proceedings to communicate, understand and make informed choices, making sure that things are explained and talked about in ways that people can understand and that appropriate accommodations and supports are provided.

Intermediaries are required to remain neutral and are not tasked with speaking or advocating for the person, nor should they lead or influence the person to a decision or an outcome. Intermediaries should not be imposed on defendants. Persons with disability should actively consent to the assistance of an intermediary.

For information about the role of intermediaries in England and Wales, see Intermediaries for Justice:

https://www.intermediaries-for-justice.org

and The Advocates Gateway

http://www.theadvocatesgateway.org/intermediaries

One of the most widely used modifications to the criminal justice system is the use of intermediaries. England and Wales, New Zealand, Israel, Kenya, Mexico, Spain, and Ontario in Canada are among the jurisdictions that have intermediaries available to assist participants in the criminal justice system.

England and Wales, New Zealand, Israel, Kenya and Spain have statutes that establish the intermediary process. Intermediary programs in Canada and Mexico are operated by NGOs with the voluntary cooperation of courts. In Spain statutes limit the official program to victims and witnesses.

In England and Wales, intermediaries work with witnesses, defendants and in child custody courts.[15]

Intermediaries can provide a variety of supports to persons with disabilities in the justice systems. For instance, an appellate court in England has described how an intermediary assisted a defendant with intellectual and communication disabilities in a criminal case. The Court said the intermediary:

> **... maintained a visual record to enable the [defendant] to follow the evidence; she wrote simple sentences for him; and she held twice daily meetings with [him] outside court to summarise past and future events in the trial; she assisted him with a vocabulary folder to explain more difficult concepts; and she was eventually able to explain satisfactorily to him what the role of the jury was.**[16]

The Hub has created a Justice Intermediary Starter Kit as a starting point for introducing Justice Intermediaries to local justice systems.

http://www.justiceintermediary.org

07 ELIMINATING THE INSANITY DEFENCE AND INIMPUTABILITY

The non-culpability defence, often referred to as the "insanity defence," requires the fact-finder to decide if the defendant had the mental capacity to commit the charged offense. Without it, the person is considered to lack moral responsibility for the act. This, then, requires a look backwards to the time of the offense. Like capacity to stand trial, the insanity defence is deeply entrenched in the medical model of disability. Psychiatrists provide expert testimony in most cases in which the insanity defence is raised.

As with a person found incapable to stand trial, a defendant determined not to have had the mental capacity to commit the crime, is usually subjected to a period of forced institutionalization, often in a forensic psychiatric facility, or, sometimes, in a prison or jail. The period of confinement, at least in some jurisdictions, may be indefinite, either by legal design or by custom and practice. In some jurisdictions a defendant may be confined at the "Governor's (or, perhaps, the Queen's, or the President's) pleasure."[17] Research in Canada shows that persons institutionalized after being found not guilty by reason of insanity spend more time in hospitals than they would have spent in prison if they had been convicted.[18] This is undoubtedly the case in other countries too.

In the U.S., most states have some version of an insanity defence. In those states, defendants must admit that they did what they are accused of, but claim they are not culpable because they lacked mental capacity at the time. Raising the insanity defence, therefore, precludes a defence of actual innocence and means the government is not required to prove its case. A challenge to a state law abolishing the defence was heard by the U.S. Supreme Court in 2019. The defendant's argument that he had a constitutional right to a non-culpability defence was not successful. Despite its abolition of the defence, the state law still provided for involuntary hospitalization in a forensic facility.[19]

Sweden abolished the insanity defence in 1965. Swedish law recognizes mens rea (meaning intent or "guilty mind") as an element of a crime but provides that a defendant's mental status may not be considered in determination of guilt. Rather, a person's mental disability may be considered in sentencing. A guilty defendant with a psychosocial disability may, therefore, be committed to a forensic facility for treatment. The term of the institutionalization is indefinite, but the individual must be released when the requirements for involuntary psychiatric treatment are no longer met. Therefore, although Swedish defendants will have the right to have their cases adjudicated, and an opportunity to force the government to prove its case, the outcome – indefinite institutionalization – may be the same as for defendants who successfully use the insanity defence in nations that allow it.[20]

Kenyan law provides that "every person is presumed to be of sound mind and to have been of sound mind at any time which comes into question, until the contrary is proved." The law provides that:

> **A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission...**[21]

Usually, therefore, mental illness is shown by expert evidence, although lay testimony may suffice. If a defendant is found to be not guilty by reason of insanity, the court reports the case to the President who may order the person detained in a psychiatric hospital, prison, or other place of safe custody.[22] The President appears to have no other options.

The CRPD Committee has called on Kenya to repeal sections of its laws which relate to the insanity defence.[23]

Islamic traditions are relatively convergent. Notions of competence and sound reasoning (*rushd*) appear in Islamic law. The absence of *rusdh* (usually proven by experts) relieves a person of legal responsibility because of the inability to have the deliberate intent to commit the act. Decisions about institutionalization are left to the family.[24]

In Mexico and other Latin American countries, defendants are deemed *inimputable* (that is, unassailable or unpunishable) if at the moment of committing the crime they lacked the mental capacity to understand the illicit nature of the conduct and behave in accordance with that understanding. As in other jurisdictions, although being declared *inimputable* implies being excluded from criminal responsibility, the defendant is given *medidas de seguridad* (security measures), which generally means being imprisoned.

Defendants found *inimputable* often are in prison for longer times than defendants convicted of the same crime but not deemed *inimputable*.[25] The Mexico Supreme Court has suggested in a non-binding advisory that the length of the treatment imposed should last no longer than the punishment for the crime in question, but that suggestion is not always followed. Defendants deemed *inimputables* are provided with less than adequate due process throughout the criminal proceedings.[26]

In response to a complaint by Arturo Medina Vela, the CRPD Committee, in 2019, found that Mexico had violated the CRPD when a court deemed him to be not criminally responsible because of his disability on a charge of stealing an automobile. Furthermore, the Committee said the CRPD was violated when he was subjected to special procedures which denied him the right to testify and other due process rights and by his commitment to a forensic prison. The Committee, exercising its authority under the CRPD's Optional Protocol, recommended that Mexico bring its criminal laws into conformity with the CRPD.[27] The government issued a public apology.[28]

The CRPD Committee also made specific recommendations to Mexico following its review of Mexico's Initial Report on its efforts to comply with the CRPD:

THE CRPD COMMITTEE'S RECOMMENDATIONS FOR MEXICO

After reviewing Mexico's criminal laws, the CRPD Committee recommended:

a. Adopt the necessary measures aimed at guaranteeing due legal process for persons with disabilities in the framework of criminal proceedings, whether as defendants, victims or witnesses, as well as developing specific criteria to provide them with procedural adjustments;

b. Promote training mechanisms in judicial and prison operators in accordance with the legal paradigm of the Convention;

c. Eliminate the security measures that forcibly imply medical-psychiatric treatment in detention and promote alternatives that are respectful of Articles 14 and 19 of the Convention;

d. Repeal legislation that allows for detention based on disability and ensure that all mental health services provided are based on free and informed consent of the person concerned.

Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial report of Mexico (2014), available at **http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/RiCAqhKb7yhskE4iNFvKWCC Gr4TiTUdbhp1hRBVKZKZHlLwRNlRdjmM5HXlP6Xo1vlipxOztb9bY/K7hzSTk5pSRirgwibOSZO3Djb2Fe2nSSsNQMYdzwpp**

The CRPD Committee has also commented on non-culpability statutes in several countries in its reviews of their reports. In its Concluding Observations to Kenya's initial report the Committee recommended that Kenya repeal provisions of its criminal code "concerning the declaration of insanity".[29]

And, in its comments to Belgium, the Committee recommended changes to laws to guarantee that persons with disabilities "who have committed a crime … be tried under the ordinary criminal procedure, on an equal basis with others and with the same guarantees, although with specific adjustments to ensure their equal participation in the criminal justice system".[30] In 2009, the High Commissioner for Human Rights wrote that recognition of the legal capacity of persons with disabilities requires replacing criminal defences based on "mental or intellectual disability" with "disability-neutral" doctrines.[31]

A human rights committee of the Organization of American States has taken a similar position. Using the CRPD to interpret the Inter-American Convention on Elimination of All Forms of Discrimination Against Persons with Disabilities,[32] the committee has recognized that excusing criminal responsibility on the basis of a "mental disorder" is a denial of legal capacity and, therefore, a violation of the CRPD and the regional treaty.[33]

08 AN ALTERNATIVE TO THE INSANITY DEFENCE[34]

The Hub believes that the insanity defence can and should be abolished. Instead of a disability-specific defence, like every other defendant, a defendant with a disability should have equal access to all defences, including the lack of intent – *mens rea*.

A CRPD approach to criminal responsibility is one that takes account of the lived reality of persons with disabilities on an equal basis with others. Under the CRPD, equal treatment means that defendants with disabilities may avail themselves of the same defences that are available to all other defendants, including, for instance, self-defence, duress and the absence of *mens rea*. The possibility to benefit from a defence must be substantively equal and not merely available in principle – that is, the mental state of a defendant with a disability, insofar as it is relevant to *mens rea* or defences such as duress, must be considered on its own terms rather than in comparison to the mental state experienced by another person.[35]

Mens rea (meaning intent or, in Latin, "guilty mind") is an essential element of most crimes. It is the knowledge that an action or lack of action will result in a consequence which is the alleged crime. An analysis of *mens rea* can be applied inclusively to persons with disabilities. Actual intent and knowledge must be analysed to take into account the particularities of an individual's mental state. Although the particularities of a person's mental state may be uncommon in the general population, they can be better understood in light of the person's disability.

Defining *mens rea* subjectively does not mean allowing the moral judgment of defendants to overrule that of the community as expressed in the criminalization of any act. It means, rather, that defendants should be judged based on their actual state of mind, irrespective of whether it conforms to what others might imagine as reasonable or expected. Consideration of the subjective dimension of the mental element of a crime is required to ensure that persons with disabilities have the opportunity to benefit from the doctrine of *mens rea* on an equal basis with others.

The CRPD permits evidence of a person's distress or unusual perceptions to be used to demonstrate whether and how a defendant's subjective experience of the world may be relevant to *mens rea*. The use by an individual of disability-related evidence to negate *mens rea* is consistent with the core principles of full participation and respect for diversity in CRPD Article 3(c) and (d).[36] To refuse a defendant the opportunity to present evidence of distress or unusual perceptions to negate *mens rea* (and instead allow only an insanity defence claim) would likely violate CRPD's Article 5 (equality and non-discrimination) and Article 13 (access to justice).

Evidence of a person's distress or unusual perceptions may also be used by the defendant to demonstrate or establish an affirmative defence such as duress that entails an inquiry into a defendant's mental state. Medical evidence should neither be necessary or dominant in any such presentation. Like *mens rea*, duress is not a disability-specific defence and the admission of evidence of disability conforms with the obligation to achieve substantive equality.

In this approach the existence of distress or perceptions does not automatically exclude criminal responsibility, any more than merely asserting an incapacity defence automatically excludes culpability. Unlike an incapacity defence, however, there need be no analysis of whether, because of a "mental disease or defect" (a finding almost always based in significant part on medical evidence), the defendant lacked capacity to appreciate the unlawfulness or nature of their conduct, or capacity to control their conduct to conform to the requirements of law.

Instead, the evidence of distress or perceptions would be examined wherever it may be raised to negate the mental element (*mens rea*) of a crime or to establish the mental element of another defence. Relevant evidence would include direct testimony by the defendant and those who knew them well at the time. Expert testimony from diverse sources congruent with the social model of disability, could include testimony based on experts' interviews with the defendant. Such evidence would assist a court to understand diverse mental states and processes that might otherwise be ignored and how the distress and/or perceptions experienced by a defendant could affect their formation of intent or construction of knowledge as relevant to a charged crime.

Moreover, defendants should be able to present evidence related to the existence of oppression, unbalanced power relations, or violence and how these impact on the defendant's perceptions. In other words, in considering *mens rea* subjectively it is necessary to take into account contextual aspects, so as to ensure that disability is considered in a social context.

09

THE HUB'S RECOMMENDATIONS FOR ABOLISHING THE INSANITY DEFENCE

The Hub recommends the following principles guide the abolition of the insanity defence concepts:

1. Since decision-making about all defences begins at very early stages in the criminal justice process, all needed voluntary supports should be available to defendants from the outset.
2. Defence attorneys should be well trained to represent clients with disabilities, including to effectively communicate with them and to advise their clients on the availability of accommodations, defences, and alternatives to the criminal legal system.
3. There should be voluntary, non-coercive diversionary processes and programs – including restorative justice – that are available to all defendants and which do not include required compliance with mental health services.
4. Defendants with disabilities should be afforded access to the same defences available to all other defendants.
5. The fact-finder (whether a judicial officer, juror, assessor or other official), considering evidence from witnesses who can understand the subjective experiences of the person, should consider if the defendant's mental state at the time of committing the acts amount to the necessary *mens rea*, taking into account how the formation of intent or construction of knowledge with respect to the crimes charged may have been affected by their perceptions or experience of distress.
6. If a defendant with a disability lacks the necessary intent (*mens rea*) within the usual meaning of the term, the defendant should be treated the same way as any other defendant who lacks intent.
7. No defendant, including one with a disability, should be placed in a setting that would pose a risk to the person's physical or mental integrity and wellbeing.
8. Defendants should not be involuntarily institutionalized (in either prisons or mental health facilities) after acquittal.
9. No one should be involuntarily committed to a mental health facility after a conviction.
10. It is appropriate to consider a defendant's disability among the factors that weigh into mitigation of sentences.
11. Community-based alternatives to incarceration should be available to all defendants, including those with disabilities.

Applying the framework suggested in the 11 recommendations above to a criminal case resets the questions at stake from those of the defendant's "insanity" at the time of the act, to asking instead:

> **Did the defendant's mental state at the time of committing the acts amount to *mens rea* required for a determination of criminal responsibility, taking into account how the defendant's formation of intent or construction of knowledge with respect to the crimes charged may have been affected by experiences of distress and/or perceptions?**

10

POSSIBLE ALTERNATIVES TO THE CRIMINAL JUSTICE SYSTEM: RESTORATIVE JUSTICE AND TRANSFORMATIVE JUSTICE

Restorative justice and transformative justice are often mentioned as alternatives to the criminal justice system. They share common roots.[37]

Restorative justice is often proposed as an alternative to or diversion from the criminal justice system. The CRPD Committee, for instance, states that "deprivation of liberty in criminal proceedings should only apply as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter future crime."[38]

There is no single accepted definition of restorative justice. One representative definition calls it "an approach to justice that focuses on addressing the harm caused by [behaviour] while holding the offender responsible for their actions, by providing an opportunity for the parties directly affected by the [behaviour] – victims, offenders and communities – to identify and address their needs in [its] aftermath…"[39]

While this is not a universally accepted definition, it does convey the essence of the restorative processes.

Restorative justice is recognized and recommended internationally. The United Nations,[40] the Organization of American States,[41] and the Council of Europe,[42] for instance, have endorsed restorative initiatives. Restorative justice is utilized in many different settings (e.g., the criminal and juvenile justice systems, schools, psychiatric hospitals, prisons, neighbourhoods) and, although there are common goals and core philosophies, the models may differ significantly in structure and emphasis.

Some programs are organic and truly community-based. Others are more formal and are officially sanctioned. Some have been designed by civil society, others by innovative local administrators, judges, or courts.[43] Some have been officially sanctioned by being incorporated into the criminal justice system by statute.[44]

RESTORATIVE JUSTICE PRINCIPLES

Restorative Justice practitioners often agree that for a program to be restorative it must be faithful to certain critical principles, usually including:

- healing
- voluntariness
- respect
- confidentiality
- impartiality
- empowerment
- responsibility and accountability
- inclusiveness and equal status
- problem-solving
- agreements and outcomes
- the importance of voluntary victim participation, and,
- community engagement

Restorative justice models seek to move beyond an emphasis on fact-finding, adjudication, and the imposition of sanctions – each a hallmark of the criminal justice system. The ultimate and harshest sanction in the criminal justice system is the banishment of the offender – by imprisonment or involuntary institutionalization, or in some places, death. In contrast, the restorative model usually emphasizes reparation for the harm, reintegration into the community, and restoration of the community's moral equilibrium and tranquillity.

Restorative and transformative justice programs *must be equally available to persons with disabilities*. The defendant's "capacity" to participate should not be a factor in deciding to use a restorative process. Supports and accommodations should be provided.

Some jurisdictions that have incorporated restorative justice alternatives into their criminal legal systems make them available at the beginning of the legal process, perhaps at or before arraignment, as a method of diversion of the individual from the punitive adjudication system.

For instance, the Northwest District Attorney (a district prosecutor) in Massachusetts, United States, has a program of pre-arraignment diversion to a restorative justice program. The prosecutors work with police and the restorative justice program staff to refer cases to the program before charges are filed.[45]

This program is available to both children in the juvenile court and to adults. This means that the person's criminal record (which may be available to potential landlords and employers, for example) will not show an arraignment or court appearance.

In contrast, the Franklin Grand Isle Restorative Justice Center in Vermont, United States, provides restorative justice to adult defendants who have been charged, for whom a court has found there is probable cause to believe a crime has been committed, but who have not yet been adjudicated (that is, pleaded guilty or found guilty).[46]

Other jurisdictions employ restorative processes later in the process, perhaps after a determination or admission of guilt, as an alternative to sentencing to prison or probation.

Safer Mid Canterbury in New Zealand, for instance, offers restorative justice in cases referred by a judge after entry of a guilty plea. In an unusual practice, the program reports back to the judge about the outcome of the restorative justice process and the judge may consider the report in sentencing.[47]

Transformative justice is usually described as taking a broader approach. Instead of simply seeking to restore the actors, transformative justice seeks to transform the larger social structure.[48] "Realizing the unjustness of our current criminal justice system, transformative justice wants to be productive by providing victims with answers for why they were victimized, recognizing the wrong that has occurred, providing restitution, and restoring/establishing peace and security."[49]

Whenever restorative or transformative processes are used, it is essential that they are voluntary and that all the participants feel they have been treated fairly. This is particularly crucial in the context of persons with disabilities whose agency is frequently ignored in reality. Some restorative and transformative program participants may express concerns about whether a person with a disability can or should participate. Whatever the basis for these concerns, it is discrimination to exclude a person with a disability from the process. Accordingly, personalized supports and accommodations must be available to assist the person with a disability to engage equally in the restorative process.

The Hub supports the use of restorative and transformative justice processes if they include proper safeguards to ensure equal voluntary participation by persons with disabilities.

There are some proposed alternatives to traditional criminal legal systems that the Hub does not support. A brief analysis of specialty courts – particularly mental health courts – which violate the CRPD appears in Annex D.

11

BARRIERS TO IMPLEMENTATION – ANTICIPATING THE ARGUMENTS AGAINST ABOLITION OF INCOMPETENCE TO STAND TRIAL AND THE INSANITY DEFENCE

Efforts to make criminal legal systems compliant with the CRPD is likely to engender some significant pushback. In this section we describe some arguments advocates are likely to encounter from those favouring the status quo or otherwise opposing reforms required by the CRPD and endorsed by the Hub in this brief. They include:

THE CLAIM THAT REFORM WILL UNDERMINE THE CRIMINAL JUSTICE SYSTEM.

Some legal scholars, criminal justice practitioners, and public servants responsible for the justice system are most likely to be among those who argue that the CRPD reforms will undermine the criminal justice system and, therefore, should be interpreted differently or just not be implemented. The arguments may include that the CRPD is contrary to hundreds of years of legal traditions.[50]

But, when states ratified the CRPD, they committed to doing what is required by the treaty; some of the CRPD obligations were required prior to the CRPD by existing international human rights law. Moreover, as we have proposed earlier in this briefing paper, CRPD compatible systems can fully respect both legal traditions and the rights and dignity of persons with disabilities. Indeed, equality and fair treatment are just as deeply a part of jurisprudence and human rights law as are concepts of capacity.

Reform advocates should focus on addressing deep structural inequities inherent within policing and prosecution systems. Addressing these wider social purposes necessitate profound structural reforms in the functioning of criminal justice systems. They can also help to reduce the perceived longstanding centrality of culpability within wider reform efforts, which instead might more successfully proceed upon restorative principles.

THE CLAIM THAT REFORMS WILL VIOLATE DEFENDANTS' DUE PROCESS RIGHTS.

Opponents will also argue that the CRPD reforms – particularly those related to the incompetence to stand trial doctrine – will violate concepts of due process. Due process is the set of rules and procedures which are designed to ensure a fair and just outcome. The argument is that people who "lack capacity" are by definition unable to participate and that a reform that allows them to will result in an unfair proceeding – a denial of due process.

However, this objection relies upon discriminatory notions which deny persons with disabilities the right to participate in the process of determining their guilt or innocence. That itself is a profound denial of due process. As we have shown earlier in this briefing paper, there are tested ways to ensure that everyone can participate. Ensuring effective communication between the person and their lawyer and accessibility and accommodations throughout the process play an important role.

THE CLAIM THAT RATHER THAN HELPING, REFORMS WILL BE HARMFUL TO PEOPLE WITH DISABILITIES.

Opponents will also argue that CRPD compliant reforms may have negative and harmful consequences for persons with disabilities, resulting in greater numbers being incarcerated and subjecting them to a range of other human rights violations.[51] Such arguments point out that criminal justice processes rarely provide proper reasonable and procedural accommodations to ensure fair and equal participation, placing suspects at risk of miscarriages of justice. Extending this position, commentators have argued that the insanity defence is in itself a fair trial guarantee for persons with impaired mental or cognitive functioning.

These objections ignore the profound reforms required to give full effect to the CRPD's Articles 12 (Equal recognition before the law), 13 (Access to justice) and 14 (liberty and security of the person). The opponents will often acknowledge that procedural and communicational accommodations are not commonly provided during investigative and trial stages. They fear that if capacity-based processes are unavailable, more people with disabilities will go to prison.

But the existing systems cannot be defended. The insanity defence may negate the culpability of the accused, but it gives rise to other serious consequences including incarceration and non-consensual treatment in psychiatric hospitals or forensic penal settings. In terms of findings of unfitness to plead, the effect can be to suspend the criminal process, during which time coercive measures may be imposed by medical or other professionals. As has been pointed out above, both situations are arbitrary and result in long-term detention, ignoring due process guarantees by giving dominant weight to psychiatric or medical evidence as the legal basis to forced institutionalization. Negating the right to plead and stand trial also prevents individuals from providing a defence.

The Hub's approach follows the CRPD and the jurisprudence of the CRPD Committee both of which can be said to be broadly reflective of the wishes of persons with disabilities.[52] This argument, which in effect asserts that persons with disabilities do not know what's good for them, is paternalistic.

THE CLAIM THAT REFORM COSTS TOO MUCH.

Another frequent issue raised by objectors is that provision of accommodations can be costly. Costs might include adapting both the physical environment of courts as well as allowing time for procedural adaptations, more flexible hearing schedules, providing supports such as intermediaries etc.

The cost argument is easily overstated. The provision of "procedural and age-appropriate accommodations" in justice processes are obligatory under Article 13 of the CRPD. Many such accommodations are likely to have few costs and may be achieved through allowing sufficient flexibility within procedures through standard case-management techniques. Examples might include directions such as shortening hearing times, guidance on posing clear questions, providing sufficient time for allowing responses, providing documents in easy-to-read formats, etc.

Other reforms may indeed require investment, such as training and establishing networks of intermediaries, but can and should be justified as being due process necessities. The International Principles and Guidelines on Access to Justice[53] set out many examples of accommodations, most of which are of no or little cost.

In the long run, reform may save money by eliminating very costly existing systems (such as involuntary institutions) and replacing them with less expensive voluntary and community-based supports and services.

THE CLAIM THAT REFORM WILL MAKE THE PUBLIC LESS SAFE.

One of the more challenging critiques relies in large part on widely accepted – but totally debunked – stereotypes which equate disabilities with dangerousness. This nexus is used to justify the continued existence of "forensic risk assessment" methods which attempt to quantify levels of risk and which may result in the imposition of various forms of control and treatment. In many countries, findings of insanity or lack of competence at various stages of the criminal procedure have the effect of removing the person from the system and placing them into parallel forensic systems.

Widespread public stigma rationalizes the imposition of severely coercive measures as being in the wider public interest. The fear of crime and the actual risk of it are different. States cannot legislate for irrational fears; they must educate to diminish them. This safety argument is just a deeper level of unwillingness to confront disability stigma which the CRPD requires all states to do.

Proponents of change can anticipate animated opposition to establishing a CRPD compliant criminal justice system. But the counter-arguments are strong and the cause is just.

ANNEXES

ANNEX A

Incorporating CRPD principles into national law

The impact of the CRPD on a state party's law, legal system and processes will vary depending on the nation's legal traditions. In many countries which follow civil law traditions international law automatically becomes part of the domestic law. Accordingly, courts in some civil law countries have declared several domestic laws to be invalid as contrary to the CRPD.

In many common law countries, on the other hand, international law is seen as a separate body of law that is effective only when included in domestic legislation, or by indirect means such as through interpretations of laws, often by appellate courts, which consider international law to help understand the meaning of domestic law. In these systems courts may choose to consider or reference international law but are not bound by it as legal precedent.[54]

Accordingly, approaches to conforming a state party's laws to the CRPD's requirement will vary depending on the country's legal traditions. These complications aside, it is important for states to understand that in terms of international law, they may not use domestic legal rules, approaches or doctrine as a justification for ensuring compliance with their international law obligations.[55] What this means is irrespective of their legal tradition, states which ratified the CPRD are required to ensure the compliance of their laws with the CRPD.

The most certain and concrete way to conform a nation's laws and practices to the CRPD is probably through statutory and policy reform.

ANNEX B

Eliminating the concept of mental capacity and replacing it with the recognition that all persons have and can exercise legal capacity

Having legal capacity means to be both a holder of rights and an actor under the law.

Legal capacity to be a holder of rights entitles a person to full protection of their rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships.

The CRPD Committee interprets the CRPD to mandate that "legal capacity" and "mental capacity" are distinct concepts.[56] The Committee has stated repeatedly that the CRPD mandates that the existence of a disability must never be grounds for denying legal capacity or the imposition of substitute decision-making – that is, a decision made by another for the person with a disability. The Committee has advised that Article 12 requires that "the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making."[57]

"Mental capacity," which is at the root of many discriminatory policies and practices, plays a significant part in most criminal justice systems. Mental capacity is usually defined in medical or psychological terms as the ability to make decisions – in other words, to reason and deliberate – and to communicate them. Since mental capacity is a measure of cognitive, intellectual, or psychosocial abilities, an adult deemed to be "incapacitated" is, by definition, a person with a disability. Medical doctors and psychologists are frequently empowered to opine about mental capacity and often their opinions are adopted (sometimes unquestioningly) by tribunals.[58] A determination that a person lacks mental capacity can and usually does result in significant loss of rights and even liberty, often with minimal if any due process. Therefore, people determined to lack mental capacity – to be legally incompetent – are denied the right to fully participate in the legal process.

According to the CRPD, unlike concepts of mental capacity, "legal capacity," is universal and is enjoyed equally by everyone. Legal capacity is both the right to be recognized as a person before the law, and the right to legal agency – the right to make decisions and to have one's decisions legally recognized. Legal capacity is considered fundamental to personhood, equal human dignity, and full citizenship.[59] Changing laws to recognize legal capacity is critical to wider reform of fully accessible criminal justice systems.[60]

The exercise of legal capacity for persons with disabilities depends on fidelity to the concept that persons with disabilities are able to express their "will and preferences." States are required to provide the supports necessary to assist the person to act autonomously and engage in legal relationships; that is, to express their will and preferences. In the extreme case when the person's preferences or will is unknowable, even after significant good faith support, the fallback is the "best interpretation" of will and preferences. Even if a person's preferences about a particular decision are essentially "unknowable," "some understanding of an individual's values, views and beliefs" can be achieved. Therefore, their longer-lasting or more general beliefs, values, and desires will be considered and determinative.[61]

Since legal capacity recognizes the right and abilities of people to have agency and to make their own decisions, it is necessary to discard concepts of "best interest" as a construct of decision-making.[62] "Best interest" is the most common standard applied by substituted decision-makers (guardians, for example) who are required to make decisions for "incapacitated" persons. Accordingly, it is usually the case that the decision will be one that is socially acceptable and one that the substituted decision-makers themselves believe most people would make in similar circumstances. Some laws do require the substitute decision-maker to consider the individual's expressed wishes. Nevertheless, even then, if the substituted decision-maker believes that carrying out the person's expressed will and preferences will be harmful or contrary to their best interests, the substitute decision-maker the law may permit the substituted decision-maker to ignore what the person wants.

Despite the ubiquity of the "best interest" standard, the CRPD rejects it, instead requiring fidelity to the person's autonomy expressed through their will and preferences.[63]

These concepts are important in the criminal justice context. The CRPD Committee has recommended that States repeal or withdraw laws and regulations that restrict the legal capacity of persons with disabilities, including: laws that allow for someone else to make a decision for the person; laws that establish and apply doctrines of "unfitness to stand trial" and "incapacity to plead"; laws that prevent persons with disabilities from participating in legal processes based on questions of or determinations about their capacity; and laws that restrict or exclude witnesses with disabilities from presenting testimony based on assessments of their capacity to testify.[64]

Peru has led the way. It is one of the first nations to legislate legal capacity. The Peru statute requires, in part:

> **Expression of will can be explicit or tacit. It is explicit when it is done orally, in writing, through any direct means, manual, mechanical, digital, electronic, through sign language or alternative means of communication, including the use of reasonable accommodation or the supports required by the person. It is tacit when the will is undoubtedly inferred from an attitude or repeated conduct in one's life history that reveals its existence. It cannot be considered that there is a tacit expression when the law requires an explicit expression or when the agent makes a reservation or expression to the contrary.**[65]

ANNEX C

Eliminating mental capacity tests and incorporating legal capacity into Domestic Law

There is an international movement to eliminate concepts of incapacity in civil codes. For instance, some nations have abolished or substantially constricted guardianships which, of course, are based on a finding of a lack of mental capacity.[66] The First Chamber of Mexico's Supreme Court, for example, has ruled that the nation's guardianship laws violate Mexico's constitution and the CRPD.[67]

In a partial reform, Sweden has abolished full guardianship and replaced it, for adults, with a *god man* (mentor, or supporter) and a *förvaltare* (administrator for limited purposes).[68] Latvia has also abolished full guardianship and instead uses a co-decision-maker model.[69] Moreover, there has been significant progress internationally in the recognition of supported decision-making as a manifestation of legal capacity. Israel, U.K., some Canadian Provinces, and (at the time of drafting this paper) fourteen states in the United States, have enacted laws which recognize supported decision-making arrangements for those persons who want to make their own decisions but choose to have assistance in making them.[70]

Perhaps the most sweeping legislative changes to concepts of mental capacity to date have been in Peru. There, the full legal capacity of persons with disabilities has been recognized throughout the entire civil code, providing a model for other nations.[71] Columbia is also recognized as having made significant progress to recognize full legal capacity.[72]

PERU RECOGNIZES LEGAL CAPACITY THROUGHOUT CIVIL CODE

In September 2018, the Peruvian Government published Legislative Decree No. 1384 recognizing the legal capacity of persons with disabilities. It recognizes the full legal capacity of all persons with disabilities, abolishes guardianship for persons with disabilities, removes restrictions on their legal capacity (e.g. to marry or to make a will), and establishes regimes for supported decision-making.

Moreover, it recognizes the right to reasonable and procedural accommodation in courts and notary offices. Some restrictions to legal capacity remain for persons with addictions, "bad administrators" and "prodigals" (that is people who squander their assets), people criminally convicted, and people in a coma who do not have a designated support.

ANNEX D

Mental health courts are inconsistent with the CRPD

"Problem-solving" courts are sometimes proposed as alternatives to traditional more adversary criminal court processes. Multiple models of these specialized courts have developed around the world, including mental health courts. The Hub does not support the use of mental health courts. However, because they are so widely used, we address them briefly in this Annex.

Mental health courts began in the United States in the 1990s as a response to a perceived increase in defendants and prisoners with psychosocial disabilities. The courts were seen by some as a way to provide community-based mental health services while diverting people from the harsh environment of prison.

Mental health courts have expanded very rapidly. The courts typically have staff who are responsible for developing treatment plans which are incorporated into a court order and probation officers who monitor defendants' compliance.[73] Participation in the courts is supposed to be voluntary. However, continued participation is almost always conditioned on compliance with a court ordered treatment plan. The majority of mental courts require guilty pleas as a condition of participation.

The Hub has the following concerns about mental health courts:

- They are based on a number of incorrect assumptions including that "treatment" can accomplish the goal of crime prevention.
- Compliance with mental health services (usually including medication) is mandated. This is a form of forced and involuntary treatment, contrary to the CRPD and other human rights norms.[74]
- Because of periodic "check-ins," often extending for long periods, defendants may be in the criminal legal system much longer than if they were traditionally sentenced, a form of disability discrimination contrary to the CRPD.
- Mental health courts create incentives to increase the criminalization of petty offenses, which may disproportionately affect people with disabilities.
- Specialty courts increase stigmatization by treating people with disabilities differently than others without disabilities in the criminal legal system, a form of disability discrimination.

Accordingly, the Hub has concluded that the courts and their processes are contrary to the CRPD.

ENDNOTES

1. The CRPD and Optional Protocol can be found at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html.
2. These goals are reflected throughout the CRPD, but particularly in Article 12 (Equal recognition before the law), Article 13 (Access to justice) and Article 14 (Liberty and security of the person).
3. Office of High Commissioner on Human Rights, *International Principles and Guidelines on access to justice for persons with disabilities* (2020) (hereafter "*Principles and Guidelines*") available at https://www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/InternationalPrinciplesGuidelinesAccessJusticePersonswithDisabilities.pdf.
4. Robert D. Fleischner, *Competency to Stand Trial – The Experience of Defendants with an Intellectual Disability Compared to Those with a Mental Illness*, in Arc, NCCJD manual available at https://www.chhs.ca.gov/wp-content/uploads/2017/12/Competency-White-Paper-2017.pdf (chapter in a manual on incapacity to stand trial in context of U.S. law).
5. Piers Gooding et al., *Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change*, 40 Melbourne. Univ. L. Rev. 816 (2017) (discussing indefinite detention in Australia, in the context of persons with cognitive disabilities). http://classic.austlii.edu.au/au/journals/MelbULawRw/2017/11.html.
6. Id.
7. CRPD/C/16/D/7/2012, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/16/D/7/2012&Lang=en.
8. *Republic v. GKN*, High Court of Kenya (2019) (describing statutory provision for incompetence to stand trial) available at http://kenyalaw.org/caselaw/cases/view/154191.
9. Code of Criminal Pro. of Taiwan, §1 Art. 294.
10. Susanna Every-Palmer, et al., *Review of Psychiatric Services to Mentally Disordered Offenders Around the Pacific Rim*, 6 Asia-Pacific Psychiatry 1 (2014) available at https://onlinelibrary.wiley.com/doi/epdf/10.1111/appy.12109 (fee required).
11. Id. See also, Joseph Alan Wszalek, Soziale Kompetenz, *A Comparative Examination of the Social-Cognitive Processes That Underlie Legal Definitions of Mental Competency in the United States, Germany, and Japan*, 39 Fordham Int'l L.J. 101, 114–15 (2015) available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2405&context=ilj.
12. *See Principles and Guidelines*, Principle 1; see also CRPD Committee, *Guidelines on the right to liberty and security of persons with disabilities*, adopted at its fourteenth session (17 August-4 September 2015), UN Doc A/72/55, annex, para. 16.
13. The International Legal Foundation is among the organizations that assist lawyers to establish sustainable and effective public criminal defence systems. For information, see https://www.theilf.org/.
14. Recommendations for legal representation are included in the *Principles and Guidelines*, supra. n. 3, at Principle 6.
15. For information about intermediaries in the U.K. visit https://www.intermediaries-for-justice.org/. See, also, *The Advocates Gateway: Responding to Communication Needs in the Justice System*, available at http://www.theadvocatesgateway.org/intermediaries.
16. *R. v. Dixon*, [2013] EWCA Crim. 465ª available at https://www.bailii.org/ew/cases/EWCA/Crim/2013/465.html.
17. See C.R. Williams, *Development and Change in Insanity and Related Defences*, 24 Melbourne U. L. Rev. 711, 734-35 (2000).
18. Sandrine Martin, et al., *Not a "Get Out of Jail Free Card": Comparing the Legal Supervision of Persons Found Not Criminally Responsible on Account of Mental Disorder and Convicted Offenders*," 12 Frontiers in Psychiatry 1 (2022) available at https://www.researchgate.net/publication/357914044_Not_a_Get_Out_of_Jail_Free_Card_Comparing_the_Legal_Supervision_of_Persons_Found_Not_Criminally_Responsible_on_Account_of_Mental_Disorder_and_Convicted_Offenders.
19. *Kahler v. Kansas*, 139 S. CT. 1318 (2020) (elimination of the insanity defence does not violate the U.S. Constitution; the majority opinion and the dissent disagree about whether the defence is a fundamental right reaching different interpretations of the history of the defence) available at https://www.supremecourt.gov/opinions/19pdf/18-6135_j4ek.pdf
20. Piers Gooding & Tova Bennett, *The Abolution of the Insanity Defence in Sweden and the United Nation's Convention on the Rights of persons with Disabilities: Human Rights Brinkmanship or Evidence it Won't Work?* 21 New Criminal L. Rev. 141 (2018) available at https://online.ucpress.edu/nclr/article/21/1/141/68831/The-Abolition-of-the-Insanity-Defense-in-Sweden.
21. Cap. 63 Laws of Kenya, §§ 11 & 12; *Republic v. S.E.*, High Court of Kenya (2017) (describing insanity defence) available at http://kenyalaw.org/caselaw/cases/view/152744/.
22. Kenya Crim. Pro. Code § 166.
23. Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Kenya* (2015), CRPD/C/KEN/CO/1, available at https://digitallibrary.un.org/record/811095?ln=en.
24. Bilal Alil & Hooman Keshavarzi, *Forensic Psychiatry*, in Oxford Islamic Studies Online, available at https://khalilcenter.com/wp-content/uploads/2015/09/Forensic-Psychiatry-Oxford-Islamic-Studies-Online.pdf.
25. Documenta & Ubijus, *Inimputabilidad y medidas de seguridad; Debate: Reflexiones America Latina derechos personas discapacidad* (2017) available at https://ddd.documenta.org.mx/wp-content/uploads/2020/04/Inimputabilidad-y-medidas-de-seguridad-a-debate.pdf.

26. Id.
27. Committee on the Rights of Persons with Disabilities, *Views Adopted by the Committee under article 5 of the Optional Protocol concerning communication* No. 32/2015 (2019), Doc. CRPD/C/22/D/32/2015, available at http://docstore.ohchr.org/SelfServices/FilesHandler.ashxnc=6QkG1d%2FPPRiCAqhKb7yhsiXdyxfsUw0U wnk5uW2OiRTgbu5mn9DRjZXvll5a4zvDBvYWFIHVeoN2gpLTJBBq%2FiazMz0C5X2ViHTjOcsdVn4sND DWMnlqARE3bg4%2B1D2eRuGu%2Fie7UW8DI6vw6MZwPQ%3D%3D.
28. Nancy Gómez, *Arturo Medina Vela: México pide histórica disculpa pública a joven con discapacidad*, sdpnoticias (October 4, 2021) available at https://www.sdpnoticias.com/mexico/arturo-medina-vela-mexico-pide-historica-disculpa-publica-a-joven-con-discapacidad/.
29. CRPD/C/KEN/CO/1 at paragraph 28.
30. CRPD/C/BEL/CO/1 paragraph 28 available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=en. See also CRPD/C/TKM/CO/1, paragraph 30(b); CRPD/C/DEU/CO/1, 32(a) and (b).
31. UN Human Rights Council, annual report of the UN High Commissioner for Human Rights and reports of the High Commissioner and the UN Secretary General, UN doc. A/hrc/10/48 at 15 (26 January 2009) https://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf.
32. Organization of American States, Committee on the Elimination of All Forms of Discrimination against Persons with Disabilities (CEDDIS), *Practical Guide for the Establishment of Supports for the Exercise of Legal Capacity by Persons with Disabilities*, OEA/Ser D/XXVI.39 (2021), pages 22-23 (Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities must be re-interpreted in light of Article 12 of the CRPD) https://www.oas.org/en/sare/publications/guia_practica_ceddis_eng.pdf.
33. Id. at page 20.
34. This section is drawn from the arguments made by Hub members in an amici brief to the International Criminal Court in *The Prosecutor v. Dominic Ongwen*. The brief is available at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/04-01/15-1930.
35. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Illness in Criminal Cases*, 86 Virginia Law Review 1199 (2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=216188.
36. https://www.ohchr.org/EN/HRBodies/CRPD/Pages ConventionRightsPersonsWithDisabilities.aspx#3.
37. Howard Zehr, Blog, *Restorative or transformative justice* (2011) (explaining difference but arguing they are really more the same than different) available at https://emu.edu/now/restorative-justice/2011/03/10/restorative-or-transformative-justice/.
38. Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities*, 21 (2015) available at https://www.ohchr.org/EN/HRBodies/CRPD/Pages/Guidelines.aspx
39. Canadian Dep't of Justice, *Restorative Justice*, available at https://www.justice.gc.ca/eng/cj-jp/rj-jr/index.html. The definition refers to "crimes" not "behaviours." We have chosen to insert the broader term here in recognition that restorative justice is used in many contexts, not only in the criminal justice system.
40. See, e.g., U.N. Commission on Crime Prevention and Criminal Justice (27th Session), *Outcome of the Expert Group Meeting on Restorative Justice in Criminal Matters* (2018) available at https://undocs.org/E/CN.15/2018/13; and, U.N. Office on Drugs & Crime, handbook on restorative justice programmes (2006), available at https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf.
41. OAS, Inter-American Commission on Human Rights, *Practical Guide to Reduce Pretrial Detention*, 30-31 (2018) (includes examples of restorative practices as a diversion to pretrial detention in several countries), available at https://www.oas.org/en/iachr/reports/pdfs/GUIDE-PretrialDetention.pdf
42. See, Ian D. Marder, Penal Reform Int'l, Restorative Justice and the Council of Europe: *An Opportunity for Progress* (2018) available at https://www.penalreform.org/blog/restorative-justice-and-the-council-of-europe/.
43. The Prison Fellowship International's Center for Justice and Reconciliation has a very useful website, www.restorativejustice.org, with information on restorative initiatives from many regions of the world, including Latin America, the Middle East, North America and the Caribbean, and the Pacific. For a review of restorative justice initiatives in Asia, see, B. Steels, D. Goulding, & K. Abbot, *Restorative Justice in Asia: From the Margins and Corners to Commonplace* (2012) (unpublished presentation) available at https://www.academia.edu/3507793/Restorative_Justice_in_Asia_From_the_margins_and_corners_to_commonplace. For a review of practices in Africa, see, Julena Jumbe Gabagambi, *A Comparative Analysis of Restorative Justice Practices in Africa*, Hauser Global L. School Program, N.Y.U. Law School (2018) available at https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html. Restorative justice programs in Israel are described at Uri Yanay, *Settling Criminal Conflicts Outside the Courts: Restorative Justice in Israel*, UCLA Y&S Nazarian Center for Israel Studies (2017) available at https://www.international.ucla.edu/israel/article/176819.
44. In the U.S., for example, restorative alternatives are provided for in statutes in Massachusetts (for juveniles), California (sentencing), Florida (juvenile and adult courts, schools), Hawai'i (urging use of native Hawaiian reconciliation practices in prisons), Minnesota (allowing establishment of local programs; recognizing successful use in prisons), and elsewhere.
45. For information, see https://www.northwesternda.org/prosecution/pages/restorative-justice.
46. For information, see https://www.fgirjc.org/adult-court-diversion.
47. For information, see https://www.safermidcanterbury.org.nz/services/restorative-justice/.
48. John F. Wozniak, et al., *Transformative justice: critical and peacemaking themes influenced by Richard Quinney* (2008).
49. Sociology Lens, *Restorative Justice and Transformative Justice: Definitions and Debates* (2013) available at https://www.sociologylens.net/topics/crime-and-deviance/restorative-justice-and-transformative-justice-definitions-and-debates/11521
50. Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 California L. Rev. 105 (1924).
51. Michael Perlin, *"God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, 54 Am. Crim. L. Rev. 477, 498 (2017).

52. Persons with disabilities played an unprecedented role in the drafting of the CRPD. Esmé Grant & Rhonda Neuhaus, Liberty and Justice for All: *The Convention on the Rights of Persons with Disabilities*, 19 ILSA J. of Int'l & Comparative Law 2 (2013) available at https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1796&context=ilsajournal. Many of the 18 members of the Committee self-identify as persons with disabilities. The Committee gives a great deal of weight and priority to the views expressed by organizations of people with disabilities, both in some of their long-standing procedures and as in the substantive results of their jurisprudence.
53. Supra, n. 3.
54. Vivienne O'Connor, *Practitioners Guide: Common Law and Civil Law Traditions*, Int'l Network to Promote the Rule of Law (2012) available at https://www.fjc.gov/sites/default/files/2015/Common%20and%20Civil%20Law%20Traditions.pdf.
55. Article 27 of the Vienna Convention on the Law of Treaties states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46." Article 46 reads: "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."
56. Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014) available at https://undocs.org/en/CRPD/C/GC/1.
57. Id. at 17.
58. There is an abundance of literature about the meaning, parameters, and implications of mental incapacity. See, e.g., Thomas Grisso and Paul Appelbaum, *Assessing competence to consent to treatment: a guide for physicians and other health professionals* (1998).
59. Gerard Quinn, *Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD*, available at http://www.nuigalway.ie/cdlp/staff/gerard_quinn.html.
60. *Principles and Guidelines*, supra n.3, Guideline 1.2(d)-(h).
61. General Comment No. 1, supra n. 6, at 3-14. See also, Organization of American States, Regional Diagnosis on the Exercise of Legal Capacity of persons with Disabilities (2015) available at http://www.oas.org/en/sedi/ddse/pages/documentos/english_diagnosis.pdf and Tina Minkowitz, Peruvian Legal Capacity Reform–Celebration and Analysis, Mad in America (October 19, 2018) https://www.madinamerica.com/2018/10/peruvian-legal-capacity-reform-celebration-and-analysis/ (analysing the Peru statute and comparing it to the requirements of the CRPD).
62. General Comment No. 1, supra n. 6, at 21.
63. Paul Skowron, *Giving Substance to the "Best Interpretation of Will and Preferences*," 62 Int'l J. of L. & Psychiatry 125 (2019) available at https://www.sciencedirect.com/science/article/pii/S0160252718301651?via%3Dihub.
64. *Principles and Guidelines*, supra n. 3; General Comment #1, supra n. 6.
65. Legislative Decree 1384; Article 141 (2018), described at https://sodisperu.org/sites/default/files/2021-05/Legislative-Decree-No-1384-Peruvian-legal-capacity-reform-2.pdf.
66. See, e.g., the Mexico Supreme Court's opinion finding guardianship violates the constitution and the CRPD at https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=190473; Peru's legislative (near) abolition in Legislative Decree No. 1384 (2018) available at https://busquedas.elperuano.pe/normaslegales/decreto-legislativo-que-reconoce-y-regula-la-capacidad-jurid-decreto-legislativo-n-1384-1687393-2/, and in English at http://sodisperu.org/wp-content/uploads/2019/08/Legislative-Decree-No-1384-Peruvian-legal-capacity-reform-2.pdf. See, generally, Robert Dinerstein et al., *Emerging International Trends and Practices in Guardianship Law for People with Disabilities*, 22 J. of Int'l & Comparative L. 436 (2016) available at https://nsuworks.nova.edu/cgi/viewcontent.cgi?referer=http://scholar.google.com/&httpsredir=1&article=1899&context=ilsajournal/.
67. Opinion holding guardianship violates CRPD available at https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=190473
68. Information available at https://www.alzheimer-europe.org/Policy/Country-comparisons/2010-Legal-capacity-and-proxy-decision-making/Sweden.
69. Information available at http://supporteddecisionmaking.org/legal-resource/latvia-abolishes-plenary-guardianship.
70. See, generally Arlene S. Kanter & Yotam Tolub, *The Fight for Personhood, Legal Capacity, and Equal Recognition Under Law for People with Disabilities in Israel and Beyond*, 39 Cardozo L. Rev. 557 (2017), Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3114364.
71. Alberto Vasquez, *The Peruvian Legal Capacity Reform* (powerpoint) (accessible by Google search) includes description of the 10 year effort to enact the reform; Tina Minkowitz, *Peruvian Legal Capacity Reform–Celebration and Analysis*, Mad in America (October 19, 2018) https://www.madinamerica.com/2018/10/peruvian-legal-capacity-reform-celebration-and-analysis/ (analysing the Peru statute and comparing it to the requirements of the CRPD).
72. UN Office of High Commissioner for Human Rights, *UN expert welcomes legal capacity reform in Colombia to end guardianship regime* (2019) available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24926.
73. Bazelon Center for Mental Health Law, *The Role of Mental Health Courts in System Reform* (undated) available at http://www.bazelon.org/wp-content/uploads/2018/03/Role-of-Mental-Health-Courts.pdf
74. Guidelines on Article 14, paragraph L21, "Diversion programmes must not involve a transfer to mental health commitment regimes or require an individual to participate in mental health services; such services should be provided on the basis of the individual's free and informed consent." Available at https://www.ohchr.org/EN/HRBodies/CRPD/Pages/Guidelines.aspx.

Correspondence relating to this briefing
paper may be directed to Robert Fleischner at
bob.fleischner@fairjustice.net

For information about the Access to Justice Knowledge
Hub, contact jenny.talbot@fairjustice.net

Access to Justice
Knowledge Hub