

NATIONAL COUNCIL ON



DISABILITY

# Citizenship for people with intellectual disability

*... why Australia needs a Bill of Rights if it is to be  
a fair and inclusive society*

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The National Council on Intellectual Disability (NCID) was established over 30 years ago by parents and friends, in an endeavour to improve the quality of life of people with intellectual disability and to fill the need for national unity and information.

The Council is the recognised national peak body with the single focus on intellectual disability, ie, our actions and priorities centre on issues that affect the lives of people with intellectual disability and their families. Our mission is to work to make the Australian community one in which people with intellectual disability are involved and accepted as equal participating members.

NCID has over 5,000 members representing all 8 States and Territories. In addition to having people with intellectual disability on its Board, NCID receives policy advice from Our Voice. Our Voice is a committee, the membership of which is exclusively people with intellectual disability representing all States and Territories.

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# NCID Supports an Australian Bill of Rights

Australia must develop a mechanism for protecting the rights of people with intellectual disability. This is not to create a unique set of rights but to ensure that the rights experienced by the general community are explicitly extended to people with intellectual disability.

The most appropriate mechanism to achieve our aim is probably best left to others. However, as a default position, NCID would like to see an 'Australian Bill of Rights' enshrined in the Australian Constitution. As this is unlikely to be achieved in the short term, we recommend a legislated Australian Bill of Rights by the Australian Parliament, with a review in five years, to begin the process of adding an Australian Bill of Rights to the Australian Constitution.

## Introduction

People with intellectual disability have an intellectual impairment which means they have difficulty in learning and putting their learning into practice; this causes them to have an 'activity limitation'<sup>1</sup> in undertaking everyday tasks. However,

- people with intellectual disability do learn and, through their learning, increase their skills and decision-making capacities
- the level of support that people need does not easily equate to their corresponding level of impairment, ie, someone who is defined as having a 'mild' disability will not by definition have low support needs
- most people with intellectual disability learn to live independently with occasional daily assistance — at times the support required is complex
- some people with intellectual disability have significant difficulty in learning and require frequent daily assistance and support.

In discussing an Australian Bill of Rights, it is important to acknowledge that rights are man-made laws. Through the UN Convention process, there is a recognition that some rights are universal but this does not imbue them with some mystic power. Why is this important? There is a great deal of debate about an Australian Bill of Rights taking power away from parliaments and putting policy-making and shaping of the Australian community into the hands of (unelected) judges. This of

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<sup>1</sup> See ABS Survey of Disability, Ageing and Carers, Australia, 2003, for definition.

course is ‘nonsense’! Parliament and the people will make the decisions about what is in the Australian Bill of Rights which, in turn, will set the parameters for its interpretation. All that judges will do is bring their knowledge and skill to these laws as they do for all laws. There is nothing special about an Australian Bill of Rights — it is not in some way ‘extra-legal’.

This argument must not derail the Australian Bill of Rights process. For people with intellectual disability, a Bill of Rights is the only way the UN Convention on the Rights of Persons with Disabilities will become Australian law and establish a process whereby people with intellectual disability and their supporters are able to seek redress where the rights of people with disability have been violated. This last point is important. Unless people with intellectual disability are able to assert their rights, they effectively will have no rights and, therefore, the Australian Bill of Rights, like other ‘rights documents’, will exclude people with intellectual disability from the community of persons.

## UN Convention on the Rights of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities has been ratified by the Australian Parliament after consultation with State and Territory Governments and the community. The articles of the Convention set out a number of rights that have been agreed at an international and national level to ensure equality of rights for people with intellectual disability — the same rights as the general community as asserted in the UN Covenants on Civil and Political Rights (etc).

In discussion about whether Australia should have a Bill of Rights, two essential questions have been asked:

1. What is the evidence that the rights of people with intellectual disability are not protected under the current arrangements?
2. Would a Bill of Rights (in whatever form) make any difference?

## The Current Situation

People with intellectual disability do not have equality in human rights with most Australians. This fact is illustrated in the examples below. This is not an exhaustive list but an indication of why an Australian Bill of Rights is needed for people with intellectual disability.

The assumption should be that people with intellectual disability have the capacity to be valued members of their community, ie, they should be viewed in the same way as everyone else— as

parents, students, employees, church attendees, drivers, consumers, etc. Too often, they are seen as a 'disability' and, from this perception, an assumption is made of incompetence.

## **Parents with intellectual disability**

People with intellectual disability have a right to be parents and to receive the assistance they need to be good parents. The current situation is that children are frequently removed from their parents with intellectual disability before the parents have an opportunity to demonstrate their competence to raise children. Little, if any, assistance or support is offered, unlike parents without disability who are offered multiple support if they struggle with the parenting role.

## **Legal Rights of People with intellectual disability**

From serving on juries, to being witnesses, to making a complaint of illegality, people with intellectual disability are assumed to be incompetent and are not given the same responsibilities as other members of the community. Therefore, as victims of crime, their offenders are granted immunity from prosecution as people with disability are not seen to be competent as witnesses. Little attempt is made to change the judicial environment to enable them to tell what happened.

## **Health Rights of people with intellectual disability**

People with intellectual disability have 'appalling' health statistics<sup>2</sup>. Health is a 'foundation' right, as without it a person's quality of life and length of life is impaired. Currently, there is no redress to this situation and so it continues.

## **Supported living rights of people with intellectual disability**

The right to live an independent life (least restricted), where and with whom you choose, is a right that is currently enjoyed by most Australian citizens. Key concepts such as choice and liberty are important in defining the life that we make for ourselves. Choices, of course, are made within limitations, but the key question is what decisions are rightfully exercised by which authority?

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<sup>2</sup> See NCID submission to NHHRC - <http://ncid.org.au/submissions/submissions/0809/NHHRC.pdf>

The Australian community sees governments as the right authority to make decisions about the level of taxes to collect and how funds should be distributed in the welfare system. But, does the Australian community see it as the role of government, for example, to dictate to people with whom they should live and by whom they should be supported, with no consideration for quality or outcomes? The answer of course is no! Who I live with is my decision and the UN Convention makes it clear that this right is a citizen right, ie, it also applies to people with disability.

But, this is but one example of where accepted community rights are not extended to people with disability by public officials and it is an example of where people with disability have no recourse to assert this community right.

## **Employment opportunities for people with intellectual disability**

Economic participation is seen not only as a right but as a responsibility, yet people with intellectual disability are seen as incapable of working for a decent wage, paying taxes and contributing to their retirement through superannuation. Individuals, parents, teachers and State/Territory and Commonwealth officials should have an expectation that all students will leave school and get a job. Any other expectation is a denial of the person's right and responsibility to be an economic participant.

The failure of Governments to fund best practice is also an issue. If we know that people with intellectual disability in some service models are averaging a weekly wage of \$245, why does the Commonwealth Government continue to fund services which pay less than 50% of this and demonstrate no commitment to meeting the average? What right of redress do people with intellectual disability have when they are 'forced' into substandard services?

## **A BILL OF RIGHTS?**

A Bill of Rights, which embodies the UN Convention on the Rights of Persons with Disability, will only make a difference, and must only come into existence, if there are effective mechanisms for people with intellectual disability to enforce their rights.

The effectiveness of the Disability Discrimination Act (DDA) and the Human Rights Commission provides lessons as to what a Human Rights Bill must address.

## Own Cost

The changes to the Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) that transferred its hearing powers to the Federal Court changed the DDA from an own-cost jurisdiction to one of an award of costs. For many people with disability and their families, this made the DDA inaccessible as they could not 'compete' with departments of education, employers, etc which have far greater access to resources and to lawyers who are able to use delaying tactics, etc, to impose maximum costs.

The Human Rights Bill must ensure that people are able to take action to assert their rights without placing their income and assets at risk. Without this, people will not be able to assert their rights and hence will effectively not have any.

## All rights

The DDA sets out a limited number of areas in which a person can assert discrimination. In addition, it makes provision for the development of DDA Standards.

As has been demonstrated above, people with intellectual disability want their rights as citizens to be fully asserted. They are not just people with a disability — they are members of the community and want and should have equality of access in all aspects of their lives.

The development of Standards, for whatever benefits that they deliver, was not about inclusion but exclusion. By definition, developing a Standard will define who is not covered, what situation is not covered or which environment is not applicable. A right is a right and without qualification (including hardship) — either we see people with intellectual disability as citizens or we do not. There is no half-way measure!

## No qualification

Therefore, the Bill of Rights must not qualify the rights that a citizen has unless the qualification applies to all citizens, regardless of whether they have a disability or not. This includes the issue of financial hardship which must not be applied to any one group as this would be an act of discrimination.

## No minimum

Therefore, the Bill of Rights must **not** become a minimum standard (which is an expression of what each citizen is entitled to, with some citizens having other or more rights).

## Advocacy

For people with intellectual disability to be able to assert their rights, they must have access to advocacy. By definition, people with intellectual disability require support and assistance to understand complex processes and to act to undertake these processes. The denial of access to advocacy or the limitation of advocacy will mean that people with intellectual disability will not be able to assert their rights and hence they will effectively not have them.

## A Final Word!

People with intellectual disability need their human rights to be asserted and a mechanism to challenge the decisions that are made by public officials who try to either control the lives of people with intellectual disability or prevent them from having access to their rights as citizens.

The Australian Bill of Rights must set out responsibilities as well as rights. In this regard the concept of subsidiarity is important. The Australian Bill of Rights must set out clearly the responsibilities of government, public officials and citizens.

The principle of subsidiarity states that, 'decisions should be made as close to the person (or institution) that the decision will impact on'. For example, taxation impacts on us all and, therefore, it is the responsibility of our elected governments to make decisions about taxation. Taxpayers can always vote them out if they disagree with their decisions.

Using the example above, it is my responsibility to make the decision about who I live with. The decision will impact on me (and my flat-mates) alone and hence that decision is rightfully mine. If the decision is made by a politician or a public official, they will not have to bear the consequences of that decision, unlike taxation decisions, as an individual cannot vote them out of office on their own. If I make a 'bad' decision, then I have not only the responsibility to change that decision but the incentive.

People with intellectual disability require support to live as citizens. It is rightfully the responsibility of governments to ensure that funding is provided to ensure that people are supported and that the funding provided is spent on the person's 'disability needs' through assessment, planning and

accountability. Beyond this limited area of responsibility, governments must ensure that people with intellectual disability have the rights and responsibilities of all citizens, ie. to control their own lives.