



Human Rights and Anti-Discrimination Bill 2012

Exposure Draft Legislation

Version 1.0

20 December 2012

The National Council on Intellectual Disability (NCID) was established over 50 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 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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Statement of Principles

- ☀ All people have inherent dignity and worth and equal and inalienable rights.
- ☀ All people are valued members of the Australian Community.
- ☀ People with intellectual disability as equal participating members of the Australian Community have the same rights:
 - ☀ to respect for their individual autonomy and independence
 - ☀ to make their own choices
 - ☀ to participate in decisions which affect their lives
 - ☀ to pursue any grievance which affects their lives
 - ☀ to diversity of choice for housing, education, work, recreation and leisure
 - ☀ to equity and justice
 - ☀ to be empowered to take their full place in the Australian Community
 - ☀ to dignity and privacy in all aspects of their lives

National Council on Intellectual Disability will:

- ✓ work to make the Australian Community one in which people with intellectual disability have full and equal enjoyment of all human rights and fundamental freedoms and are involved and accepted as equal participating members.
- ✓ promote and protect the human rights of all persons with intellectual disability, including those who require more intensive support.

Consultation Statement

National Council on Intellectual Disability consults people with intellectual disability and family members through our State and Territory Agency Members. In particular we:

- ➔ conduct an annual survey of members and stakeholders
- ➔ hold two meetings a year, rotating through all States and Territories
- ➔ present at the Having a Say Conference each year, attended by over a 1,000 delegates the majority of whom have a disability
- ➔ hold forums on specific issues
- ➔ sponsor actions and representations on issues of importance to people with disability

On the Human Rights and Anti-Discrimination Bill 2012 National Council on Intellectual Disability has specifically consulted with members who over the past 10 years have discussed with us how the Disability Discrimination Act has failed to address the discrimination they have suffered.

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1. Introduction

The Disability Discrimination Act (1986) has failed people with intellectual disability¹. The failure of the courts to understand the nature of discrimination that people with intellectual disability experience and the cost imposition of the transferring of hearings to the Federal Court/Magistracy have meant that people with intellectual disability are no longer protected from discrimination in Australia.

The question that is posed by NCID members is, will the Human Rights and Anti-discrimination Bill make any real difference?

For the reasons set out below the answer must be no! The current draft Bill does not provide sufficient change to give people with intellectual disability the protection they need to exercise their rightful citizenship.

National Council on Intellectual Disability does not support the Bill in its current form; we will continue to consult with people with intellectual disability on all aspects of human rights and anti-discrimination to be informed for the introduction of the Bill proper.

The fact that NCID does not support this draft Bill does not mean that it will not address discrimination against people with the other attributes listed in the Bill, including other people with disability. NCID only makes comment on the draft Bill as it will affect people with intellectual disability.

2. Definition of disability

The failure of the Human Rights Commission and the courts to recognise discrimination against people with intellectual disability is due to a lack of understanding of the nature of disability. This draft Bill does not remedy this issue but makes it worse.

The definition of disability given in the list of definition is not a definition of disability but of impairments, that is, impairments of bodily functions which are directly related to health.

Disability is an interaction between a person's impairments and their environment, including attitudes (see International Classification of Functioning and Disability, WHO). An understanding of this is fundamental to an understanding of disability and discrimination. The draft Bill shows no such understanding and hence a key foundation principle is missing.

For example, an act of discrimination does not make a person pregnant nor does it make a person belong to a particular race nor does it make a person acquire a particular gender orientation, etc. They all have these attributes before the act of discrimination takes place.

¹ *The term intellectual disability is used in this submission as opposed to intellectual impairment as all people with intellectual impairment currently experience the disabling effects of discrimination.*

Why is this important? Disability is unique in the list of attributes in that it is not 'the person', but an interaction that involves the person. The act of discrimination creates the attribute disability. An act of discrimination therefore disables a person, that is, causes their disability. The act of discrimination is the environment (including attitudes) that the person with the impairment comes up against and is disabled by.

This is acknowledged by the 'special measures' provision but the link is poorly if understood and the the special measures provision is, we suggest, more charitable than a framework for creating a non-disabling environment.

For people with intellectual disability this failure to appreciate the true nature of disability and hence the disabling action of discrimination is particularly acute.

For centuries people with intellectual disability have been segregated from the community and congregated in institutional settings. This 'habit' persists in 2012/13 and is a major disabler of people with intellectual disability. The acceptance of separateness has created an environment of 'normality' which has not be challenged by the Human Rights Commission or Australian courts. The fact that people have a disability (and not simply an impairment) has been taken to be who they are; and therefore their disablement is 'only natural'.

People with intellectual disability have a saying, "see the person first" (the motto of the People First movement). People with intellectual disability have an intellectual impairment, they have a disability because they are disabled by the community, this draft Bill does not make them people with an impairment it reinforces their disability - their separation from their community.

- The current 'disability' attribute must be retitled a health attribute.
- The Bill must included a definition of disability which fully addresses the lived experience of people with intellectual disability; disability is the consequence of any act, or failure to act to include people in the life of the community. It goes beyond 'unfavourable treatment' or 'disadvantage'.
- A person having a disability is sufficient proof that they suffer an act of discrimination, the act of discrimination gives them the attribute.

3. Access to redress for discrimination

The second key issue for people with intellectual disability are the impediments to making a complaint; costs and exclusion of representative complaints.

3.1 Costs

The issue of costs has been included in the draft Bill and at a superficial reading the issues appears to have been addressed. But the list of 'considerations' when deciding costs in particular d,e,f, of Section 133 (3) give wide latitude to the court and offer no protection to people with intellectual disability. Given these three clauses it would be unwise for anyone to recommend to a person with intellectual disability that they proceed with a complaint of discrimination.

In effect there is no substantive change from the current arrangements.

3.2 Representative complaints

People with intellectual disability are in a very vulnerable position in making complaints of discrimination. Most rely on support services (accommodation, employment) and essential services (transport, education) and the fear of retribution is very real for people who have difficulty communicating.

Representative organisations are the only practical and 'safe' way for the voice of complaint of people with intellectual disability to be heard and dealt with.

The omission of representative complaints from the draft Bill is disappointing and blocks an essential pathway for people with intellectual disability to have their rights enshrined in the UNCRDP realised.

4. Vilification

Vilification is a very real issue for people with intellectual disability. During 2012 members of NCID who have an intellectual disability wrote a policy paper on Vilification and hate crime; the paper is attached.

The section on vilification in the draft Bill specifically concerns race. Why is this section included when the definition, for all attributes, includes "conduct that offends, insults and intimidates the other person" (unfavourable treatment)?

Section 51 provides an extended definition of when and how racial vilification can occur. These also apply to people with intellectual disability and it is confusing that they are only explicitly detailed under racial vilification. The question is raised as to whether the conduct explicitly detailed in racial vilification will apply to people with intellectual disability.

Section 51 must apply to all protected attributes.

5. Conclusion

National Council on Intellectual Disability is disappointed that amalgamation of the discrimination acts did not lead to people with intellectual disability having redress for acts of discrimination against them. The UNCRPD, the publication of the International Classification of Functioning and Disability and the social theory of disability all provided the drafters with an opportunity to update the definition of disability and eliminate discrimination against people with intellectual disability. In considering this draft Bill it is an opportunity that was not only missed but not even considered! Under this draft Bill people with intellectual disability will continue to be separated (disabled) by their community, their parliament and the Human Rights Commission.