

Board Members with Intellectual Disability

ADVICE

Introduction

1. Professor Ian Freckleton KC has provided the Australasian Society for Intellectual Disability (“ASID”) with a memorandum of advice dated 9 October 2025 in which he concludes that it is not possible for people with an intellectual disability to serve as board members. I am asked to advise in response to Professor Freckleton’s opinion. For the reasons that follow, I disagree with Professor Freckleton’s conclusion.

Definition of “intellectual disability”

2. Professor Freckleton’s advice is entirely premised on the definition of “intellectual disability” in s 3(1) of the Victorian *Disability Act 2006* (“the Victorian Act”). That definition is as follows:

intellectual disability, in relation to a person over the age of 5 years, means the concurrent existence of—

- (a) significant sub-average general intellectual functioning; and
 - (b) significant deficits in adaptive behaviour—
- each of which became manifest before the age of 18 years;

3. The definition in the Victorian Act appears to paraphrase in simplified form the definition of “mental retardation” in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed, text revision 2000 (DSM-IV-TR).
4. I accept that a person who has “significant sub-average general intellectual functioning” is unlikely to have sufficient capacity to serve as a board member.

Other Statutory Definitions

5. With one exception, the Victorian Act is the only State or Territory Act to contain a specific definition of “intellectual disability”. However, each of the equivalent Acts in the other States and Territories (“the other State and Territory Acts”) contain definitions of “disability” that encompass intellectual disability. Those definitions are as follows.

6. In New South Wales s 7(1) of the *Disability Inclusion Act 2014* provides:

disability, in relation to a person, includes a long-term physical, psychiatric, intellectual or sensory impairment that, in interaction with various barriers, may hinder the person’s full and effective participation in the community on an equal basis with others.

7. In Queensland s 11 of the *Disability Services Act 2006* provides:

11 What is a *disability*

- (1) A **disability** is a person’s condition that—
 - (a) is attributable to—
 - (i) an intellectual, psychiatric, cognitive, neurological, sensory or physical impairment; or
 - (ii) a combination of impairments mentioned in subparagraph (i); and
 - (b) results in—
 - (i) a substantial reduction of the person’s capacity for communication, social interaction, learning, mobility or self care or management; and
 - (ii) the person needing support.
- (2) For subsection (1), the impairment may result from an acquired brain injury.
- (3) The disability must be permanent or likely to be permanent.
- (4) The disability may be, but need not be, of a chronic episodic nature.

8. In South Australia s 3 of the *Disability Services Act 1993* provides:

disability in relation to a person means a disability—

- (a) that is attributable to intellectual, psychiatric, cognitive, neurological, sensory or physical impairment, or a combination of any of those impairments; and
- (b) that is, or is likely to be, permanent; and

- (c) that results in the person having—
 - (i) a reduced capacity for social interaction, communication, learning, mobility, decision making or self care; and
 - (ii) a need for continuing support services,
 and includes such a disability notwithstanding that it is of an episodic nature;

9. In Western Australia s 3 of the *Disability Services Act 1993* provides:

disability means a disability —

- (a) which is attributable to an intellectual, psychiatric, cognitive, neurological, sensory, or physical impairment or a combination of those impairments; and
- (b) which is permanent or likely to be permanent; and
- (c) which may or may not be of a chronic or episodic nature; and
- (d) which results in —
 - (i) a substantially reduced capacity of the person for communication, social interaction, learning or mobility; and
 - (ii) a need for continuing support services;

10. In Tasmania s 5 of the *Disability Rights, Inclusion and Safeguarding Act 2024* provides:

disability, in relation to a person, includes long-term physical, mental, cognitive, intellectual or sensory impairments which in interaction with various barriers may hinder the person’s full and effective participation in society on an equal basis with others;

11. In the Australian Capital Territory s 5 of the *Disability Services Act 1991* provides:

disability, in respect of a person, means a disability—

- (a) that is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of those impairments; and
- (b) that is permanent or likely to be permanent; and
- (c) that results in—
 - (i) a substantially reduced capacity of the person for communication, learning or mobility; and
 - (ii) the need for continuing support services; and
- (d) that may or may not be of a chronic episodic nature.

12. In the Northern Territory s 2 of the *Disability Services Act 1993* provides:

disability, in respect of a person, means a disability:

- (a) which is attributable to an intellectual, sensory, physical or psychiatric impairment or a combination of those impairments;
- (b) which is permanent or likely to be permanent;

- (c) which results in:
 - (i) a substantially reduced capacity of the person for communication, learning or mobility; and
 - (ii) the need for continuing support services; and
 - (d) which may or may not be of a chronic episodic nature.
13. As can be seen, intellectual disability for the purposes of each of the other State and Territory Acts is much more broadly defined than in the Victorian Act. In particular, these definitions do not require a person to have “significant sub-average general intellectual functioning” for that person to be considered to have an intellectual disability. Under each of the other State and Territory Acts an “intellectual disability” will include any intellectual impairment:
- (a) “which ... may hinder the person’s full and effective participation in society on an equal basis with others”; or
 - (b) “which results in ... a substantially reduced capacity of the person for communication, social interaction, learning or mobility”.
14. Clearly, there are many people with an intellectual disability who would fall within the definition of that expression under the other State and Territory Acts, but not the Victorian Act.
15. The exception previously mentioned is the Queensland *Forensic Disability Act 2011* (Qld), s 12 of which provides:

12 What is an *intellectual disability*

- (1) An *intellectual disability* is a disability within the meaning of the Disability Services Act that—
 - (a) is characterised by significant limitations in intellectual functioning and adaptive behaviour; and
 - (b) originates in a person before the age of 18.
- (2) Schedule 1 provides for assessing a person’s intellectual functioning and adaptive behaviour for subsection (1)(a).

16. Like the Victorian Act, the Queensland *Forensic Disability Act 2011* contains a much narrower definition of “intellectual disability”, including use of the word “significant”. However, that Act is confined to the very specific context of the involuntary detention of people with an intellectual or cognitive disability. In all other contexts in Queensland, the more general Queensland *Disability Services Act 2006* would apply.

17. There are 2 principally relevant Acts at the Commonwealth level.

18. First, s 4(1) of the *Disability Discrimination Act 1992* provides:

disability, in relation to a person, means:

- (a) total or partial loss of the person’s bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person’s body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future (including because of a genetic predisposition to that disability); or
- (k) is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

19. Second, s 24 of the *National Disability Insurance Scheme Act 2013* provides:

24 Disability requirements

(1) A person ***meets the disability requirements*** if:

- (a) the person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or the person has one or more impairments to which a psychosocial disability is attributable; and

- (b) the impairment or impairments are, or are likely to be, permanent; and
- (c) the impairment or impairments result in substantially reduced functional capacity to undertake one or more of the following activities:
 - (i) communication;
 - (ii) social interaction;
 - (iii) learning;
 - (iv) mobility;
 - (v) self-care;
 - (vi) self-management; and
- (d) the impairment or impairments affect the person's capacity for social or economic participation; and
- (e) the person is likely to require NDIS supports under the National Disability Insurance Scheme for the person's lifetime.

...

20. Similarly to the other State and Territory Acts, intellectual disability under both of these Commonwealth Acts is more broadly defined than under the Victorian Act.

21. At an international level, article 1 of the United Nations *Convention on the Rights of Persons with Disabilities* to which Australia is a signatory provides:

Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

22. Again, the definition of disability in the relevant UN Convention when applied to intellectual disability will plainly include many people with an intellectual impairment who do not fall within the definition in Victorian Act.

Other Definitions

23. Outside the statutory context the peak body for disability service organisations in Australia, National Disability Services, describes intellectual disability on its website in the following terms:

Intellectual disability

Intellectual disability is a lifelong condition that affects a person's intellectual skills and their behaviour in different situations. It can include difficulties with reasoning, problem solving, planning, abstract thinking, academic learning, judgement and learning from experience. Intellectual disabilities can range from mild to severe and may be present from birth or acquired later in life.

24. As this definition points out, there is a wide spectrum of intellectual disability. Whether a particular individual has sufficient capacity to serve as a board member will depend on the nature and severity of their intellectual disability.
25. Finally, I note that ASID's own website equates intellectual disability with "learning disability": <https://asid.asn.au/about/words-we-use/>. Plainly, there is a vast difference between someone with "significant sub-average general intellectual functioning" and a person who merely has a learning disability.

Decision-making Capacity

26. Boards can only act by making decisions. As Professor Freckleton identifies, whether a person with an intellectual disability is qualified to serve as a board member will depend on whether they have sufficient decision-making capacity.
27. I agree with Professor Freckleton that s 5 of the Victorian *Guardianship and Administration Act 2019* provides useful guidance as to whether an individual has sufficient decision-making capacity. That section provides in full as follows:

5 Meaning of decision-making capacity

- (1) For the purposes of this Act, a person has capacity to make a decision in relation to a matter (decision-making capacity) if the person is able—
 - (a) to understand the information relevant to the decision and the effect of the decision; and
 - (b) to retain that information to the extent necessary to make the decision; and
 - (c) to use or weigh that information as part of the process of making the decision; and

- (d) to communicate the decision and the person's views and needs as to the decision in some way, including by speech, gesture or other means.
- (2) For the purposes of subsection (1), a person is presumed to have decision-making capacity unless there is evidence to the contrary.
- (3) For the purposes of subsection (1)(a), a person is taken to understand the information relevant to a decision if the person understands an explanation of the information given to the person in a way that is appropriate to the person's circumstances, whether by using modified language, visual aids or any other means.
- (4) In determining whether a person has decision-making capacity, regard must be had to the following—
 - (a) a person may have decision-making capacity in relation to some matters and not others;
 - (b) if a person does not have decision-making capacity in relation to a matter, it may be temporary;
 - (c) it should not be assumed that a person does not have decision-making capacity in relation to a matter on the basis of the person's appearance;
 - (d) it should not be assumed that a person does not have decision-making capacity in relation to a matter merely because the person makes a decision that, in the opinion of others, is unwise;
 - (e) a person has decision-making capacity in relation to a matter if it is possible for the person to make the decision with practicable and appropriate support.

Examples

The following are examples of practicable and appropriate support—

- (a) using information or formats tailored to the particular needs of a person;
- (b) communicating or assisting a person to communicate the person's decision;
- (c) giving a person additional time and discussing the matter with the person;
- (d) using technology that alleviates the effects of a person's disability.

28. In my opinion a person with an intellectual disability as broadly defined who is able to meet the criteria in s 5(1) will clearly have sufficient decision-making capacity to serve as a board member. Whether a particular individual meets those criteria will need to be assessed on a case-by-case basis.

29. Further, as s 5(4)(e) suggests, a person who might not otherwise have sufficient decision-making capacity may be able to meet the requisite criteria if they are provided with appropriate support. For example, the financial statements could be presented in a less traditional, more user-friendly form that included an overview or summary, and appropriate exception reporting with plain language explanations. In addition, board members with an intellectual disability could be provided with a separate briefing by an appropriately qualified person prior to the board meeting at which the financial statements are to be considered.

Financial Literacy

30. It is no doubt desirable that all board members should have sufficient financial literacy to be able to analyse the organisation's financial statements and fully understand its financial position. However, this is a "counsel of perfection". In my experience there are very many board members of not-for-profit organisations who have little or no financial literacy. Further, there are very few not-for-profit organisations that mandate financial literacy as a qualification for board membership. To disqualify a person with an intellectual disability from being a board member because they are not financially literate when other board members without an intellectual disability are not required to be financially literate is plainly discriminatory.

Skills Matrix

31. In addition, Professor Freckleton's advice does not take into account contemporary governance guidance on board composition. Current best practice in each of the public, for-profit and not-for-profit sectors requires boards to develop a skills matrix to assist in the selection of board members with appropriate expertise and experience.

32. By way of example, the use of a skills matrix is mandated for all appointments to Victorian government boards: <https://www.vic.gov.au/diversity-victorian-government-board-guidelines>. Similarly, the Australian Securities Exchange recommends the use of a skills matrix for the boards of all listed companies: <https://www.asx.com.au/-/about/regulation/corporate-governance-principles-and-recommendations>. Finally, and most relevantly in the present context, the Australian Institute of Company Directors includes a skills matrix as part of its Not-for-Profit Governance Principles: <https://www.aicd.com.au/corporate-governance-sectors/not-for-profit/studies/2024-not-for-profit-governance-principles.html>.
33. A skills matrix typically includes such categories as: accounting, investment, legal, human resources, technology, marketing, fundraising, industry, governance, media, risk and government. Implicit in the use of a skills matrix is that the composition of the board will not be homogenous. Board members will contribute their different skills and experience to the board without being required to have expertise in every area of the board's responsibilities.
34. As the AICD NFP Governance Principles suggest, a skills matrix can include a category of lived experience. If so, consistent with my earlier comments, the Principles point out:
- Effective training, induction, and supports are critical to ensuring directors with lived experience are upskilled and supported to undertake their governance roles. The board should consider what other funding resources may be needed to ensure the voice of people with lived experience is heard, including accessibility supports.
35. It is difficult to see how an intellectual disability organisation can implement a skills matrix for its board that properly reflects the interests of its stakeholders without including at least some board members with an intellectual disability.

Risk Assessment

36. Finally, Professor Freckleton's advice does not include any assessment of the magnitude of the risk he identifies for board members with an intellectual disability.
37. At a practical level, a board member will only be at risk of personal liability if the organisation concerned carries on business while it is insolvent. Unless the organisation has a board all the members of which lack financial literacy it is inconceivable that one or more board member will not identify the risk of insolvent trading before it occurs and cause the board to take the necessary steps to mitigate the risk. Put another way, the fact that some, but not all, board members have an intellectual disability is unlikely to put them (and their fellow board members) at any greater risk of personal liability provided at least some other board members are financially literate.

Conclusion

38. For these reasons, in my opinion a person with an intellectual disability should not necessarily be disqualified from serving as a board member. Whether a person with an intellectual disability has sufficient decision-making capacity to serve as a board member needs to be assessed on a case-by-case basis taking into account the nature and severity of the intellectual disability, and the support that can be provided to assist that person.



A. D. LANG

21 April 2026