



Including directors with intellectual disabilities on boards: the legal issues and legal opinion

Over the past few years, there has been increasing interest in including people with intellectual disabilities on boards of disability service providers. This was promoted in the final report of the Disability Royal Commission.

The dilemma

Some academics and commentators have questioned whether people with intellectual disabilities can carry out the legal duties of directors imposed by various Australian laws. These duties include:

- the General Law (Common Law and Equity)
- legislation about the way organisations operate and are governed; typically, this is the Corporations Act, or the various state/territory incorporated associations Acts
- the Australian Charities and Not-for-Profit Commission Act
- the NDIS Act, and
- the various state/territory occupational/work health and safety Acts.

The legal opinion

ASID - the Australasian Society for Intellectual Disability - asked a leading barrister and Professor of Law, Ian Freckelton AO KC, to analyse the legal obligations of all directors and to give an opinion about including directors with intellectual disabilities on boards of disability service providers. His opinion has implications for all organisations. This document summarises the opinion which is available from ASID.

Professor Freckelton stated that:

he started from the position that he wanted to identify a legal justification for including persons with an intellectual disability in a decision-making role on boards of directors. Ultimately, however, I have concluded, to my disappointment, that this is not possible as inherent in intellectual disability is an absence of the demanding skills that are prerequisites as a matter of law to the discharge of the role. Accordingly, I have recommended other means of drawing upon the lived experience and the insights of persons with intellectual disabilities to enrich the functioning of board members (para 4.).

The duties of directors typically rest on each individual director. They do *not* rest on the board as a group.

Professor Freckelton's view is that:

- There are good reasons *in principle* for people with intellectual disabilities to participate in governing disability providers. Among other things, they can add a valuable additional perspective to decision making.
- There is no reason why people with disability, other than intellectual disabilities, should not serve as directors of disability service providers.
- However, **there are significant legal reasons why people with intellectual disabilities should not serve as directors of disability providers.** They are unlikely to be able to consistently meet the core financial and governance duties imposed on directors by various laws. This is because they would not be able to fully understand the complex knowledge about governance, the management of financial affairs and operation of organisations. This is important not only because the law requires directors to have this understanding but also because a **failure to discharge legal duties of a director can result in civil and even criminal liability.**
- **The duties of directors cannot be delegated.**
- Appointing people with intellectual disabilities to boards risks exposing them to legal liability and eroding the ability of boards to undertake their legal obligations to the necessary standards.
- People with intellectual disabilities have important lived experience that can benefit organisations. There are feasible creative alternatives to board membership for involving people with intellectual disabilities in an organisation's governance. These require further exploration.

What are the standards expected of any director?

In meeting the duties, the law sets standards that must be met. The standards expected of directors are many and complex. They vary under the different laws. The Opinion explores them in detail.

For example, there are standards around financial knowledge often known as financial literacy:

... what each director is expected to do is to take a diligent and intelligent interest in the information available to him or her, to understand that information, and apply an enquiring mind to the responsibilities placed upon him or her ... Because of their nature and importance, the directors must understand and focus upon the content of financial statements, and if

necessary, make further enquiries if matters revealed in these financial statements call for such enquiries.

No less is required by the objective duty of skill, competence and diligence in the understanding of the financial statements that are to be disclosed to the public as adopted and approved by the directors ...¹

The leading relevant Australian case about director's liability for allowing an organisation to trade while insolvent involves a volunteer director of a not-for-profit organisation. He was found **personally liable for \$97 million**.²

In the Opinion, Professor Freckelton explained that the financial duties of directors are "objective" requirements and are not reduced because a director is not able to meet these requirements.

...in Gamble v Hoffman Justice Carr in the Federal Court of Australia heard that a director had left school at the age of 14, had no tertiary qualifications and had spent his life essentially as a fruit and vegetable market gardener. Justice Carr held that while the ambit of the director's duty and the standard of care depend on the particular circumstances,

"the test is essentially objective i.e. did the officer exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances? I doubt whether the factors which [a barrister for the director] advanced would justify a lower standard of care."

Justice Carr's enunciation of the legal principles highlights that the test that is applied is not flexible in respect of financial skills or comprehension that a particular director has.

Another example relates to work health and safety. Directors have a duty of due diligence under work health and safety law except in Victoria. "Due diligence" includes taking reasonable steps:

- (a) to acquire and keep up-to-date knowledge of work health and safety matters, and
- (b) to gain an understanding of the nature of the operations of the business and generally of the hazards and risks associated with those operations, and
- (c) to ensure that the the business has available for use, and uses, appropriate resources and processes to eliminate or minimise risks

¹ *Australian Securities and Investment Commission v Healey* [2011] FCA 717 at [20-21]

² *Commonwealth Bank of Australia v Friedrich and Ors* (1991) 5 ACSR 115

to health and safety from work carried out as part of the conduct of the business, and

(d) to ensure that the business has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, and

(e) to ensure that the business has, and implements, processes for complying with any duty or obligation of the business under the Act, and

(f) to verify the provision and use of the resources and processes referred to in paragraphs (c)-(e).

In summary, the task of directors in meeting their numerous legal duties to the required standards is cognitively complex and unsuited to people with intellectual disability.

But surely some people with intellectual disability can be supported to meet their duties?

Some people with intellectual disabilities might be able to meet some of the duties and make *some* of the decisions involved in being a director. Of course, if they were directors, people with intellectual disabilities should be supported to participate and make decisions. Some organisations attempt to reduce the risks by having support officers and pre-meeting briefings, and producing board papers in plain language. However, Professor Freckleton stated:

while it is important to support individuals to exercise their decision-making capacity, in the context of corporate governance, it is equally as important to remember that directors are personally liable for their conduct...

In recognising and seeking to adopt the principles within the United Nations Convention on the Rights of Persons with Disabilities, adults should be supported to exercise their capacity. However, the recognition of such fundamental rights must also be balanced against the burdensome obligations placed on board and committee members, which have the potential for significant legal consequences ...

Organisations can seek their own legal opinion

Some organisations might choose to get their own legal opinion. ASID would be interested to learn if any advice is contrary to the Opinion from Professor Freckleton.

What can organisations do to ensure that the views of people with intellectual disabilities are known and included in their decision-making?

Some of the options might be:

- having board advisors with intellectual disabilities
- having advisory committees and panels of people with intellectual disabilities, and
- involving people with intellectual disabilities as part of recruitment panels.

We note that there is little research about these mechanisms and how to ensure they are effective in capturing and conveying perspectives of people with intellectual disabilities. In particular there is no evidence about including the lived experiences of people with more severe or profound intellectual disabilities in how organisations deliver services.

ASID will promote the existing evidence and calls for new research about including the lived experiences of all people with intellectual disabilities in organisations.

The law needs to change

ASID believes that the law needs to change to enable people with intellectual disabilities to be directors. We will write to the Commonwealth and state/territory Ministers responsible for incorporation legislation and Ministers for Disability asking them to commission work exploring law reform and options to allow people with intellectual disabilities to participate as directors in ways that protects them and organisations from civil and criminal penalties. We will also invite organisations that represent people with intellectual disabilities, and people with disability more generally, to be part of these efforts. We recognise that such reforms may take many years.

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