

Submission to the *Committee on the Rights of Persons with Disabilities* from the Cambridge Intellectual and Developmental Disabilities Research Group (www.cid drg.org.uk) responding to the call for papers on:

The Participation of Persons with Disabilities in Political and Public Life

15 October 2011

Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD)

Article 29 of the CRPD guarantees persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, requiring with respect to voting that States: (i) ensure voting procedures, facilities and materials are appropriate, accessible and easy to understand and use; (ii) the right of persons with disabilities to vote by secret ballot be protected; (iii) the free expression of the will of persons with disabilities as electors is guaranteed, and where requested persons with disabilities are allowed assistance when voting (29:a).

For people with intellectual disabilities (defined as significant limitations in both (i) intellectual functioning with respect to learning, reasoning, and problem solving, and (ii) adaptive behaviour, *id est* the ability to cope with everyday social and practical situations with an on set during the developmental period of life) Article 29 is backed-up by Article 12 of the CRPD. Article 12 guarantees, not only equal recognition before the law (12:1), but legal capacity: “*States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life*” (12:2). In keeping with this formal statement of equality, States are required to “provide access by persons with disabilities to the support they may require in exercising their legal capacity” (12:3). While the CRPD does not describe the nature of this support, for people with intellectual disabilities it usually entails: providing all information relevant to a decision; including information on alternative courses of action; communicating that information in an appropriate way, perhaps using simple language or visual aids; considering how to put the person at ease; and whether there is a particular person who is most suited to providing this support because of specialist skills or intimate knowledge of the person concerned. This kind of support is not, however, without risk. Article 12 requires safeguards to ensure that support respects the person’s will and preferences; is free of conflicts of interests, and undue influence; both the information presented and the person presenting it are impartial; the support is specific to the person needing it and the decision in question; and these measures are subject to regular view (12:4).

The CRPD promulgates a belief that all people with disabilities, irrespective of their specific impairment or its severity, can with appropriate support exercise legal capacity. This is the basis of the CRPD's "paradigm shift", and the essence of the social model: persons are not disabled by their impairments but by a society that refuses to recognise and accommodate their needs. With those needs accommodated, persons with disabilities can enjoy all human rights and fundamental freedoms, including the right to vote.

Is however, the CRPD's position credible? Six out of 104 State Parties to the CRPD have submitted reservations and declarations on Article 12, on grounds that an erroneous presumption of, and respect for, a person's legal capacity could result in a person being supported to make one of more decisions with little or no understanding of the consequences. A possibility that might lead to (i) ill-health or death where medical treatments are refused; (ii) economic insecurity where the implications of a financial decision are not fully understood, or concerns over electoral irregularities in the case of voting.

A global survey of 63 democratic States found only four – Canada, Ireland, Italy and Sweden – that placed no legal restrictions on voting by adults with mental disabilities (Blais et al., 2001). A more recent survey of the European Union's 27 member States found thirteen that denied voting rights to adults under proactive measures for an intellectual disability or a mental health problem; ten where scope for participation is limited because either a judge or a medical practitioner makes an individualised assessment of a person's competence to vote, and four States – Austria, Cyprus, Sweden and the United Kingdom – that have no capacity-based restrictions on voting (European Union Agency for Fundamental Rights, 2010).

The two principle arguments that have traditionally excluded people with intellectual disabilities from a ballot lack legitimacy (Green & Klein, 1980). The first of these arguments is based upon a State's interest in ensuring an educated electorate. There can be little doubt that an educated electorate is desirable. However, defining the level at which a citizen might "pass" as educated, is a moot point. The UN Human Rights Committee considers it unreasonable to restrict voting rights on the basis of educational attainment or literacy, as this may disproportionately affect particular cultural or socio-economic groups (Human Rights Committee, 1996). It is also widely acknowledged that many electors, far from engaging thoughtfully with the political issues of the day, cast their votes unreflectively by following traditional loyalties of class, tribe, religion, or ethnicity. In this context, denying voting rights to people solely because their diagnostic status implies a limited capacity to understand, is discriminatory. It is also ill informed, as the presence of an intellectual disability does not necessarily compromise a person's capacity to reason or think; moreover, restricting the voting rights of people labelled as intellectually disabled runs counter to a prevailing trend towards respecting abilities and promoting inclusion. It is doubtful whether a laudable desire for an educated electorate warrants excluding people labelled as having an intellectual disability. Far better, surely, to honour their right to an education, guaranteed in Article 24 of the CRPD.

The second argument against people with intellectual disabilities voting, rests on the presumption that those of "unsound mind" are easily manipulated, with the consequence that their votes can be misappropriated by the unscrupulous. This concern is particularly pertinent with respect to people with intellectual disabilities as it is widely believed they are susceptible to the influence of others (Sigelman et al.,

1981). A concern which may be heightened in those States allowing proxy and postal votes, and/or have legislation entitling voter with disabilities to assistance when casting a vote. A distinction, however, needs to be made between misappropriating a person's vote, either through intimidation or under the guise of providing assistance, and simply influencing a person's voting intentions. In the case of the former, States will already have legal safeguards against intimidation, and inappropriate behaviour by proxies and assistants. With respect to the latter, influencing a voter's intentions is part of the culture of politics and is not something that can be easily identified or legislated against. Nonetheless, in the UK concerns have been expressed over the practice of "granny farming", in which members of political parties offer to drive elderly people to polling stations (BBC News, 2005), and the difficulties of supporting people with intellectual disabilities to vote without influencing their voting intentions (Bell et al., 2001). To deny voting rights to persons with an intellectual disability because of their presumed susceptibility to the influence of others is, however, tantamount to penalising the victims rather than the perpetrators of an offence.

The right to vote is not, however, an absolute right. The UN Human Rights Committee (HRC) allows States to suspend and exclude citizens from a ballot on "objective and reasonable criteria", such as status with respect to residency, age, and "established mental incapacity" (Human Rights Committee, 1996). A recent ruling by the European Court of Human Rights (ECtHR) offers some insight as to how the voting rights of people thought to be at risk of lacking decision-making capacity might be understood. In the case of *Alajos Kiss v. Hungary*, the ECtHR ruled that automatically disenfranchising Mr Kiss because he was under guardianship for manic depression violated his right to vote (Article 3 of Protocol 1 of the European Convention on Human Rights). The ECtHR accepted the Hungarian government's contention that only citizens capable of making conscious and judicious decisions, and assessing the consequences of those decisions, should participate in public life, but not that Mr Kiss should automatically lose his right to vote as a consequence of guardianship. This, the ECtHR, considered was disproportionate as it failed to take into account either Mr Kiss's actual fitness to vote, through an individualised assessment of his mental capacity, or the historic injustices endured by people with mental disabilities (Judgement of 20 May 2010). This is an important ruling as it (i) rejects the automatic denial of voting rights simply because a person is under protective measures for a mental disability while (ii) accepting that an individualised assessment of a person's fitness to vote could legitimately lead to that person being denied the right to vote.

An individualised assessment of a disabled person's decision-making capacity is however, wholly incompatible with the CRPD's social model of disability since such assessments measure functional deficiencies in a person, rather than addressing attitudinal and environmental barriers.

What is to be done?

The commitments made in the CRPD to the autonomy of people with disabilities raise important question where someone has an intellectual disability: does an Article 29 right to assistance extend beyond help with marking a ballot paper to include the kind of decision-making support envisaged in Article 12? If the right to assistance when voting does extend this far, then states will need suitable safeguards, as *per* Article 12.4, to ensure the voting intentions of a highly vulnerable population are not inappropriately influenced or even usurped.

One response to this issue would be to ensure that all adults reaching the age of majority were automatically registered to vote, this would ensure a basic equality of opportunity. It would then be a matter of choice whether or not a person wished to exercise their right to vote. Where a person with an intellectual disability expressed a wish to vote they should be supported to do so, with the proviso that the decision *how* to vote is made by the person with a disability alone. Those people whose intellectual disability is so limiting that they are unable to express a wish to vote, assuming reasonable efforts were made to make them aware of a forthcoming election, would like those members of the general population who chose not to vote, not take part. This would ensure justice with respect to the distribution of voting rights while hopefully avoiding *some* of the contentions surrounding: undue influence, the blurred distinction between supported and substitute decisions, and the possibility of assessing an individual's capacity to vote. It is in this context that measures aimed at supporting people with intellectual disabilities to understand their county's electoral system, along with the production of easy-read manifestos, can make voting a meaningful activity (for two excellent web based resources see www.promotethevote.co.uk/ & www.everyvotecounts.org.uk/)

Nonetheless, supported decision-making is subtle and complex task (European Foundation Centre, 2010). At present there is little consensus as to how the veracity or legal standing of a supported decision is to be established, or even how to differentiate between genuinely supported decisions and support that has resulted in a substitute decisions. Unless it can be reliably established that the voting decisions of adults with intellectual disabilities are free and informed arguments against their participation will continue to hold currency. While it undoubtedly it is the case that many people with intellectual disabilities can benefit from decision-making support, it is not necessarily the case in all areas of their life, or for those people with more severe intellectual impairments. Some intellectual impairments are so intrinsically limiting that removing prohibitions against recognising legal capacity and promoting autonomy will make no difference to their lives (Shakespeare, 2006).

The CRPD is forcing a debate between social and bio-medical conceptions of disability; specifically inviting consideration of whether, with appropriate support, *all* people with an intellectual disability can vote through the autonomous exercise of legal capacity. This is a debate unlikely to result in an easy consensus; compromise along with political slight of hand, are perhaps inevitable.

Submitted on behalf of the **Cambridge Intellectual & Development Disabilities Research Group**, whose members include: Professor Tony Holland, Drs Isabel Clare and Marcus Redley, and Amanda Keeling. All correspondence to Dr Marcus Redley by email to mr382@medschl.cam.ac.uk or by letter to Department of Psychiatry, University of Cambridge, Douglas House, 18b Trumpington Road, Cambridge, United Kingdom, CB2 8AH

Appendix:

This submission has been informed by a collaboration with Edah Maina of the Kenya Society for Mental Handicap (www.ksmh.org/) and a range of interdisciplinary research undertaken by the CIDDRG over several years. Listed below are a selection of peer-reviewed papers informing our thinking on (1) voting and (2) mental capacity.

(1) Voting:

- Redley, M., Hughes, J., & Holland, A (2010) Voting and capacity: political rights not decision-making competence, *British Medical Journal*, BMJ 2010;341:c4085
- Redley, M. (2008) Citizens with learning disabilities and the right to vote, *Disability & Society*, 23,4,375-384.
- Keeley, H., Redley, M., Holland, A. J., & Clare, I.C.H. (2008) Participation in the 2005 general election by adults with intellectual disabilities, *Journal of Intellectual Disability Research*, 53,3, 175-181

(2) Capacity:

- Redley, M., Keeley, H., Clare, I.C.H., Hinds, D., Luke, L. and Holland, A.J. (2011). Respecting patient autonomy: understanding the impact on NHS hospital in-patients of legislation and guidance relating to patient capacity and consent. *Journal of Health Services Research and Policy*, 16 (1), pp. 13-20.
- Redley, M., Clare, I.C.H., Luke, L. and Holland, A.J. (2010). Mental Capacity Act (England & Wales) 2005: The emergent Independent Mental Capacity Advocate (IMCA) service, *British Journal of Social Work*, 40 (6), 1812-1828.
- Suto, W.M.I.; Clare, I.C.H.; Holland, A.J. and Watson, P.C. (2006). [Understanding of basic financial concepts among adults with mild learning disabilities.](#) *British Journal of Clinical Psychology* 261-266(6)
- Jacob, R., Clare, I.C.H., Holland, A.J., Watson, P.C., Maimaris, C. and Gunn, M. (2005). Self-harm, capacity, and refusal of treatment: implications for emergency medical practice. A prospective observational study. *Emerg. Med. Journal* 22:799-802
- Suto, W.M.I., Clare, I.C.H., Holland, A.J., and Watson, P.C. (2005). Capacity to make financial decisions among people with mild intellectual disabilities. *Journal of Intellectual Disability Research*, 49(3):199-209
- Suto, W.M.I., Clare, I.C.H., Holland, A.J. (2004). Managing money: the path to independent choice-making. *Living Will*, 4(2): 11-16
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- Wong, J.G., Clare, I.C.H., Holland, A.J., Watson, P.C. and Gunn, M.J. (2000). The capacity of people with a 'mental disability' to make a particular health care decision. *Psychological Medicine* 30: 295-306.
- Wong, J.G., Clare, I.C.H., Gunn, M.J. and Holland, A.J. (1999). Capacity to make health care decisions: Its importance in clinical practice. *Psychological Medicine*, 29 (2): 437-446.

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- (Judgement of 20 May 2010), 'Alajos Kiss v. Hungary', in ECtHR (ed.).
- BBC News (2005), 'Row over Alzheimer woman's proxy'.
- Bell, D.M., McKay, C. and Philips, K.J. (2001), 'Overcoming the barriers to voting experienced by people with learning disabilities', *British Journal of Learning Disabilities*, 29, 122-127.
- Blais, A., Massicotte, L. and Yoshinaka, A. (2001), 'Deciding who has the right to vote: a comparative analysis of election laws', *Electoral Studies*, 20, 41-62.
- European Foundation Centre (2010), 'Study on challenges and good practices in the implementation of the UN Convention on the Rights of Persons with Disabilities VC/2008/1214', Brussels.
- European Union Agency for Fundamental Rights (2010), *The right of political participation of persons with mental health problems and persons with intellectual disabilities* Wien, Austria FRA-European Union Agency for Fundamental Rights.
- Green, B.B. and Klein, N.K. (1980), 'The mentally retarded and the right to vote', *Northeastern Political Science Association* 13, 2, 184-206.
- Human Rights Committee (1996), *General Comment No. 25: The right to participate in public affairs, voting rights and the right to equal access to public service*, United Nations
- Shakespeare, T. (2006), *Disability Rights and Wrongs*, London Routledge.
- Sigelman, C.K., Budd, E.C., Spanhel, C.L. and Schoenrock, C.J. (1981), 'When in doubt say yes: acquiescence in interviews with mentally retarded person', *Mental Retardation*, 19, 53-8.