

**RESPONSE OF AUSTRALIA TO THE VIEWS OF THE COMMITTEE ON THE
RIGHTS OF PERSONS WITH DISABILITIES IN COMMUNICATION NO.
35/2016 (J.H. v AUSTRALIA)**

1. The Australian Government (Australia) presents its compliments to the members of the Committee on the Rights of Persons with Disabilities (the Committee).
2. Australia has given careful consideration to the Views of the Committee expressed in Communication No. 35/2016 (*J.H. v Australia*), adopted 31 August 2018 and transmitted to Australia 26 September 2018. The final version of these Views will be published on the website of the Australian Attorney General's Department.¹
3. Australia acknowledges its obligations under the *Convention on the Rights of Persons with Disabilities* (the Convention) and takes its obligations under international human rights law seriously. The Western Australian Government is committed to removing structural and attitudinal barriers to access and participation that impact on the lives of people with disabilities.
4. However, Australia respectfully disagrees with a number of the Committee's Views that Australia has violated the author's rights under the Convention.

Article 5(2) and (3) – Non-discrimination and Reasonable Accommodation

5. The Committee formed the view that

‘the State party does not provide the estimate cost of such accommodation in the individual case of the author, or any data that would justify that the requested accommodation is disproportionate or constitutes an undue burden in the specific circumstances of the case. In the same way, the State party failed to analyse the reasonableness of the accommodation requested for the author, which refers to its relevance, appropriateness and effectiveness.’²

6. Australia acknowledges its obligations under the Convention to prohibit discrimination on the basis of disability and guarantee to persons with disability equal and effective legal protection against discrimination on all grounds. Australia also acknowledges its obligations to take all appropriate steps to ensure that reasonable accommodation is

¹ Human Rights Communications, Australian Attorney-General's Department website:

<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx>.

² Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 35/2016*, CRPD/C/20/D/35/2016, adopted 31 August 2018, Advance Unedited Version of 31 August 2018 (Committee's Views), para. 7.5.

provided to persons with disabilities. However, Australia respectfully disagrees with the Committee's view that Australia has violated the author's rights under Article 5(2) and (3) of the Convention.

7. In particular, Australia disagrees with the Committee's view that Australia did not consider whether the requested accommodation was disproportionate or constituted an undue burden in the specific circumstances of the case and did not provide supporting data.
8. Australia emphasises that it did conduct this assessment in 'a thorough and objective manner, covering all the pertinent elements'.³ The specific circumstances of the case involved a deaf individual being considered for service as a juror, and who did not wear any form of technological hearing device and required an Auslan interpreter for jury service. In these specific circumstances, Auslan interpretation is not a 'common accommodation' as stated by the Committee in paragraph 7.5.
9. Further, the impact of Auslan interpretation on the duration and complexity of trials is directly relevant to the reasonableness of the accommodation requested by the author, including its relevance, appropriateness and effectiveness.⁴ The negative impact on duration and complexity of trials was evidenced by Australia in its Submissions as follows:
 - a. the provision of an Auslan interpreter may not be feasible as a case may feature non-verbal audio evidence that would be difficult or impossible for an interpreter to properly convey in context,⁵
 - b. the case may be scheduled for many weeks, making access to the requisite number of interpreters impractical,⁶
 - c. the Court would need to be assured that the information conveyed to a deaf juror is exactly the same as that presented in court,⁷ and

³ Committee's Views, para 7.4.

⁴ Committee's Views, para 7.5.

⁵ *Australian Government Submission on Admissibility and Merits concerning communication No. 35/2016*, dated 23 October 2016 (Australian Government Submissions), para 62.

⁶ *Ibid*, para 62.

⁷ *Ibid*, para 62.

- d. a three year study by the University of New South Wales and Australian Research Council, *Participation in the administration of justice: deaf citizens as jurors*, identified the need for significant pre-trial preparation, including:⁸
- i. ‘interviewees have pointed to the need for jurors to receive detailed instructions from the bench, a demonstration, and a greater understanding of sign language prior to such trials commencing,’
 - ii. ‘[t]echnical language needs to be agreed upon by relevant interpreting and legal professionals beforehand,’
 - iii. ‘lawyers and the bench also need training and appropriate preparation to perform in court where deaf people and interpreters are involved, such that the pace of delivery and any complex issues that require specific interpretation progress without issue’, and
 - iv. ‘deaf jurors and interpreters suggested that pre-trial preparations could also determine processes and protocols around access and the extent of flexibility inside individual courtrooms when it comes to interpreter positioning’, which will change depending on the courtroom.

10. In relation to cost, Australia disagrees that the appropriate cost consideration is ‘the estimate of cost of such accommodation in the individual case of the author’,⁹ rather than the cost of providing all individuals in like circumstances with the requested accommodation. Under the human rights treaties to which it is a party, Australia is obliged to respect and to ensure human rights to all individuals within its territory or under its jurisdiction without distinction. As such, if Auslan interpretation were to otherwise be considered a reasonable accommodation in the jury service setting, it would need to be provided to all individuals in like circumstances to the author, not just to the author. That other individuals have also requested this accommodation is apparent through recent Communications (such as *G.B. v Australia* and *A.M. v Australia*) and Australian court cases (such as *Lyons v Queensland* (2016) 259 CLR 518). Given Australia’s obligations and the existence of other individuals requesting the

⁸ Participation in the administration of justice: deaf citizens as jurors – ARC Linkage Project 120200261 – Project Update No. 3 (June 2015) (Attachment B to Australia’s Submissions dated 23 October 2016), page 2.

⁹ Committee’s Views, para. 7.5.

accommodation, the relevant consideration is the cost of fulfilling the obligation and thus providing the accommodation to all those for whom it is a necessary and reasonable accommodation. Australia provided this data in Submissions, as noted by the Committee in paragraph 7.5 of its Views.

11. In *G.B v Australia* and *M.L v Australia*, concerning almost identical factual situations in the Australian State of New South Wales, the Committee similarly concluded that ‘while the State party argues that the use of [Auslan interpreters/stenographers] has an impact on the complexity, cost and duration of trials, it does not provide any data or analysis to demonstrate that it would constitute a disproportionate or undue burden’.¹⁰ In response to the Committee’s Views in *G.B v Australia* and *M.L v Australia*, Australia took pains to include comprehensive data in its Submissions on the current communication.
12. The Committee has accepted that States parties ‘enjoy a certain margin of appreciation’ in assessing the reasonableness and proportionality of accommodation measures.¹¹ Australia considers that its comprehensive consideration on the basis of the above data, provided in its initial Submissions, satisfies its obligations under Articles 5(2) and (3) of the Convention. In the event that the Committee disagrees, we note that there are further concerns, not addressed in initial Submissions, that justify the refusal of an Auslan interpreter in jury service, including:
 - a. the requirement for multiple interpreters rotating every 15-40 minutes, which may impact the continuity of case and/or the jury deliberations,
 - b. potential delays to criminal trials, including the risk that scheduled hearing days would need to be vacated if there were no interpreters available,
 - c. all interpretation from one language to another involves some degree of subjective interpretation. In particular, there may be interpretative ambiguities in conveying shade, mannerisms, nuance and tone through an Auslan interpreter. A deaf juror will not be able to make their own direct assessment of such evidence, but would instead need to rely on the interpretation of the translator, and

¹⁰ CRPD, *Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning communication No. 11/2013*, UN Doc. CRPD/C/15/11/2013, 25 April 2016 (G.B. Views), paragraph 8.5; and CRPD, *Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning communication No. 13/2013*, UN Doc. CRPD/C/15/D/13/2013, 25 April 2016 (M.L. Views), paragraph 8.5.

¹¹ Committee’s Views, para 7.4.

- d. complex technological evidence is increasingly being used in criminal investigations and prosecutions in Australian Courts (e.g. body worn video equipment; telephone intercepts). This type of evidence may create translation difficulties, particularly where footage is lengthy, two (or more) people are conversing at the same time, where audio is indistinct (and jurors are required to rely on their own individual interpretation of the recording) or where background noises and mannerisms may have a significant influence on the interpretation of the recording.
13. Australia also takes this opportunity to reiterate that the principle of legitimate differential treatment allows State Parties to treat particular groups differently, provided particular criteria are met. The justification for differentiation must be reasonable and objective. There must also be a clear and reasonable relationship of proportionality between the aim sought and the measures and their effects.¹²
14. As stated in the Australian Response to Views in *G.B v Australia* and *M.L. v Australia*, Australia treats all prospective jurors who require an interpreter in the same manner, and does not simply refuse interpreters to people who are deaf. In Australia's view, the appropriate comparator for the purpose of determining whether discrimination has occurred is a hearing person who requires an interpreter to understand the proceedings conducted in the English language. Thus the refusal to provide an Auslan interpreter is not discrimination against a person on the basis of disability, but legitimate differential treatment of all people who require the assistance of another person to understand legal proceedings.
15. The Western Australian Government's position is to continue to support and promote the inclusion of people with a disability in court proceedings wherever possible. This includes exploring the possibility of the participation of deaf people in jury service if it is reasonably practical to do so without compromising the fairness of a trial and the interests of justice.

¹² CESCR, General Comment No. 20, *Non-discrimination in economic, social and cultural rights* (art. 2, para. 2), UN Doc. E/C.12/GC/20, 2 July 2009, [13]. Note: the justification for differentiation as reasonable and objective should include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 21(b) and (e) – freedom of expression and opinion and access to information

16. The Committee considered that ‘a juror is a person holding a public responsibility in the administration of justice in interaction with others, including other jurors and judicial officers, and that such interaction constitutes “official interactions” within the meaning of article 21’.¹³ The Committee stated that ‘[i]n view thereof’, it considered that Australia’s refusal to provide an Auslan interpreter in the circumstances ‘amounted to a violation article 21(b) and (e) of the Convention’.¹⁴
17. Australia acknowledges its obligations under the Convention to take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in Article 2 of the present Convention, including by accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions; and by recognising and promoting the use of sign languages. As acknowledged in initial Submissions, Australia agrees that Auslan is a form of communication in accordance with Article 2 of the Convention. However, Australia respectfully disagrees with the Committee’s Views that Australia has violated the author’s rights under Article 21(b) and (e) of the Convention.
18. As evidenced by Australia in its initial Submissions and also in the previous communications of *G.B. v Australia* and *M.L. v Australia*, the focus of Article 21 is the accessibility of information, particularly public documents, provided by the government to the general public. In the context of Article 21 as a whole, this interpretation is supported by Article 21(c) and (d), which requires States to urge private entities and the mass media to provide information and services, intended for the general public, in accessible ways to persons with disabilities.¹⁵ This construction is also clearly reflected in the evolution of this Article through negotiations.¹⁶ The *travaux préparatoires* also

¹³ Committee’s Views, para. 7.7.

¹⁴ *Ibid*, para. 7.7.

¹⁵ Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) provides that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

¹⁶ See, for example, discussions of Fifth Session of the Ad Hoc Committee and in context of the Working Group. Article 32 of the VCLT provides that ‘[r]ecourse may be had to supplementary means of interpretation,

confirm an understanding that the obligation contained within Article 21(b) is to be realised progressively, subject to the limitations on the resources of States.¹⁷

19. On this basis, Australia respectfully disagrees with the Committee on the interpretation of Article 21 and the view that Australia has violated Article 21.

Recommendations

20. The Committee has recommended that Australia provide a remedy to the author for breach of the Convention, including reimbursement of legal costs, compensation, and to enable her participation in jury service by the provision of Auslan interpretation.

21. As the Australian Government does not agree with the Committee's view that a breach of the Convention has occurred, the Government does not consider it appropriate to implement the recommendations of the Committee.

22. The Western Australian Government will continue to increase opportunities for people with a disability by providing supports that enable their participation and promote their inclusion in the community.

23. In relation to the involvement of people with disabilities in jury service, the Western Australian Government will consult with key stakeholders regarding existing barriers that may prevent people with certain disabilities being considered for jury service.

24. In relation to deaf jurors particularly, the Western Australian Government, through the Department of Justice, monitors developments in disability aids, technologies and interpreter services for incorporation into courtroom design and refurbishments.

25. The Australian Government avails itself of this opportunity to renew to the Committee on the Rights of Persons with Disabilities the assurances of its highest consideration.

including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31'.

¹⁷ See, for example, Daily summary of discussion of the Fifth Session of the Ad Hoc Committee, 1 February 2005, morning session.