

**RESPONSE OF AUSTRALIA TO THE VIEWS OF THE COMMITTEE ON THE
RIGHTS OF PERSONS WITH DISABILITIES IN COMMUNICATIONS NO.
11/2013 (G.B. v AUSTRALIA) AND 13/2013 (M.L. 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 Communications No. 11/2013 (*G.B. v Australia*) and 13/2013 (*M.L. v Australia*), adopted 1 April 2016 and published 25 April 2016. These Views have been 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 NSW Government is committed to removing structural and attitudinal barriers to access and participation that impact on the lives of persons with disabilities. It seeks to foster an inclusive society that enables persons with disabilities to fulfil their potential as equal participants in society.
4. However, Australia respectfully disagrees with a number of the Committee's views that Australia has violated the authors' rights under the Convention.

Article 5(1) and (3) – Equality and Non-discrimination

5. The Committee formed the view 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'. It further considered that 'while the confidentiality principle of jury deliberations must be observed, the State party does not provide any argument justifying that no adjustment could be made to enable the Auslan interpreter to perform his/her functions without affecting the confidentiality of the deliberations of the jury such as a special oath before a court'.²

¹ Human Rights Communications, Australian Attorney-General's Department website: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx>.

² 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); 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.

6. The Committee also accepted that States parties ‘enjoy a certain margin of appreciation’ in assessing the reasonableness and proportionality of accommodation measures, but must ensure ‘that such an assessment is made in a thorough and objective manner, assessing all the pertinent elements’.³ The Committee concluded that Australia had refused to provide Auslan interpretation and steno-captioning without thoroughly assessing whether this would constitute a disproportionate or undue burden and that this constituted disability based discrimination, in violation of the authors’ rights under Article 5(1) and (3) of the Convention.⁴
7. Australia acknowledges its obligations under the Convention to ensure all persons are equal before the law and entitled without discrimination to equal protection and equal benefit of the law; as well as obligations to promote equality, eliminate discrimination and take all appropriate steps to ensure reasonable accommodation is provided. However, Australia respectfully disagrees with the Committee’s view that Australia has violated the authors’ rights under Article 5(1) and (3) of the Convention.
8. 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.⁵
9. Australia treats all prospective jurors who require an interpreter in the same manner, and does not simply refuse interpreters to people who are deaf. To the extent that the appropriate comparator for the purpose of determining whether discrimination has occurred is a person who is not deaf but requires an interpreter, the refusal to provide an Auslan interpreter or stenographer 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.
10. It is a long-standing common law principle in Australia, supported by statute and affirmed by the courts, that for the purpose of ensuring a fair trial, juries are to deliberate in secret and private. At this stage, the New South Wales (NSW) Government has a number of

³ G.B. Views and M.L. Views, paragraph 8.4.

⁴ Ibid.

⁵ 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.

concerns about an interpreter or stenographer being used in the jury room which could not be adequately addressed by legislation:

- the potential for an Auslan interpreter or stenographer to become, or be perceived as, an indirect or direct participant in the deliberations or to influence the structure, flow and nature of the deliberations, and
- the requirement for multiple interpreters rotating every 15-40 minutes or two senior court reporters for steno-captioning, which may impact the continuity of the deliberations and will result in more than one ‘non-juror’ being permitted in the jury room (i.e. a 13th and 14th person).

11. As outlined above, Australia treats all prospective jurors who require an interpreter in the same manner. It would be inconsistent to provide interpretative assistance to deaf jurors yet continue to prohibit the use of language interpreters for non-English speaking jurors.

12. In relation to the Committee’s view that Australia has not provided enough evidence that the reasonable adjustment would constitute an unjust burden (due to the impact of the use of Auslan interpreters/stenographers on the complexity, cost and duration of trials), Australia provides the following advice.

13. In relation to complexity, the NSW Government continues to have concerns about the ability of a deaf juror (notwithstanding the provision of an interpreter or stenographer) to properly assess certain types of evidence at trial, given:

- 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 or steno-captioning. 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
- complex technological evidence is increasingly being used in criminal investigations and prosecutions in NSW Courts (e.g. Body Worn Video equipment). 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.

14. For these reasons, where a transcript of a recording is provided to the jury, they are reminded that the primary evidence is the recording itself. A judge will ordinarily give a direction that the transcript may not be completely accurate and a juror is to rely on what they heard for themselves in the recording, not the transcript. In addition, unanticipated issues about interpretation of evidence may arise during trial which cannot be appropriately conveyed to the deaf juror such as is indicated above.
15. In addition to the direct cost of engaging interpreters or stenographers throughout the proceedings, preparations would be required and costs incurred in advance, with no certainty that a deaf juror would be ultimately selected. Two interpreters (or senior court reporters and equipment for steno-captioning) would need to be engaged in advance in the event that the juror is ultimately selected through the random ballot process, empanelled and not the subject of a challenge. Currently, only 12 per cent of jurors that attend court are ultimately empanelled.
16. In relation to duration of trials, the provision of an Auslan interpreter or steno-captioning for deaf jurors may also lead to further delays in proceedings, due to:
 - the need for pre-trial preparation of the courtroom and all courtroom participants and a potential need for pre-briefings between the interpreters or stenographers to resolve any technical language or interpretative difficulties
 - additional practice and procedural requirements in the courtroom (e.g. the requirement for interpreters to rotate at regular intervals, the need to modify pace of delivery, parties being required to speak one at a time, the need to pause fast paced recorded evidence to accommodate interpretation or steno-captioning etc)
 - the need for an assessment of any request for reasonable adjustments to take place after a juror is empanelled on a particular trial, delaying the start of the trial.While the Committee has recommended that the State party ensure a comprehensive assessment be carried out every time a person with disabilities is summoned to perform jury duty, in NSW jurors are not summoned for a particular trial – rather they are summoned for a particular court for a particular date. A number of potential trials could be ready to commence that day, so an

assessment could not be made until the juror is empanelled and the specifics of that trial are known, delaying the start of the trial, and

- added risk of non-sitting days where an interpreter is unable to attend (particularly in the context of the current skills shortage in this area).

17. The effect of likely further delays includes:

- significant impacts for the accused both financially (such as payment of legal representatives) as well as in terms of their wellbeing (including where they are in custody). This impacts upon the human rights of the accused, particularly their minimum guarantees in a criminal trial as reflected in Article 14(3) of the International Covenant on Civil and Political Rights, and
- further significant costs to the justice system, particularly where there are mistrials and retrials (jury trials currently cost courts on average AU\$18,000 per day, including the cost of the Judge, Associate, Reporting Services Branch, Court Officer and Sheriffs Officer).

18. The NSW Government's position is to continue to support and promote the inclusion of people with a disability in jury duty wherever possible. However, it does not presently consider the provision of Auslan interpreters or steno-captioning to potential jurors to be a reasonable accommodation.

Article 9(1) – Accessibility, including in conjunction with Articles 2, 4 and 5(1) and (3)

19. The Committee recalled that Article 9(1) obliged States 'to take appropriate measures to "enable persons with disabilities to live independently and participate fully in all aspects of life"', in coming to the view that 'the performance of jury duty is an important aspect of civic life within the meaning of Article 9(1), as it constitutes a manifestation of active citizenship.'⁶

20. The Committee concluded that 'by refusing to provide Auslan interpretation, the State party did not take the appropriate measures to enable the author to perform jury duty, thereby preventing her participation in a clear "aspect of life", in violation of her rights under Article 9(1) read alone and in conjunction with Articles 2, 4, and 5 (1) and (3) of the Convention.'⁷

⁶ G.B. Views and M.L. Views, paragraph 8.6.

⁷ Ibid.

21. Australia acknowledges its obligations under the Convention to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical locations and services as set out in Article 9, including in order to enable persons with disabilities to live independently and participate fully in all aspects of life. However, Australia respectfully disagrees with the Committee's views that Australia has violated the authors' rights under Article 9 of the Convention, read alone and in conjunction with Articles 2, 4, and 5 (1) and (3) of the Convention.
22. Australia notes that Article 9 is directed toward accessibility to physical locations and services generally made available to the public and Australia considers it to be narrower than that interpretation expressed by the Committee.
23. According to Article 31 of the Vienna Convention on the Law of Treaties, a treaty should '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'.⁸ Such an interpretation of Article 9(1) of the Convention makes clear that the article is about accessibility to certain physical locations, facilities and services as set out in Article 9. The words used and the grammatical construction of the Article supports this – the obligation is clearly that 'States Parties shall take appropriate measures to ensure to persons with disabilities *access*, on an equal basis with others, to [certain places and services]'. The word 'access', 'accessible' or 'accessibility' is used ten times in Article 9 and the heading to the article also indicates that it is about '[a]ccessibility'. Further, the *travaux préparatoires* to the Convention supports this construction of Article 9(1).⁹ In particular, it indicates that discussion of Article 9 centred on accessibility to locations and services that were publically available. For example, the summary of discussion indicates that on the issue of whether access to guide dogs should be explicitly mentioned,

The Chair conveyed his interpretation that Article 9 deals with accessibility issues in general, such as accessibility to buildings and facilities, while guide dogs are a personal form of assistance generally not made available to the public.¹⁰

⁸ *Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, 1155 UNTS 331 (entered into force generally and for Australia on 27 January 1980) (VCLT), Article 31.

⁹ Article 32 of the VCLT provides for recourse to supplementary materials of interpretation, including the preparatory work of the treaty, in order to confirm the meaning resulting from the application of Article 31.

¹⁰ Daily summary of discussion of the Seventh Session of the Ad Hoc Committee, 17 January 2006, afternoon session, Chair.

24. Jury duty is not a ‘service open or provided to the public’ within the meaning of Article 9. This is because jury duty is not a ‘service’ but rather, a duty. It is also not ‘open to the public’ – in fact, a significant number of people are involuntarily excluded from performing the duty due to criminal history, profession and other factors.
25. Under the *Jury Act 1977* (NSW) (the Act), every person who is enrolled as an elector in NSW is qualified and liable to serve as a juror, unless they are excluded or exempted from service.
- Schedule 1 of the Act sets out the categories of persons excluded from jury service, which includes persons who have committed certain serious offences, persons who are Australian lawyers, persons employed or engaged in certain occupations in the public sector and undischarged bankrupts.
 - There are also people who have the right to claim exemption from service under the Act. These people, set out in Schedule 2 of the Act, generally fall within certain professional and other employment categories, including dentists, pharmacists, medical practitioners and persons who reside with and have the full-time care of a person who is sick, infirm or disabled.
26. In addition, a person may request the Sheriff exempt him or her from jury service by showing ‘good cause’. The Sheriff may also exempt a person for ‘good cause’, whether or not on request. ‘Good cause’ is defined under section 14A of the Act and includes where some disability associated with the person would render him or her, without reasonable accommodation, unsuitable for or incapable of serving as a juror. Other persons are also ineligible for jury service because of the *Jury Exemption Act 1965* (Cth).
27. On this basis Australia respectfully disagrees with the interpretation of the Committee on the content of Article 9. Australia notes that the Committee has not provided any analysis in its views to support such an interpretation such that its views on this Article are unconvincing.
28. Even accepting the Committee’s interpretation of Article 9, the Committee has not demonstrated that jury duty is an ‘aspect of life’ even though it is not open to the public writ large, as detailed above.

29. Further, Article 9 only requires States parties to ‘take appropriate measures’. That is, a State is not required to take any measures that would be considered inappropriate. As set out above in paragraphs 8 and 10, Australia does not consider the provision of Auslan interpretation and stenography to potential jurors to be an appropriate measure to ensure accessibility.

Article 13(1) – Access to justice, including in conjunction with Articles 3, 5(1) and 29(b)

30. The Committee considered that ‘the performance of jury duty is an integral part of the Australian judicial system, and as such, it constitutes a “participation” in legal proceedings’.¹¹ It further considered, particularly in reference to Article 29(b), that ‘[a]ttention must therefore be given to the participation of persons with disability in the justice system in capacities besides those of claimant, victim or defendant, including in jury service, on an equal basis with others’. On this basis, the Committee concluded that Australia had violated Article 13(1) read alone and in conjunction with Articles 3, 5(1) and 29(b) of the Convention.

31. Australia acknowledges its obligations under the Convention to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. However, Australia respectfully disagrees with the Committee’s view that Australia has violated the authors’ rights under Article 13(1) read alone and in conjunction with Articles 3, 5(1) and 29(b) of the Convention.

32. Australia considers that the relevant consideration is not whether juries are an integral part of the judicial system or whether jury duty constitutes participation in legal proceedings; but whether for the purpose of ensuring ‘effective access to justice for persons with disabilities’, juries are direct or indirect participants in legal proceedings.

33. In relation to Article 29, Australia has also previously stated that it does not consider that the reference to ‘political rights’ in Article 29 of the Convention ‘encompasses and guarantees’ all human rights more broadly characterised as political rights in international human rights law. Therefore, Australia does not consider that Article 29 furthers the authors’ arguments.

¹¹ G.B. Views and M.L. Views, paragraph 8.9.

Article 21(b) – freedom of expression and opinion and access to information, including in conjunction with Articles 2, 4 and 5(1) and (3)

34. The Committee noted the authors' argument 'that a juror is a person holding a public responsibility in the administration of justice "in interactions with other persons" including other jurors, and judicial officers, and that such interactions therefore constitute "official interactions" within the meaning of Article 21. The Committee accepted this argument, stating that "[i]n view thereof", it considered that Australia had violated Article 21(b) read alone and in conjunction with Articles 2, 4 and 5(1) and (3) of the Convention.
35. Australia acknowledges its obligations under the Convention to take all appropriate measures 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. Australia agrees that Auslan and steno-captioning can be forms of communication in accordance with Article 2 of the CRPD. However, Australia respectfully disagrees with the Committee's views that Australia has violated the authors' rights under Article 21(b) read alone and in conjunction with Articles 2, 4 and 5(1) and (3) of the Convention.
36. As evidenced by Australia in the Australian Government's submissions, the focus of this provision is the accessibility of public documents provided to the public generally by the Government and this is clearly reflected in the evolution of this Article through negotiations. The *travaux preparatoires* also indicates an understanding that the obligation contained within Article 21(b) is to be realised progressively, subject to the limitations on the resources of States. On this basis, Australia respectfully disagrees with the Committee on the interpretation of Article 21(b).

Recommendations

37. The Committee has recommended that Australia provide a remedy to the authors for breaches of the Convention, including reimbursement of legal costs, compensation, and

allowing them to participate in jury duty by the provision of Auslan interpretation and steno-captioning.

38. 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.
39. The NSW 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. All 360 courtrooms in NSW currently use portable infra-red systems to assist people who are hearing impaired. In the past four years, infra-red transmitters have been installed in all new court installations. Every new or upgraded remote witness room in the past 12 months has also had infra-red transmitters installed. Work in this area is dynamic and continuing with each new install or upgrade of courtrooms.
40. In relation to deaf jurors particularly, the NSW Government will continue to review its policies, taking into account the ongoing academic research in this area. The NSW Government will continue to monitor developments in disability aids, technologies and interpreter services to consider reform opportunities.
41. 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.