

**RESPONSE OF AUSTRALIA TO THE VIEWS OF THE COMMITTEE ON THE
RIGHTS OF PERSONS WITH DISABILITIES IN COMMUNICATION
NO. 19/2014 (GIVEN 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. 19/2014 (*Given v Australia*), adopted 16 February 2018 and transmitted to Australia by *note verbale* dated 13 March 2018. 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. Australia is committed to removing structural and attitudinal barriers to access and participation that impact the lives of persons with disabilities.
4. After giving due consideration to the Views in good faith, the Australian Government advises that Australia respectfully disagrees with a number of the Committee's views that it has violated the author's rights under the Convention. In particular, Australia disagrees, for the reasons set out in paragraphs 14-18 below, that it was or is required to provide the author with access to computer-assisted voting or a voting option of her choice. Further, Australia disagrees, for the reasons set out in paragraph 6-8 below, that it was or is required to provide the author with access to voting procedures and facilities that will enable her to vote without having to reveal her voting intention to any other person.
5. However, Australia also acknowledges that there were failures in the way the author was dealt with and with the operation of the *Electoral Act 1918* (Cth) (the Electoral Act) more generally, as described below.

The secrecy of the ballot

6. Australia notes that it is unclear on the Committee's view as to what constitutes a 'secret' vote for the purpose of article 29(a)(ii) the Convention. This is because the Committee 'noted' each party's conflicting position without distinguishing between the weight it

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

considered might be given to each.² Australia reiterates its considered view that the correct interpretation of article 29(a)(ii) is that a ballot can still be ‘secret’ for the purposes of the Convention (and article 25 of the ICCPR) even if an elector is assisted to vote by another person, *provided* the voter is protected from coercion or compulsion and from disclosure of the vote to the State authorities.

7. Australia notes that article 29(a)(ii) is a similar provision to article 25 of the ICCPR. As Australia noted in its initial submissions,³ the Human Rights Council supports Australia’s view, in that it acknowledges that the right to vote by secret ballot is subject to certain reasonable restrictions. The HRC has stated that ‘assistance provided to the disabled, blind or illiterate should be independent’.⁴ Therefore, when a person is assisted to vote by a person of their choice, or by someone else who can be considered independent, that vote is still secret, as it is protected from disclosure to the relevant state authorities or those holding political power.
8. Further, academic commentary supports Australia’s view. A recent commentary on the Convention notes that while article 29(a)(ii) of the Convention ‘is essential to ensuring that the secrecy of the ballot is preserved’, article 29(a)(iii) ‘introduces the concept of assistance voting, which has to be allowed, where necessary, to facilitate the exercise of franchise.’ In this regard, article 29(a)(iii) ‘runs with Article 12’ to establish ‘a supported decision-making framework to create conditions within which decision making can occur free of coercion and undue influence.’⁵
9. However, Australia notes the Committee’s recommendation that a Presiding Officer who provides live assistance to a voter be required by law to maintain the confidentiality of that voter’s ballot. While committing to legislative change is not possible at this stage of the electoral cycle,⁶ Australia has developed training materials for all polling place staff, including Presiding Officers, on supporting electors with a disability in the polling place

² CRPD Committee, Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No 19/2014 (*Given v Australia*), CRPD/C/19/D/19/2014, 13 March 2018, paragraph 8.3.

³ *Ibid.*, paragraph 93.

⁴ Human Rights Committee, General Comment No. 25, *Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (12 July 1996), at paragraph 20.

⁵ Cera, Rachel, “Article 29 [Participation in Political and Public Life]” in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (Eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer 2017), 534-5.

⁶ The Government has not yet announced the date of the next federal election. The latest possible date for the House of Representatives election is 2 November 2019. The latest possible date for the half-Senate election is 18 May 2019.

in direct response to this matter. A training video, accessed via Youtube, will be watched by all staff prior to or during the election and will complement the comprehensive online training for temporary election workers. Stakeholders from a Disability Advisory Committee assisted with preparing the materials and were present during the filming of the video to ensure it was appropriately filmed and communicated relevant information appropriately.

10. Australia is also considering trialling enhanced access and support services at polling locations determined by national disability data at the next election. These polling locations would be promoted through prominent disability networks, along with an education campaign to assist voters with a disability to better understand their eligibility and services available to them.
11. In parallel, the Australian Electoral Commission is improving its complaints management process with a focus on complainants with a disability.
12. Australia considers these administrative actions will improve the franchise of people with a disability generally, and more specifically, ensure electoral officials involved in providing assistance to a person in casting a vote will maintain the confidentiality of the resulting ballot.
13. These measures will provide better access to, and support for, people with disabilities to place a secret vote in federal elections and ensure that complaints, such as the refusal of a Presiding Officer to assist a person with disabilities (as encountered by the author) are resolved in a timely manner and on the same day where possible.

The Provision of technologically-assisted voting

14. Australia is grateful that the Committee took note of its submissions that
 - a. article 29(a)(ii) ‘does not require States parties to the Convention to provide assistive and new technologies to each and every voter who cannot vote without assistance’
 - b. the ‘requirement to facilitate the use of assistive technology is a general or aspirational obligation required from States parties, which need only be done where it is appropriate and that it falls within the State party’s discretion to decide how to allocate limited resources’, and

- c. 'that barriers to accessing existing objects and services should be removed gradually, in a systematic and continuously monitored manner, aiming at achieving full accessibility.'⁷

15. However, Australia is disappointed at the Committee's statement that 'the State party has failed to put any material before the Committee substantiating that the use of an electronic voting option would constitute a disproportionate or undue burden'.⁸ Australia provided information in initial submissions describing the Australian Electoral Commission's (the Commission's) trial of stand-alone electronic voting machines (computer-assisted voting) for blind or low-vision voters at the 2007 Federal Election. The machines consisted of a computer, a monitor, key-pad, printer, barcode scanner and uninterrupted power supply. As Australia expressly stated in submissions, the result of this trial was a low level of voter engagement with the voting option and a cost per vote of AUD 2,597.00. By comparison, the average cost per elector at that election was AUD 8.36. Australia submitted that this huge cost renders computer-assisted voting, of the kind requested by the author, inappropriate at the present time.

16. In support of the contention that Australia is not required to utilise technologies where their high cost would constitute a disproportionate or undue burden, Australia recalled that where there are differences in understanding of meaning, the *Vienna Convention on the Law of Treaties* provides for regard to the *travaux préparatoires* to the Convention.⁹ The *travaux préparatoires* of the Convention supports the contention that significant increases in cost can constitute a 'disproportionate' burden in the provision of reasonable accommodation.¹⁰

17. In addition, the Australian Parliament has periodically considered the appropriateness of electronically-assisted voting, including computer-assisted voting, in Australian elections.¹¹ On 18 November 2014, the Joint Standing Committee on Electoral Matters (the Joint Standing Committee), a committee of the Australian Parliament, released its 'Second Interim Report on the Inquiry into the Conduct of the 2013 Federal Election: An

⁷ Above n 2, paragraph 8.4.

⁸ Ibid, paragraph 8.4.

⁹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, [1974] ATS 2 (entered into force 27 January 1980) (VCLT), article 32.

¹⁰ Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *The Concept of Reasonable Accommodation in Selected National Disability Legislation*, Background conference document prepared by the Department of Economic and Social Affairs U.N. Doc. A/AC.265/2006/CRP.1 (December 2005).

¹¹ See the Joint Standing Committee on Electoral Matters inquiries following the 2004 and 2007 federal elections as well as the Inquiry discussed in this paragraph.

assessment of electronic voting options'. The Joint Standing Committee considered that 'electronic voting promises benefits such as speed and secure ballot-handling, but has also identified concerns such as safety and cost.'¹² In particular, the Joint Standing Committee identified 'significant questions over the capacity of an electronic voting solution to be both cost-effective and protect the security and sanctity of the ballot in the Australian context', and concluded that 'there can be no widespread introduction of electronic voting in the near term without massive costs and unacceptable security risks.'¹³ In particular, the Joint Standing Committee noted that

international examples outlined earlier in this report highlight the fact that, even though the technology currently exists to provide for electronic voting, the integrity and security of such systems can be vulnerable. In the case of Estonia's remote internet voting system, an independent analysis recommended discontinuation of the system due to fundamental security and data integrity flaws.¹⁴

18. Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the various federal institutions and the six States¹⁵ and two self-governing Territories, which operate autonomously and whose election processes are independent of each other.¹⁶ A necessary aspect of this system is that these entities make independent decisions on the basis of different factors and risk profiles. As such, it is entirely explicable that a similar cost and security assessment of computer-based voting would result in a different outcome for each of the States and Territories of Australia and the Federal entity.

19. However, in relation to technologically-assisted voting more generally, Australia will continue to periodically consider electronically-assisted voting. Such consideration may include amending the Electoral Act to empower the Commission to extend technologically-assisted voting to people with disabilities other than sight-impairment. However, Australia notes that extending section 202AB(1) of the Electoral Act¹⁷ to

¹² Parliament of Australia, 'Electronic Voting Options' available at <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/ElectronicVoting>.

¹³ Parliament of Australia, Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2013 Federal Election: An assessment of electronic voting options*, Report, November 2014, paragraph 1.8.

¹⁴ *Ibid*, paragraph 4.35.

¹⁵ New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania.

¹⁶ The Australian Capital Territory and the Northern Territory.

¹⁷ Australia recalls that this provision provides: 'The regulations may provide for sight-impaired people to vote by an electronically assisted voting method at general elections, Senate elections and by-elections'.

people with disability other than sight impairment does not mean that Australia will be in a position to provide assistive and new technologies to each and every voter who cannot vote without assistance. In particular, considerations of cost, availability and efficiency will still be relevant to a decision to provide technologically-assisted voting.

Comment on Article 9(1) – Accessibility

20. In relation to the Committee’s views regarding article 9(1) of the Convention, Australia reiterates its long-standing position regarding this article.¹⁸
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.
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 implied by the Committee’s view that Australia has violated article 9(1) in respect of the author.
23. Australia emphasises that 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’.¹⁹ 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, rather than voting (which is not a location, facility or service). 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).²⁰ In particular, it indicates that discussion of Article 9 centred on accessibility to locations and services

¹⁸ Australia previously made its legal views clear in the Australian Government’s Response to Views in CRPD Communication No. 11/2013 (*G.B. v Australia*) and 13/2013 (*M.L. v Australia*). This is available at <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx>>.

¹⁹ VCLT, article 31.

²⁰ 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.

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.²¹

24. In this regard, Australia notes that access to electronically-assisted voting is not a service that is generally made available to the public.

25. Australia reiterates its previous observation that the Committee has not provided any analysis to support an alternative interpretation of article 9 of the Convention.²²

The author's experience on Election Day

26. Finally, Australia acknowledges that there were failures in the way the author was treated when voting in the 2013 Federal Election. In particular, Australia deeply regrets that the author was not provided live assistance to vote and was instead instructed to utilise her assistant. In this regard, Australia hopes that the administrative action it has taken, as outlined in paragraphs 9-11, will make it clearer that the Presiding Officer is obliged, under Australian law, to render assistance to a person who is unable to vote without assistance.

Conclusion

27. The 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.

28. In relation to the provision of technologically-assisted voting specifically, Australia will continue to periodically monitor technological advancements in this area and consider reform opportunities.

29. 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.

²¹ Daily summary of discussion of the Seventh Session of the Ad Hoc Committee, 17 January 2006, afternoon session, Chair.

²² Australia previously made its views clear in the Australian Government's Response to Views in CRPD Communication No. 11/2013 (*G.B. v Australia*) and 13/2013 (*M.L. v Australia*), paragraph 27. This is available at <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx>>.