Case summary:[[1]](#footnote-1) *Fiona Given v Australia*

[CRPD/C/19/D/19/2014](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/080/99/pdf/G1808099.pdf?OpenElement)

Communication no 19/2014

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Invoked provisions of the Convention: Articles [29 (a) (i), (ii) and (iii)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#29), [4 (1) (a), (b), (d), (e) and (g)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#4) , [5 (2) and (3)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#5), and [9](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9)

Provisions of the Optional Protocol: Article [2 (d) and (e)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx)

Keywords: Participation in political and public life; right to vote by secret ballot; electronically assisted voting

Decision: Violation of Articles [29 (a) (i) and (ii)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#29), read alone and in conjunction with articles [4 (1) (a), (b), (d), (e) and (g)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#4) , [5 (2)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#5), [9 (1) and (2) (g)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#9) of the Convention

Full decision in PDF format: [English](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/080/99/pdf/G1808099.pdf?OpenElement), [Russian](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/081/01/pdf/G1808101.pdf?OpenElement) and [Spanish](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/081/02/pdf/G1808102.pdf?OpenElement).

Full decision in PDF and/or Word format in UN official languages should be made available in the UN Official Documentation System. Search in <https://documents.un.org>, fill the blank space after ‘Symbol’ with the CRPD case code mentioned above and then click on ‘Details’.

Facts

The author is Fiona Given, a national of Australia. On 7 September 2013, federal elections were held. The Australian Electoral Commission conducted the election by means of postal voting, polling stations and electronically assisted voting for persons with visual impairments. Due to her limited dexterity, the author is unable to mark a ballot paper and fold and deposit it in a ballot box without live assistance, which would compromise the secrecy of her vote. She argues that requires access to an electronic voting system, but electronically assisted voting would only be made available to persons with visual impairments registered as such.

According to the author, when she attended the polling station and in the absence of an electronic voting facility, she opted to exercise her right as a person with physical disabilities, requesting the assistance of the polling booth’s presiding officer. The presiding officer refused the author’s request for assistance on the grounds that she was “too busy” and directed the author to obtain assistance from her attendant. However, the author did not wish to disclose her voting intention to her attendant; still, she eventually unwillingly did it due to the circumstances.

The author argues that she does not have access to an effective domestic remedy in order to address the violations of her rights and that she would have had no prospect of success for any claim challenging the fact that she did not have access to an electronic voting platform, as the Electoral Act stipulates that electronic voting are only available to persons with visual impairments. She further argues that there would have been no prospect of success for any claim alleging discrimination based on disability in relation to the presiding officer’s refusal, since the Electoral Act establishes that the presiding officer should provide assistance if the eligible voter “fails” to nominate another person and not merely upon request.

The complaint submitted to the Committee

The author claims that the State has breached its obligations under article 29 (a) (i), (ii) and (iii), read alone and in conjunction with articles 4 (1) (a), (b), (d), (e) and (g), 5 (2) and (3) and 9. In particular, regarding article 29, she argues that the State did not ensure that she, as a person with disabilities, could effectively and fully participate in political and public life on an equal basis with others. The author claims that the State violated her rights, as it denied her the rights to accessible voting procedures and facilities, to vote by secret ballot utilizing assistive technology and to obtain voting assistance from a person of her choice.

State party’s observations on the admissibility and merits

The State submits that, save for the author’s claim under article 29 (a) (ii), the complaint should be declared inadmissible for failure to exhaust domestic remedies or for failure to sufficiently substantiate the claims under article 2 (d) and (e) of the Optional Protocol. Should the Committee find the author’s claims admissible, the State submits that the claims are without merit and that the author’s rights under the Convention have been respected.

In relation to article 2 (e), the State submits that the author has not provided any evidence or substantiation of her claims under: (a) article 5, as she has not explained why her treatment constituted discrimination; (b) article 9, except for referring to the lack of an electronic voting option for persons with her disability; (c) article 29 (a) (i); (d) article 29 (a) (iii), regarding her version of events on 7 September 2013,; and (e) article 4.

In relation to article 2 (d), the State submits that the author has failed to exhaust both legal and non-legal domestic remedies available to her regarding the claims under article 29 (a) (iii). The State submits that the author failed to exhaust domestic remedies in regard to the presiding officer actions. The State argues that the author should have submitted a complaint to the national jurisdictions or made a complaint during the polling day, through the use of the available legal and administrative mechanisms.

In relation to the merits of the author’s claims under article 29 (a) (i), the State points out that persons with disabilities have access to a range of accessible and appropriate voting options under the Electoral Act. The Electoral Commission Disability Inclusion Strategy ensures that the advertising and information distributed prior to every election clearly show the location of polling places with either full or partial access for persons with disabilities. Besides, the Commission’s website contains enrolment and voting information in accessible formats. The State argues that, although the author was not able to vote in her preferred way, this situation does not constitute a breach of the State’s obligations under article 29 (a) (i).

In relation to the merits of the author’s claims under article 29 (a) (ii), the State argues that this article does not require States parties to the Convention to provide assistive and new technologies to each and every voter who cannot vote without assistance. It submits that the requirement to facilitate the use of assistive technology is a general or aspirational obligation required of States parties, which need only to be met where appropriate. The State additionally submits that it falls within its broad discretion to decide how to allocate limited resources, and that it is justifiable that, at this stage, only voters with visual impairments are provided with the option of using assistive technologies when voting.

With regard to the author’s claims under article 5 (2), the State argues that it has prohibited both direct and indirect discrimination on the basis of disability in its legislation, and that a range of legal and non-legal measures are in place in the State to prohibit and prevent discrimination on protected grounds. The State further argues that the author has not explained, beyond referring to her lack of a secret voting option, what aspect of the conduct of the 2013 federal election amounted to discrimination. Regarding the author’s claim under article 5 (3), the State argues that it has introduced specific reasonable accommodations to ensure that persons with disabilities can participate in the electoral system on an equal basis with others. The State further submits that having access to assistive voting technology does not represent a reasonable accommodation, but would amount to an absolute obligation to provide assistive technology to all those who cannot vote unassisted.

As concerns the author’s claim under article 9 that the State failed to ensure that persons with disabilities have access to information and communications technology and live assistance, the State reiterates that it falls within its broad discretion to decide how to allocate its limited resources, being justifiable at this stage not to have promoted the use and development of information and communications technology in relation to voting and elections, for all persons with disabilities similar to those of the author. Therefore, the State submits that the author’s claims under articles 4, 5 and 9 are without merit.

The author’s comments on the State party’s observations

The author maintains that she has sufficiently substantiated her claim regarding the presiding officer’s conduct and that the fact that she did not lodge a complaint with the Electoral Commission or any other body in this regard is not evidence that the event did not occur. The author notes that the State has not challenged her assertion that there was no domestic remedy available as concerns her claims under article 29 (a) (i) and (ii). Regarding her claim under article 29 (a) (iii), she argues that there was no possibility to rectify the alleged violation by making an application for judicial review of the presiding officer’s conduct under the Administrative Decisions Act prior to the close of polling on 7 September 2013. She further argues that, the assistance of the presiding officer would have potentially exposed her voting intention to multiple scrutineers and other persons, contrary to her right to cast a secret vote, and that the Electoral Act imposes no obligation on the person assisting to maintain the confidentiality of that vote.

In response to the State party’s claim that she has failed to sufficiently substantiate her complaint, the author refers her initial complaint. In particular, she pointed out that she was not provided with the opportunity to vote by secret ballot on an equal basis with others. The voting procedure adopted by the Electoral Commission meant that she was compelled to accept the assistance of another person and potentially to be observed casting her vote by multiple persons, in violation of her right to equality and non-discrimination.

In relation to her complaint under article 9 of the Convention, the author argues that the State has failed to observe its obligation with respect to the realization of article 29, in particular for not providing her with an accessible electronic voting system or facility that would have enabled her to independently cast a secret ballot. She notes that she uses such a system to cast an independent vote by secret ballot in New South Wales State elections and that such a platform is readily available and in use within the jurisdiction. In that regard, the author argues that, in her case, an electronic voting option is a reasonable accommodation to enable her to cast a secret vote. She submits that it falls on the State to demonstrate how the accommodation required would constitute a disproportionate or undue burden.

As concerns her claim under article 4, the author argues that the State has not taken legislative measures to repeal or amend the Electoral Act to introduce an electronic voting system that would enable her to independently cast a vote by secret ballot. She considers that this amounts to disability-based discrimination in the 2013 federal election.

State party’s additional observations

The State argues that article 29 contains obligations that are of immediately realisation and others that are of a general nature, including the obligation to facilitate the use of assistive and new technologies, where appropriate. It notes that the Committee has acknowledged that accessibility should be achieved through gradual implementation, when necessary. As concerns the reasonable accommodation standard, the State refers to the CRPD *travaux préparatoires*, noting that significant increase in cost can constitute a disproportionate burden

Issues and proceedings before the Committee

Consideration of admissibility

The Committee ascertains that the same matter has not already been examined by it and has not been or is not being examined under another procedure of international investigation or settlement, as required by [article 2(c) of the OP](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx).

Regarding inadmissibility for non-exhaustion of domestic remedies, the Committee finds that, by failing to make an application to the Federal Circuit Court or the Federal Court of Australia for judicial review of the alleged conduct of the presiding officer, the author failed to exhaust domestic remedies in this regard. The Committee concludes that the author’s claims under article 29 (a) (iii) are inadmissible under article 2 (d) of the OP. The Committee also notes that the State has not contested the author’s argument that she was not able to directly challenge her claims under article 29 (a) (i) and (ii) under domestic law. The Committee considers that the requirements of article 2 (d) of the OP have been met with regard to the author’s claims under article 29 (a) (i) and (ii), read alone and in conjunction with articles 4 (1) (a), (b), (d), (e) and (g), 5 (2) and (3) and 9.

Regarding inadmissibility due to failure to sufficiently substantiate claims, the Committee considers that the author has sufficiently substantiated her claims under article 29 (a) (i) and (ii), read alone and in conjunction with articles 4 (1) (a), (b), (d), (e) and (g), 5 (2) and (3) and 9. Consequently, the Committee declares the communication admissible regarding the author’s claims under those articles.

Consideration of the merits

Regarding article 29 (a) (i) and (ii), the issue before the Committee is to assess whether the State violated the author’s rights by failing to provide her with accessible voting procedures and facilities, including through the use of assistive technology. The Committee recalls that, under article 29, a State is required to adapt its voting procedures, by ensuring that they are appropriate, accessible and easy to understand and use. As concerns the accessibility of voting procedures, the Committee recalls that accessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an *ex ante* duty.

The Committee notes that none of the options available to the author in the 2013 federal election could have enabled her to exercise her right to vote in the way she wanted, namely without having to reveal her political choice to the person accompanying her. The Committee further notes that access to the use of an electronic voting system would have enabled the author to achieve that, on equal basis with others.

As to the argument of the State that barriers to accessing existing objects and services should be removed gradually, taking into account limited resources, and that significant increase in cost can constitute a disproportionate burden, the Committee recalls that the obligation to implement accessibility is unconditional. In this case, the Committee notes that the electronic voting option has been widely used for persons with visual impairments in New South Wales State elections since 2011. It also notes that the State has not provided any information that could justify the claim that the use of such an electronic voting option would have constituted a disproportionate burden, so as to prevent its use in the 2013 federal election for the author and for all persons requiring such accommodation.

Conclusion

In the light of the above, the Committee concludes that the State has failed to fulfil its obligations under article 29 (a) (i) and (ii), read alone and in conjunction with articles 5 (2), 4 (1) (a), (b), (d), (e) and (g) and 9 (1) and (2) (g) of the Convention, and recommends:

Regarding the author: to provide her with an effective remedy, including compensation for any legal costs incurred; and to take adequate measures to ensure that the author has access to voting procedures and facilities that will enable her to vote by secret ballot without having to reveal her voting intention in all future elections and referendums in the State.

As general measures to prevent similar violations in the future:

(i) to consider amending the Electoral Act in order to ensure that electronic voting options are available and accessible to all people with disabilities, whatever the types of impairment;

(ii) to uphold, and guarantee in practice, the right to vote for persons with disabilities, on an equal basis with others by ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use, and protect their right to vote by secret ballot through the use of assistive technologies; and

(iii) to consider amending the Electoral Act in order to ensure that, in cases where assistance by another person may be necessary to enable a voter to cast his or her vote, the person providing such assistance is under an obligation to maintain the confidentiality of that vote.

1. This summary has been prepared by the International Disability Alliance. For more information on how to lodge individual communications under the Optional Protocol to the CRPD, visit [IDA’s disability rights litigation website.](http://www.internationaldisabilityalliance.org/es/node/105)  [↑](#footnote-ref-1)