Case summary:[[1]](#footnote-1) *Ms. J.H (represented by counsel, Ms. Michele Hardesty-Munday) v Australia*
CRPD/C/20/D/35/2016

Communication No. 35/2016

Date of communication (initial submission): 12 February 2016

Date of adoption of Views: 31 August 2018

Invoked provisions of the Convention: [5 (2) and (3)](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#5); [12(2) and (3](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#12)); [21 (b) and (e)](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#21)

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

Keywords: Disability; Equality and non-discrimination; reasonable accommodation; equal recognition before the law; freedom of expression

Decision: The State has failed to fulfil its obligations under articles 5 (2) and (3); and 21 (b) and (e) of the Convention

Full decision in English

**Facts**

The author is Ms. J.H, an Australian national born on 17 August 1977, deaf and using Australian Sign Language as native language. She claimed Australia has violated her rights under articles [5](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#5), [12](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#12) and [21](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#21) of the Convention on the Rights of Persons with Disabilities. Australia ratified the Optional Protocol to the Convention in August 2009.

Between April/May 2014, the author was summoned by the Department of the Attorney General (DAG) in Perth to attend jury service on 3 June 2014. Ms. J.H. informed the DAG of her circumstances and that she required an Auslan interpreter to perform her jury duty, providing them with information on how to book an interpreter through Sign Language Communication at the WA Deaf Society. On 15 May 2014, when contacted by the Manager of Jury Service asking whether she required the assistance of an Auslan interpreter or a suitable hearing device, she responded on the very same day stating her need for an Auslan interpreter.

In Western Australia (WA), jurors are selected randomly from the electoral roll. The author states that jury duty is everyone’s civic responsibility and an important part of the administration of justice in Australia. On 16 May 2014, the Manager informed the author that she will be excused from her requirement to serve as a juror under section 34G the Juries Act 1957 (WA), stating that for the sake of affording a fair trial to the accused, the court was unable to provide the author with the necessary means for her to effectively act as a juror.

On 20 May 2014, the author responded raising concerns about the decision to excuse her, noting that the Manager had previously asked whether she could use technological hearing devices or if she required an Auslan interpreter. Referring to section 34G(2)(e) of the Juries Act, she noted that it is clear from their written communication that she had no issue in her comprehension of English and could not be excused under this provision. On 27 May 2014, the author sent an additional follow-up email to the Manager noting that under the WA Language Services Policy, state agencies, including the District courts, are required to provide access to interpreters.

The Manager replied that the main rationale of his decision was to provide a fair system to the accused which complies with the applicable legislation, and his decision was not related to financial impediments and that he did not consider the author as a burden to the court system.

In February 2015, the author lodged a complaint with the Equal Opportunity Commission (‘EOC’) under sections 66A and 66K of the Equal Opportunity Act 1984 (WA). EOC found that, as the DAG was acting directly as an arm of the government rather than a provider of “service” provider to the community, the complaint fell outside the scope of the Equal Opportunity Act. As the EOC did not consider the merits of the complaint, the author’s case could not be referred to the State Administration Tribunal under the Equal Opportunity Act. As the decision did not constitute an error of law, no appeal could be made to the Supreme Court. In that regard, the author submits that section 69 of the Equal Opportunity Act provides that ‘nothing in this Act renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with a requirement of: (a) any other Act which is in force when this section comes into operation’. The DAG’s decision was therefore made in compliance with the Juries Act and the Equal Opportunity Act.

The author intended to lodge a complaint under the Disability Discrimination Act 1992 (Commonwealth). However, section 47(2) provides that anything done by a person in direct compliance with a Commonwealth or State or Territory law cannot be rendered unlawful. This domestic remedy would therefore also have been ineffective in addressing the author’s complaint.

On 24 April 2015, the author wrote to the Attorney General who replied on 15 May 2015, stating that in some circumstances, an individual may be unable to properly discharge the duties of a juror and that the decision of the Manager was correct.

**The complaint submitted to the Committee**

The author claims that the State violated its obligations under article [5](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#5), [12](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#12) and [21](https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#21) of the CRPD.

Regarding article 5 and (3), the author argues that the provision of an Auslan interpreter to enable her to complete her jury duty is not a disproportionate or undue burden, claiming that audio loop devices installed in courtrooms did not constitute a means of complete access for people with hearing impairments.

Regarding articles 12(2) and (3), the author claims that the State has violated her right to enjoy her legal capacity on an equal basis with others in all aspects of life, which include the entitlement to form part of a jury pane.

Regarding article 21, the author claims that her right to the freedom of expression and opinion has been violated.

**State ’s observations on admissibility**

The State submits that the author’s claims under article 12 should be considered inadmissible *ratione materiae* or as manifestly unfounded and insufficiently substantiated as per article 2(e) of the OP. Further, the State submits that the author’s claims under articles 5, 12, and 21 of the Convention are without merit.

The State contends that the DAG did not take a blanket approach in excusing the author from jury duty but considered her individual circumstances and enquired into her assistance requirements, concluding that she was not capable of serving effectively as a juror in accordance with section 34G (2) of the Juries Act.

The State further submits that the author’s claims under article 12 of the Convention are inadmissible *ratione materiae* as jury duty does not represent a manifestation of legal capacity. The concept can be construed as a person’s legal standing to have rights and be recognised as a legal person before the law, and as a legal agent who may act on those rights and have those actions legally recognised.12 Therefore, article 12 is concerned with enumerating the elements of legal personality rather than enumerating elements of interaction with the judicial process.

Alternately, the State recalls that a ‘claim’ is not merely an allegation but must be supported by substantiating material. The State submits that the Manager did not at any time question the author’s legal capacity but made his decision by considering the ‘overriding necessity of affording a fair trial to the accused, including the preservation of the secrecy of jury deliberations’.

The State further submits that the relevant domestic law establishes a legitimate differential treatment of people who require an interpreter and thus is not discriminatory under article 5(2) of the Convention considering the well-established approach in international law that legitimate differential treatment will not constitute discrimination. The State argues that the Juries Act constitutes a legitimate differential treatment of all people who require the assistance of another person to understand legal proceedings and is aimed at the legitimate purpose of ensuring a fair trial for the accused. It considers that such differential treatment is reasonable and proportionate as the law and practice of WA facilitates the participation of persons with hearing impairments in jury duty whenever possible.

Moreover, the State argues that the provision of an Auslan interpreter cannot be qualified as a reasonable accommodation under article 5(3) of the Convention claiming that in the case of a deaf juror, the provision of an Auslan interpreter may not be feasible as a case may feature non-verbal audio evidence. The State is of the view that the WA policy and law provide reasonable accommodation in accordance with article 5(3) of the Convention through the provision of hearing loop devices in courtrooms, re-emphasising that the overriding necessity in criminal proceedings is to afford a fair trial and that this foundational right must prevail over those of the potential juror. It therefore considers that the author’s claims under article 5 are without merit.

The State also submits that the provision of an Auslan interpreter is outside the actions required by article 12(3), recalling that article 12 requires States parties to take ‘appropriate measures’ but not all measures the State considered the author’s needs but concluded that the provision of an Auslan interpreter was not an ‘appropriate measure’ given the overriding necessity of ensuring a fair trial. Therefore, the author’s claims under article 12 are without merit.

The State further submits that article 21 of the Convention is not engaged on the facts of the case, as it does not provide the author with an entitlement to form part of a jury panel given that jury duty does not constitute an official interaction under article 21(b). The State considers that even if article 21 encompassed obligations to provide interpretation in courts, the corresponding obligation would be limited to individuals who officially come before the courts and does not extend to the provision of jury duty. As per the obligation under article 21(b), the State submits that it must be implemented in the light of the resource limitations of States parties. The State submits that the WA State has satisfied this standard through the provision of hearing loops in the courtrooms, and that the author’s claims under article 21 are therefore without merit.

The author’s comments on the State ’s observations

On 19 December 2016, the author reiterated her arguments under her initial submission but did not add further comments in response to the observations of the State .

**Committee’s consideration of admissibility and merits**

**Consideration of admissibility**

The Committee has ascertained, as required under article 2(c) of the Optional Protocol, that the same matter has not already been examined by the Committee and has not been or is not being examined under another procedure of international investigation or settlement.

Regarding the author’s claims under article 12 of the Convention, the Committee notes the State ’s submission that they should be held inadmissible *ratione materiae* as jury duty does not represent a manifestation of legal capacity. The Committee recalls its General Comment No. 1 (2014) according to which legal capacity includes the capacity to be both a holder of rights and an actor under the law, entitling the person to full protection of his or her rights by the legal system and recognising that they are an agent with the power to engage in transactions and to create, modify, or end legal relationships. In the present case, the Committee notes the author’s claim that the Manager’s refusal to provide her with Auslan interpretation amounted to a violation of her right under article 12, to enjoy legal capacity on an equal basis with others. The Committee also notes that the Manager expressly explained to the author that the authorities did not consider deaf jurors as a burden for the administration of justice and that the State did not question at any time the author’s legal capacity to perform jury duty. Accordingly, the Committee concludes that the author’s claims are inadmissible under article 2 (b) of the Optional Protocol.

**Consideration of the merits**

The Committee has considered the case in the light of all the information provided by the parties, in compliance with article 5 of the Optional Protocol. The Committee notes the author’s claim that the State has violated articles 5 (2) and 5(3) of the Convention since by refusing to provide her with an Auslan interpreter, it failed to provide the reasonable accommodation she needed to perform her jury duty, which resulted in a discrimination based on her hearing disability. The Committee also notes the State ’s submission (i) that there has been no violation of the author’s rights under article 5, as the pertinent national law is not discriminatory and the differential treatment provided for in the Jury Act is legitimate; and (ii) that the provision of an Auslan interpreter to enable the author to take part in jury duty would not be a reasonable accommodation in the circumstances of the case.

Referring to the definition of discrimination on the basis of disability in article 2 of the Convention explicitly states that “it includes all forms of discrimination, including denial of reasonable accommodation”, the Committee recalls that discrimination can result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate, but that disproportionately affects persons with disabilities. Under article 5 (2), States parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds and that, under article 5 (3), States parties must take all appropriate steps to ensure that reasonable accommodation is provided to promote equality and eliminate discrimination. Moreover, under article 2 of the Convention, “reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. The Committee considers that, when assessing the reasonableness and proportionality of accommodation measures, States parties enjoy a certain margin of appreciation. However, States parties must ensure that such an assessment is made in a thorough and objective manner, covering all the pertinent elements, before reaching a conclusion that the respective support and adaptation measures would constitute a disproportionate or undue burden for a State .

In the present case, the Committee observes that the adjustments provided by the State for people with hearing impairments would not enable the author to participate in a jury on an equal basis with others. In this connection, the Committee notes the argument of the State that its law and policy provide reasonable accommodation for people with hearing impairment through the provision of hearing loop devices in courtrooms. However, it considers that this accommodation would not enable the author to access complete communication during her service as a juror. The Committee notes that the State provides the Committee with an estimation of the costs involved in having interpreters (approximately US$300,000 annually, including US$100,000 for American Sign Language interpreting) but it 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 failed to analyze the reasonableness of the accommodation requested for the author, which refers to its relevance, appropriateness and effectiveness. The Committee therefore considers that the State ’s arguments are not sufficient to conclude that providing the author with Auslan interpretation would have amounted to a disproportionate or undue burden. Further, while the confidentiality principle of jury deliberations must be observed, the State does not provide any argument justifying that no adjustment, such as a special oath before a court, could be made to enable the Auslan interpreter to perform his/her functions without affecting the confidentiality of the deliberations of the jury. On the basis of the information before it, the Committee considers that the State has not taken the necessary steps to ensure reasonable accommodation for the author and concludes that the refusal to provide Auslan interpretation, without thoroughly assessing whether that would constitute a disproportionate or undue burden, amounts to disability-based discrimination, in violation of the author’s rights under article 5 (2) and (3) of the Convention.

As to the author’s contention that the State violated its obligations under article 21 by failing to provide her with an Auslan interpreter to ensure that she could exercise her right to freedom of expression and opinion, the Committee recalls that, pursuant to article 21 (b) of the Convention, States parties shall 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 by accepting and facilitating different means and formats of communication in official interactions. Additionally, article 21 (e) of the Convention stipulates that appropriate measures to ensure that persons with disabilities can exercise their right to freedom of expression and opinion include recognizing and promoting the use of sign languages. The Committee further recalls that, according to article 2 of the Convention, “communication” includes languages and alternative modes, means and formats of communication, obviously encompassing Auslan interpretation. In that context, the Committee considers 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. In view thereof, the Committee considers that the refusal to provide the author with the format of communication she needs to enable her to perform jury duty, and therefore to express herself in official interaction, amounted to a violation of article 21(b) and (e) of the Convention.

**Conclusion and recommendations**

The Committee on the Rights of Persons with Disabilities, acting under article 5 of the Optional Protocol, is of the view that the State has failed to fulfil its obligations under articles 5 (2) and (3); and 21 (b) and (e) of the Convention. The Committee therefore makes the following recommendations to the State:

(a) With respect to the author, the State is under an obligation: (i) To provide her with an effective remedy, including reimbursement of any legal costs incurred by her, together with compensation; (ii) To enable her participation in jury duty, providing her with reasonable accommodation in the form of Auslan interpretation in a manner that respects the confidentiality of proceedings at all stages of jury selection and court proceedings;

(b) In general, the State is under an obligation to take measures to prevent similar violations in the future, including by: (i) Ensuring that every time a person with disabilities is summoned to perform jury duty, a thorough, objective and comprehensive assessment of his/her request for adjustment is carried out and all reasonable accommodation is duly provided to enable his/her full participation;

(ii) Adopting the necessary amendments to the relevant laws, regulations, policies and programs, in close consultation with persons with disabilities and their representative organizations; (iii) Ensuring that appropriate and regular training on the scope of the Convention and its Optional Protocol, including on accessibility for persons with disabilities, is provided to local authorities, such as the Manager of Jury Services, and the judicial officers and staff involved in facilitating the work of the judiciary.

In accordance with article 5 of the Optional Protocol and rule 75 of the Committee’s rules of procedure, the State should submit to the Committee within six months a written response, including any information on any action taken in the light of the present Views and recommendations of the Committee. The State is also requested to publish the Committee’s Views and have them translated into the official language of the State and widely disseminated, in accessible formats, in order to reach all sections of the population.

1. This case 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, consult IDA’s factsheet available on [IDA’s disability rights litigation website.](http://www.internationaldisabilityalliance.org/en/disability-rights-litigationhttp%3A/www.internationaldisabilityalliance.org/en/disability-rights-litigation)  [↑](#footnote-ref-1)