



## Convention on the Rights of Persons with Disabilities

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### Committee on the Rights of Persons with Disabilities

#### Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 56/2018\*, \*\*

<i>Communication submitted by:</i>	Lauren Henley (represented by counsel, Erin Turner Manners)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	3 October 2018 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 70 of the Committee's rules of procedure, transmitted to the State party on 28 November 2018 (not issued in document form)
<i>Date of adoption of Views:</i>	26 August 2022
<i>Subject matter:</i>	Failure to provide audio description on free-to-air television, preventing accessibility for persons with visual impairments
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims
<i>Substantive issues:</i>	Equality and non-discrimination; accessibility; participation in cultural life
<i>Articles of the Covenant:</i>	4 (1) and (2), 5 (3), 9 (1) (b) and 30 (1) (b)
<i>Article of the Optional Protocol:</i>	2 (d) and (e)

1. The author of the communication is Lauren Henley, a national of Australia born on 25 March 1986. She claims to be the victim of violations by the State party of her rights under articles 9 (1) (b) and 30 (1) (b), read in conjunction with articles 4 (1) and (2) and 5 (3), of the Convention, as the State party has failed to enable her, as a person with a disability, to live independently and participate fully in all aspects of life by not providing audio description on free-to-air television. The Optional Protocol entered into force for the State party on 19 September 2009. The author is represented by counsel.

\* Adopted by the Committee at its twenty-seventh session (15 August–9 September 2022).

\*\* The following members of the Committee participated in the consideration of the communication: Rosa Idalia Aldana Salguero, Danlami Umaru Basharu, Gerel Dondovdorj, Gertrude Oforiwa Fefoame, Vivian Fernández de Torrijos, Mara Cristina Gabrilli, Amalia Eva Gamio Ríos, Samuel Njuguna Kabue, Kim Mi Yeon, Abdelmajid Makni, Sir Robert Martin, Floyd Morris, Jonas Ruskus, Markus Schefer and Saowalak Thongkuay. Pursuant to rule 60 of the Committee's rules of procedure, Rosemary Kayess did not participate in the consideration of the communication.



## **A. Summary of the information and arguments submitted by the parties**

### **Facts as submitted by the author**

2.1 The author has been completely blind since an injury she sustained as a result of a motor vehicle accident in 2006. Since then, the author has advocated for the rights of persons who are blind or have visual impairments.

2.2 She submits that she is unable to access free-to-air television in the State party on an equal basis with sighted users because of the lack of audio description (the narration of visual elements in television, film and live performances). During gaps in dialogue, audio description describes visual elements that appear on screen, such as scenes, settings, actions, costumes and on-screen text. In countries where audio description is available, it may be accessed through a separate language track on digital television or through separately provided equipment, such as a set-top box, that can access receiver-mixed description. The provision of audio description would enable access to television programming that is otherwise unavailable to people living in Australia who are blind or have visual impairments. She claims that no audio description is available on free-to-air television or on free online “catch-up” television services provided by Australian broadcasters.

2.3 On 12 May 2015, the author submitted a complaint to the Australian Human Rights Commission about the lack of provision of audio description on free-to-air television. On 21 August 2015, the Department of Communications responded, explaining that several measures had been taken by the Government of Australia in relation to trialling or providing audio-description content on television (see para. 4.7 below). The author submits that these measures are insufficient and that many audio description-related measures are available but have not yet been taken by the Government, including, for example, the adoption of legislation making the provision of audio description a criterion for obtaining a television broadcasting licence.

2.4 On 14 March 2016, the President of the Australian Human Rights Commission informed the author of its decision to discontinue the investigation into her complaint under section 20 (2) (c) (ii) of the Australian Human Rights Commission Act, which allows the Commission to cease the investigation of a complaint if it considers that it is misconceived and/or lacking in substance.

2.5 On 11 April 2016, the author applied to the Federal Circuit Court of Australia for an administrative review of the decision of the Australian Human Rights Commission, under the Administrative Decisions (Judicial Review) Act 1977. The Court was restricted to considering whether the Commission had made a legal error or had not exercised its powers correctly. The Court had no jurisdiction to conduct a review of the merits of the decision. On 10 April 2017, the Court dismissed the author’s application for administrative review and found that the Commission had not made a legal error in deciding to discontinue the author’s complaint.

2.6 The author did not appeal the decision before the Federal Court of Australia because she considered that such an appeal would have had limited prospects of success and was unlikely to provide her with an adequate remedy. Furthermore, the author would have faced prohibitive costs had she lost the appeal. The author refers to the Committee’s jurisprudence, in which it is stated that, if the claim for a possible remedy does not have reasonable prospects of success, it is unlikely to provide the author with an effective remedy.<sup>1</sup>

2.7 The author maintains that the Australian Human Rights Commission was the only complaint mechanism available to her domestically, because “human rights are not typically justiciable in domestic courts in Australia”. The author refers to the Committee’s Views in *Beasley v. Australia* to sustain that even her complaint to the Commission was ineffective as the Commission did not have the power to compel the Government to fulfil the author’s rights and that a complaint before the Commission is not required to exhaust all domestic remedies.<sup>2</sup>

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<sup>1</sup> *Noble v. Australia* (CRPD/C/16/D/7/2012); and *Lockrey v. Australia* (CRPD/C/15/D/13/2013).

<sup>2</sup> CRPD/C/15/D/11/2013, para. 7.4.

2.8 The author states that she has not submitted the matter to another international mechanism of investigation or settlement.

### **Complaint**

3.1 The author asserts that the State party has violated her rights under articles 9 (1) (b) and 30 (1) (b), read in conjunction with articles 4 (1) and (2) and 5 (3), of the Convention, through its failure to take all appropriate measures to progress the provision of audio description on free-to-air television in Australia. Article 9 (1) (b) compels States parties to enable persons with disabilities to live independently and participate fully in all aspects of life, through the identification and elimination of obstacles and barriers to accessibility in terms of information, communications and other services.

3.2 In addition, article 30 (1) (b) of the Convention compels States parties to take all appropriate measures to ensure that persons with disabilities enjoy access to television programmes in accessible formats. Articles 9 (1) (b) and 30 (1) (b) thus clearly set out the author's rights to enjoy access to television programmes in accessible formats, including through the provision of audio description.

3.3 The State party's duties in this regard must be read in the context of articles 4 (1) and (2) and 5 (3) of the Convention. Under article 4 (1), States parties undertake to adopt all appropriate, legislative, administrative and other measures for the implementation of the rights recognized in the Convention. Under article 4 (2), States parties undertake to take measures to the maximum of their available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of economic, social and cultural rights. Article 5 (3) compels States to take all appropriate steps to ensure that reasonable accommodation is provided in order to eliminate discrimination.

3.4 Although the Government has taken some steps in relation to audio description, these measures do not suffice to fulfil its obligations under the Convention.

### **State party's observations on admissibility and the merits**

4.1 On 30 September 2019, the State party submitted its observations on the admissibility and merits of the communication. It submits that the communication should be declared inadmissible for failure to exhaust domestic remedies.

4.2 The State party argues that the author could have filed a complaint to the Australian Human Rights Commission under the Disability Discrimination Act 1992, which makes discrimination on the basis of disability unlawful in certain areas of public life and is aimed at promoting equal opportunities and access for people with disabilities. If such a complaint had not been resolved after an investigation and subsequent conciliation process, the author could have initiated legal proceedings before the Federal Circuit Court of Australia or the Federal Court of Australia. If the author had been successful in such court proceedings, remedies could have been ordered. The State party notes that, on 14 March 2016, the Commission advised the author that that option remained open when it discontinued her complaint on the basis that it was misconceived and/or lacking in substance.

4.3 The State party submits that the author's claims under article 5 of the Convention are manifestly ill-founded and/or insufficiently substantiated. The State party notes that the author does not sufficiently substantiate in her submission the relevance of the model of "inclusive equality", nor does she explain on what basis the State party has violated her rights under article 5.

4.4 The State party argues that the author's claims under article 9 (1) (b), read in conjunction with articles 4 (1) and (2) and 5 (3), of the Convention are without merit.

4.5 The State party understands enabling persons with disabilities to "live independently in the community and participate fully in all aspects of life" to mean the provision of support and accessible structures and systems that enable persons with disabilities to live in the community on an equal basis with others. The State party acknowledges that this could encompass systems such as audio description to enhance the accessibility of free-to-air television. It submits that it is its obligation under the Convention to take measures to

progressively realize these rights. The obligation to take appropriate measures takes into account the resource constraints that States are under and their need to balance a large number of competing national priorities, including the service delivery of other accessibility options for persons with disabilities.

4.6 The State party asserts that it has taken appropriate measures with a view to progressively achieving the full realization of the right to accessibility in relation to information and communications. These measures include investigating and trialling the provision of audio description on Australian free-to-air television. It considers that such steps are reasonable, appropriate and proportionate in order to ascertain the viability of providing audio description in Australia, its effects on many segments of the community, and options for implementation. It submits that audio description research measures through trials and reporting, in addition to other measures such as the legislated requirements for broadcasters to provide captioning on free-to-air and subscription television, are consistent with the Convention and are aimed at ensuring that persons with disabilities have access to television programmes in accessible formats.

4.7 The State party submits that the measures taken to progressively realize the rights of persons with visual impairments to access information and communications on an equal basis with others include the following:

(a) In June 2008, the Department of Broadband, Communications and the Digital Economy released a discussion paper entitled “Access to the electronic media for the hearing and visually impaired”. The paper included the examination of the availability of captioning and audio description for free-to-air television, subscription television and film. A total of 167 submissions, including from persons with hearing or visual impairments and their representative bodies, were received and considered. In November 2009, the Department released a subsequent discussion report, entitled “Access to electronic media for the hearing and vision impaired: approaches for consideration”;

(b) In December 2010, after careful consideration of the submissions and stakeholder feedback, the Department released a report entitled “Investigation into access to electronic media for the hearing and vision impaired: media access review final report”. The report included two recommendations relating directly to audio description, namely that the Government commission a technical trial of audio description on Australian Broadcasting Corporation channels and that the Government give further consideration to the introduction of progressive audio description requirements after the completion of the audio description trial and the receipt of technical advice from the Australian Communications and Media Authority on the results of the trial;

(c) In 2012, through funding from the Government, the Australian Broadcasting Corporation conducted a 13-week technical trial of broadcasting television programmes with audio description commentary on its primary television channel, ABC1, for 15 hours per week. A report was produced in December 2012;

(d) In April 2015, a further 15-month trial on the Australian Broadcasting Corporation’s online catch-up television service, with audio description for 14 hours per week, was held, and a final report was published on 5 April 2017;

(e) In April 2017, the Government announced the formation of an audio description working group to examine options for increasing the availability of audio-description services. The working group’s report was made public on 22 May 2018;

(f) The State party is considering the advice provided by the free-to-air broadcasters and Free TV Australia in response to a letter from the former Minister for Communications and the Arts sent in March 2019 seeking a plan from the industry to introduce audio description on Australian free-to-air television.

4.8 The State party sustains that it is appropriate, reasonable and proportionate for it to undertake research regarding the provision of audio description. This research is critical in ascertaining the necessary information to deliver a service involving significant technical challenges. The technical challenges of delivering audio description in the broadcasting context revealed by the trial require consideration by the Government and provide a preliminary indication of the processes that would need to be implemented ahead of the

introduction of a functional audio-description service. The trials indicated that there would be significant capital and ongoing operation costs, and therefore informed the Government's understanding of the financial commitment that would be required to deliver the service. The trial conducted in 2015 was broadly successful, with limited technical difficulties, but did reveal different types of technical issues in delivering audio-description services. The detailed research that was drawn partly from the trials shows that it is appropriate for the State party to conduct research and report on a range of options, including, in particular, surveying the technical, financial and implementation challenges and implications of each delivery option. For instance, the research allowed for the consideration of the advantages and disadvantages of some technical options, including the preference of older viewers for broadcast television and the challenges that older viewers, in particular those who have visual impairments and may not be familiar with the appropriate devices, may have in utilizing online platforms.

4.9 In relation to the author's argument that the State party should adopt legislation mandating audio description and providing ongoing funding, the State party notes the resource and regulatory burden that accompanies the introduction of an additional service for Australian broadcasters at a time of decreasing audiences of free-to-air programmes and increasing financial challenges. The Australian broadcasting structure is constrained and this limitation means that the implementation of audio description on broadcast television, as one of the three platforms on which audio description could be implemented, could cause major structural, technical and financial disruptions to broadcasters and potentially significant disruption to viewers. The State party highlights the importance of the margin of appreciation in considering competing national priorities and resources.

4.10 In relation to the author's argument that the State party should publicly set targets for broadcasters to provide audio description, it argues that broadcasters have requested government support because of the structural implementation issues facing free-to-air television. For this reason, it is not possible to separate targets for broadcasters from some level of government involvement. Finally, in relation to the author's argument that the State party should develop a publicly available comprehensive plan for achieving the rights set out under articles 9 and 30 of the Convention, the State party refers to its National Disability Strategy, which is consistent with the margin of appreciation of the State party in prioritizing certain resource demands, including the delivery of other accessibility services for persons with disabilities, over others. The State party considers that the Convention does not require States parties to provide time-bound plans for the introduction of specific accessibility measures, and a violation of the Convention should not be found on this basis.

4.11 The State party disagrees with the author's argument that the State party has failed to show commitment to ongoing funding and that the time-limited allocations of funding for the two trials, which were then withdrawn, should be viewed as a regressive step. The State party sustains that such a conclusion would discourage States parties from conducting research, trials and testing that ultimately lead to better policy and practical outcomes. This would be contrary to the meaning of the phrase "to take appropriate measures" and the requirement set out in the Convention to take steps to ensure accessibility.

4.12 Regarding the author's claims under article 9 (1) (b), in conjunction with article 5, of the Convention, the State party argues that the author has not sufficiently substantiated why the duty of reasonable accommodation is relevant in her individual case. Rather, the remedies sought by the author appear to be for all persons with visual impairments in respect of free-to-air television. It submits that reasonable accommodation relates to the need for an adjustment in a particular case as it relates to an individual. It refers to the Committee's opinion that reasonable accommodation duties are different from accessibility duties because, while both are aimed at guaranteeing accessibility, the duty to provide accessibility through universal design or assistive technologies is an *ex ante* duty, whereas the duty to provide reasonable accommodation is an *ex Nunc* duty. As an *ex Nunc* duty, reasonable accommodation is an individualized reactive duty that is applicable from the moment a request for accommodation is received.<sup>3</sup>

<sup>3</sup> General comment No. 6 (2018) on equality and non-discrimination, para. 24.

4.13 Finally, concerning the author's claims under article 30 (1) (b), regarding her right to take part on an equal basis with others in cultural life, the State party acknowledges that it is under an obligation to facilitate the participation of persons with disabilities in cultural life and that "to take all appropriate measures" under this article is subject to the same or similar considerations of progressive realization to the maximum available resources as discussed above, in relation to article 9. This includes an ongoing assessment and national prioritization of resources after weighing up relevant considerations. The State party refers to its arguments in relation to article 9, in conjunction with articles 4 (1) and (2), to assert that it has taken deliberate and concrete measures with a view to progressively achieving the right to cultural life by implementing audio description in Australia.

4.14 The State party also refers to its arguments in connection with article 9 (1) (b) (see para. 4.12 above) to sustain that the measures that it has taken in respect of implementing audio description have not been implemented in a discriminatory manner and submits that the same considerations outlined above are relevant in relation to article 30 (1) (b) as it relates to article 5.

#### **Author's comments on the State party's observations on admissibility and the merits**

5.1 On 6 December 2019, the author submitted her comments on the State party's observations on the admissibility and merits of the communication. She maintains that the communication is admissible.

5.2 Regarding the exhaustion of domestic remedies, the author argues that the Disability Discrimination Act 1992 refers only to limited types of disability discrimination claims in the State party. Since a claim concerning the provision of audio description as a service could not be made against the Government of Australia but only against each individual television broadcaster, each claim may result in a variety of different outcomes.<sup>4</sup> There could be no remedy against the Government, nor could the court afterwards compel the Government to adopt any measures to progress the provision of audio description in Australia. In addition, the author's claim does not concern the performance of any function or the exercise of any power under any Commonwealth law or for any Commonwealth programme or the administration of any law or programme.<sup>5</sup> It is precisely the absence of any law or policy related to audio description that the author is challenging in the present communication. Her complaint therefore falls outside the scope of the Disability Discrimination Act.

5.3 The author considers that she has sufficiently substantiated her claims under article 5 of the Convention. She submits that the State party has failed to take all appropriate steps to ensure reasonable accommodation, that is, it failed to legislate minimum targets for the provision of audio description by broadcasters. This has resulted in a violation of her rights as an individual. In 2012, during the first technical trial of audio description on the Australian Broadcasting Corporation network, the author sent correspondence to the Government requesting that audio-description services remain switched on following the trial end date. She did not receive a response.

5.4 The author submits that the Convention's model of inclusive equality is well-understood and articulated. This model of equality is developed throughout the Convention and the Convention itself is based on inclusive equality.<sup>6</sup>

5.5 The author reiterates that the State party has failed to adopt all appropriate measures to the maximum of its available resources. Although it has provided funding for two trials of audio description, it has failed to show commitment to ongoing funding or the provision of audio description on any platform. It has also failed to adopt a plan, strategy or policy framework for the progressive realization of the rights under articles 9 (1) (b) and 30 (1) (b) in respect of the provision of audio description. The requirement to monitor and devise strategies and plans exists even where there are resource constraints.

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<sup>4</sup> The author refers to section 24 of the Disability Discrimination Act.

<sup>5</sup> The author refers to section 29 of the Disability Discrimination Act.

<sup>6</sup> Committee on the Rights of Persons with Disabilities, general comment No. 6 (2018) on equality and non-discrimination, para. 11.

5.6 First, the author argues that resource constraints are no excuse for the State party's failure to devise strategies and concrete plans with regard to the realization of the rights under articles 9 (1) (b) and 30 (1) (b) in respect of the provision of audio description. The State party has not provided any evidence of resource or financial constraints. The mere assertion of the existence of such constraints does not prove their existence. Even if such constraints existed, it does not excuse the failure to provide legislative and monitoring frameworks to ensure that concrete and deliberate steps are made towards the full realization of the rights covered by the Convention. It is also revealing that the State party considers decreasing audiences of free-to-air programmes as a factor relevant to the provision of audio-description services. The author submits that the fact that audience numbers are decreasing is entirely irrelevant to the obligation. In any case, the author notes that she also submitted a complaint that no audio description was available on free online "catch-up" television services.

5.7 Second, as to the State party's argument that the setting of targets for broadcasters could not be separated from some level of government involvement because broadcasters had requested government support, the author argues that it is unclear how this responds to her suggested measures, given that one of those measures is the provision of funding to broadcasters to assist with the production and broadcasting of audio description. Again, the mere assertion of financial constraints is not evidence of such constraints and, even if such constraints existed, this does not excuse the State party from the obligations of progressive realization, including the adoption of legislative and monitoring frameworks and plans.

5.8 Third, the author notes that the State party refers to the National Disability Strategy in response to her point about the development of a publicly available, comprehensive plan for achieving the rights covered under articles 9 and 30 of the Convention. This does not respond to the author's complaint. The term "audio description" does not even feature in the existing Strategy.

5.9 The author notes that her proposed measures are consistent with the recommendations made by both the Australian Human Rights Commission in its submission to the Committee entitled "Information concerning Australia's compliance with the Convention on the Rights of Persons with Disabilities"<sup>7</sup> and the Committee in its concluding observations on the second and third periodic reports of Australia.<sup>8</sup>

5.10 The author submits that, contrary to the statement of the State party, her position is not that the conclusion of the trial constitutes a regressive step. Rather, it is that the failure of Australia to show commitment to the ongoing funding of the provision of audio description following the withdrawal of the trial and the failure to replace the trial with any further progressive measures should be viewed as a regressive step.

5.11 The author concludes that the only measure currently being undertaken by the State party is the consideration of the advice provided by free-to-air broadcasters and Free TV Australia in response to a letter from the former Minister for Communications and the Arts sent in March 2019. In the author's view, this does not constitute a deliberate, concrete and targeted step towards the realization of audio-description services, especially given that there appears to be no time frame for the response to be prepared and made public. This approach is not consistent with the requirements underlying the concept of progressive realization, given that:

(a) The measures taken by the State party have not been taken expeditiously or effectively; they have been implemented in a sporadic manner rather than in any gradual, steady and systematic way. In the 11-year period referred to in the State party's submission, the most substantial measures implemented were two trials conducted in 2012 and 2015, neither of which have led to any ongoing funding of audio description, and no deliberate, concrete or targeted plans or strategies have been implemented;

<sup>7</sup> See [https://humanrights.gov.au/sites/default/files/int\\_crp\\_d\\_nhs\\_au\\_35594\\_e.pdf](https://humanrights.gov.au/sites/default/files/int_crp_d_nhs_au_35594_e.pdf). Recommendation 44, as contained in that document, is that: "The Australian Government, drawing on the Audio Description Working Group's report, develop and introduce amendments to the Broadcasting Services Act 1992 (Cth) requiring audio description of not less than 10% of all television content to facilitate greater access to television news, information and entertainment for people with disability."

<sup>8</sup> CRPD/C/AUS/CO/2-3, paras. 17-18.

- (b) There is no framework for the continuous monitoring of the development or promotion of audio description;
- (c) There are no time frames for the provision of audio description;
- (d) There are no prescribed duties for different authorities, including private entities, for the gradual realization of audio-description services;
- (e) There is no relevant legal framework in place, including no minimum standards or targets.

**State party's additional observations**

6.1 On 6 March 2020, the State party submitted further observations on the admissibility and merits of the communication. The State party reiterates its arguments that the communication is inadmissible for lack of exhaustion of domestic remedies.

6.2 The State rejects the author's allegations that she could not make a claim under sections 24 and 29 of the Disability Discrimination Act. It contends that it would have been possible for the author to make a complaint under that Act regarding the Government's actions with respect to broadcasting by the Australian Broadcasting Corporation and the Special Broadcasting Service Corporation. It explains that the national broadcasting services include those that are provided by those two corporations, which are publicly funded national broadcasters and governed by the Australian Broadcasting Corporation Act 1983 and the Broadcasting Services Act 1992 (sect. 13). The author could equally have made a complaint under section 29 of the Disability Discrimination Act. Broadcasters are performing a function under the Broadcasting Services Act 1992. The Australian Broadcasting Corporation and the Special Broadcasting Service Corporation, as the national broadcasters, are performing a function under a Commonwealth programme, which is defined by the Disability Discrimination Act as being a programme conducted by or on behalf of the Government. As to the author's submission that no analogous cases have been successfully brought in respect of section 29, the State party reiterates the Committee's position that mere doubts as to the effectiveness of available domestic remedies do not absolve the author from the obligation to exhaust them.<sup>9</sup>

6.3 Regarding the merits of the communication, the State party submits that, on 16 December 2019, the Government announced that it would provide the national broadcasters, the Australian Broadcasting Corporation and the Special Broadcasting Service Corporation, with the equivalent of \$1,410,200 to introduce audio-description services by 1 July 2020. The State party reiterates that it is making measurable progress towards the full realization of the rights in question. It is doing so with definitive time frames and through the allocation of adequate resources.

**Author's comments on the State party's additional observations**

7.1 On 3 July 2020, the author submitted further comments. She reiterates her arguments that the complaint is admissible as Australian law does not permit either the Australian Human Rights Commission or the courts to require the Government to legislate minimum targets for audio description or to require it to implement a targeted plan for the achievement of the rights covered by the Convention.

7.2 As to the merits of the complaint, the author reiterates that the State party has adopted no plan, strategy or legislative framework to advance towards progressive realization of the right to accessibility in respect of audio description on a continuous basis. The author welcomes the announcement that the State party will provide national broadcasters with the equivalent of \$1,410,200 to introduce audio-description services by 1 July 2020. However, this announcement does not demonstrate any deliberate, concrete or targeted step towards the realization of audio-description services. First, there is no indication of whether this funding will continue. She notes that no policy, guideline, funding agreement, legislative framework or any other document setting out the circumstances of the funding was published with the media announcement. Second, there is no evidence that audio-description services on the

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<sup>9</sup> *D.L. v. Sweden* (CRPD/C/17/D/31/2015), para. 7.3.



Australian Broadcasting Corporation and the Special Broadcasting Service Corporation will continue after the initial period. She observes that, after the trials of provision of services that were held in 2012 and 2015, the provision of audio-description services did not continue following the initial funding. There is no legislative requirement to continue to provide audio-description services in the absence of funding. The current funding may be time-limited, as was the case in 2012 and 2015. Third, the announcement only covers funding for the Australian Broadcasting Corporation and the Special Broadcasting Service Corporation. No funding has been announced for any other free-to-air broadcasters and no steps have been taken towards the realization of audio description on any other free-to-air broadcasters.

7.3 There is no formal plan for monitoring progress towards realization, no prescription of any duties of different authorities and entities, no time frames or allocation of adequate resources, no legal or policy framework and no method for assessing the gradual implementation of audio description against specific benchmarks. No legislation is proposed for minimum targets for audio-description services.

#### **Additional observations**

8. In its additional observations dated 18 November 2020, the State party submits that, following the provision of funding by the State party, the national broadcasters engaged the Centre of Inclusive Design to advise on the development of audio-description services and to undertake research to assist in understanding the requirements and preferences of persons who are blind or have visual impairments. Following this, audio description was implemented by the national broadcasters on 28 June 2020. Both national broadcasters were, at the time of the submission, offering approximately 14 hours a week of content with audio description. This action is consistent with the State party's early submission that it has taken reasonable, appropriate and proportionate measures to the maximum of its available resources as understood under the Convention to fulfil its obligations under articles 9 (1) (b) and 30 (1) (b).

## **B. Issues and proceedings before the Committee**

### **Consideration of admissibility**

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

9.2 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 that it has not been, nor is it being, examined under another procedure of international investigation or settlement.

9.3 The Committee notes the State party's argument that the author has not exhausted all available domestic remedies as she has not brought her complaint before the Australian Human Rights Commission under the Disability Discrimination Act 1992, which prohibits discrimination on the basis of disability in certain areas of public life. It also notes the State party's argument that the author could have initiated legal proceedings before the Federal Circuit Court of Australia or the Federal Court of Australia, had the complaint before the Commission been unsuccessful.

9.4 However, the Committee notes the author's uncontested argument (see para. 5.2 above) that the Disability Discrimination Act 1992 only provides recourse for limited or particular types of disability discrimination claims in the State party, given that a potential claim concerning the provision of audio description as a service could not be made against the Government but only against each individual television broadcaster and that the author's claim does not concern the performance of any function or exercise of any power under any Commonwealth law or for any Commonwealth programme or the administration of any law or programme, but the absence of any law or policy related to audio description. In that regard, the Committee observes that the State party does not explain or provide any examples of how such a complaint before the Commission and subsequent appeals before the Federal Circuit

Court could have had a reasonable prospect of success in the present case, where the author is challenging the absence of any laws or policies on audio description. The Committee therefore cannot conclude that a complaint under the Disability Discrimination Act would have had a reasonable prospect of success in the present case or would have provided the author with an effective remedy.<sup>10</sup> Given the nature of the claims under consideration and in the light of the information provided by the parties, the Committee finds that article 2 (d) of the Optional Protocol does not preclude it from considering the communication.

9.5 The Committee also notes the State party's argument that the author's claims under article 5 (3) of the Convention are manifestly ill-founded and/or not sufficiently substantiated on the basis that the author does not sufficiently substantiate in her submission the relevance of the model of "inclusive equality" in her case or how the State party has violated its duty to provide the author with "reasonable accommodation". The Committee recalls that "reasonable accommodation", as defined in article 2 of the Convention, means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. Accessibility is related to groups, whereas reasonable accommodation is related to individuals.<sup>11</sup> The Committee considers that, in the present communication, the author's claims relate to general accessibility concerns by persons with visual impairments and that she has failed to substantiate her claims under article 5 (3). The Committee therefore finds the claims raised under article 5 (3) of the Convention to be inadmissible for lack of substantiation under article 2 (e) of the Optional Protocol.

9.6 The Committee notes that the State party has raised no other objections to the admissibility of the author's claims under articles 9 (1) (b) and 30 (1) (b), read in conjunction with article 4 (1) and (2), of the Convention. Accordingly, it declares those parts of the communication admissible and proceeds with its consideration of the merits.

### Consideration of the merits

10.1 The Committee has considered the communication in the light of all the information that it has received, in accordance with article 5 of the Optional Protocol and rule 73 (1) of its rules of procedure.

10.2 As regards the author's claims under articles 9 (1) (b) and 30 (1) (b), read in conjunction with article 4 (1) and (2), of the Convention, the issue before the Committee is to assess whether the State party violated her rights, as a person with a visual impairment, by failing to take all appropriate measures to provide audio description on free-to-air television in the State party.

10.3 The Committee notes the author's argument that the measures taken by the State party to provide audio-description content on television, including through trials and budget allocation, are insufficient and are inconsistent with the requirement of progressive realization. According to the author, these measures have not been taken expeditiously or effectively and have been implemented in a sporadic manner rather than in any gradual, steady or systematic way. The Committee notes that the author's assertion that in the 11-year period referred to in the initial submission by the State party, the most substantial measures implemented were two trials, conducted in 2012 and 2015, and that no deliberate, concrete or targeted plans or strategies or legislation requiring television broadcasters to provide audio description have been adopted.

10.4 The Committee also notes the State party's argument that it has taken appropriate measures with a view to progressively achieving the full realization of the right to accessibility in relation to information and communications, including through the investigation and trialling of the provision of audio description on Australia free-to-air television. The Committee further notes the State party's argument that: (a) it was appropriate, reasonable and proportionate for it to undertake research regarding the provision of audio

<sup>10</sup> *X. v. Argentina* (CRPD/C/11/D/8/2012), para. 7.4; and *Beasley v. Australia*, para. 7.4.

<sup>11</sup> Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014) on accessibility, para. 25.

description as that was critical in ascertaining the information necessary to deliver a service involving significant technical challenges; (b) the introduction of legislation mandating audio description and providing ongoing funding would be an excessive burden for broadcasters; (c) the State party has a margin of appreciation in considering competing national priorities and resources; and (d) the National Disability Strategy is consistent with its margin of appreciation in prioritizing certain resource demands, including the delivery of other accessibility services for persons with disabilities, over others. The Committee observes that the State party refers to these same arguments to sustain that it has not violated the author's rights to take part on an equal basis with others in cultural life under article 30 (1) (b) of the Convention.

10.5 In this connection, the Committee notes the author's arguments that: (a) the State party has not provided any evidence of resource or financial constraints; (b) in any case, resource constraints are no excuse for the failure of the State party to adopt legislation and devise strategies, plans and monitoring frameworks to ensure that concrete and deliberate steps are made towards the full realization of the rights covered by the Convention; and (c) the term "audio description" does not even feature in the National Disability Strategy.

10.6 Regarding the State party's provision of funding to national broadcasters to introduce audio-description services in 2020, the Committee notes the author's arguments that this does not demonstrate any deliberate, concrete or targeted steps towards the realization of audio-description services, as there is no indication as to whether this funding will continue, that it is not accompanied by any policy, guideline, funding agreement or legislative framework, and that it only covers funding for Australian Broadcasting Corporation and the Special Broadcasting Service Corporation, and not any other free-to-air broadcaster.

10.7 The Committee recalls that, in accordance with article 9 (1) (b) of the Convention, States parties are to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to information and communications, including information and communications technologies and systems. Such measures, which are to include the identification and elimination of obstacles and barriers to accessibility, are to apply to information, communications and other services, including electronic services and emergency services. The Committee also recalls that, in accordance with article 30 (1) (b) of the Convention, States parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and are to take all appropriate measures to ensure that persons with disabilities enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats. The Committee further recalls that, in accordance with article 4 (1) and (2) of the Convention, States parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. With regard to economic, social and cultural rights, each State party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of those rights. The Committee recalls that progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of rights.<sup>12</sup> The Committee considers that the steps taken towards the full realization of rights should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Convention.<sup>13</sup>

10.8 The Committee also recalls its general comment No. 2 (2014) on accessibility, in which it stated that, in accordance with the Convention, States parties are not allowed to use austerity measures as an excuse to avoid ensuring gradual accessibility for persons with disabilities. The obligation to implement accessibility is unconditional; in other words, the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities (para. 25). It also recalls that persons with disabilities face technical and environmental barriers, such as a lack of

<sup>12</sup> Committee on the Rights of Persons with Disabilities, general comment No. 4 (2016) on the right to inclusive education, para. 40; and Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties' obligations, para. 9.

<sup>13</sup> Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), para. 2.

information in accessible formats.<sup>14</sup> The Committee further recalls that the importance of information and communications technology lies in its ability to open up a wide range of services, transform existing services and create greater demand for access to information and knowledge, in particular in underserved and excluded populations, such as persons with disabilities.<sup>15</sup>

10.9 The Committee further recalls that States parties should adopt action plans and strategies to identify existing barriers to accessibility, set time frames with specific deadlines and provide both the human and the material resources necessary to remove the barriers. Once adopted, such action plans and strategies should be strictly implemented. States parties should also strengthen their monitoring mechanisms in order to ensure accessibility and they should continue providing sufficient funds to remove barriers to accessibility and train monitoring staff.<sup>16</sup>

10.10 Finally, the Committee recalls that, in its concluding observations on the second and third periodic reports by the State party, it expressed concern about the lack of comprehensive and effective measures to implement the full range of accessibility obligations under the Convention, including the lack of information and communications technologies and systems. The Committee recommended that the State party take the necessary legislative and policy measures to implement the full range of accessibility obligations under the Convention, including regarding information and communications technologies and systems, and ensure effective sanctions measures for non-compliance.<sup>17</sup>

10.11 While giving due regard to the measures taken by the State party to provide audio description to persons with visual impairments, including through research, two trials in 2012 and 2015 and the provision of funding to the main television broadcasters in 2020, the Committee observes that these measures do not reveal the existence of a strategy to progressively and effectively take the necessary steps to provide audio description in a sustainable manner to persons with visual impairments. The Committee observes, in particular, that the State party has failed to adopt specific legislation, a policy framework, a sustainable budget line allocation or any other measure to demonstrate its commitment to advance in the provision of audio description to persons with visual impairments in a sustainable manner.

10.12 In the light of the above, the Committee finds that the State party has failed to comply with its obligations under articles 9 (1) (b) and 30 (1) (b), read in conjunction with article 4 (1) and (2), of the Convention.

## C. Conclusion and recommendations

11. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under articles 9 (1) (b) and 30 (1) (b), read in conjunction with article 4 (1) and (2), of the Convention. The Committee therefore makes the following recommendations to the State party:

(a) Concerning the author, the State party is under an obligation to afford her adequate compensation, including for any legal costs incurred in filing the present communication;

(b) In general, the State party is under an obligation to take measures to prevent similar violations in the future. In that regard, the Committee requires the State party:

(i) To adopt action plans and strategies to identify existing barriers to accessibility, including the provision of audio-description services to persons with visual impairments, set time frames with specific deadlines and provide both the human and the material resources necessary to remove the barriers. Such action plans and strategies should be strictly implemented. The State party should also strengthen its

<sup>14</sup> *F. v. Austria* (CRPD/C/14/D/21/2014), para. 8.5.

<sup>15</sup> Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014), para. 5.

<sup>16</sup> *Ibid.*, para. 33.

<sup>17</sup> See, *CRPD/C/AUS/CO/2-3*, 15 October 2019, paras. 17–18.

monitoring mechanisms in order to ensure accessibility and it should continue providing sufficient funds to remove barriers to accessibility and train monitoring staff;<sup>18</sup>

(ii) To take the necessary legislative and policy measures with a view to ensuring the provision of audio-description services to persons with visual impairments;

(iii) To educate persons with disabilities about their rights under the Convention and, in particular, about accessibility as a crucial means to enable them to live independently and participate fully in all aspects of life;

(iv) To ensure that appropriate and regular training and awareness-raising activities on the scope of the Convention and the Optional Protocol thereto, including on accessibility for persons with disabilities, is provided to all service providers of free-to-air television and other relevant stakeholders, to ensure that they are fully accessible, in compliance with the Convention. Awareness-raising should be carried out in cooperation with persons with disabilities, their representative organizations and technical experts.<sup>19</sup>

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

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<sup>18</sup> Committee on the Rights of Persons with Disabilities, general comment No. 2 (2014), para. 33.

<sup>19</sup> Ibid.