



## 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 Ms. Erin Turner Manners)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	3 October 2018 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 70 decision, 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), 4 (2) and 5 (3), 9(1)(b) and 30(1)(b)
<i>Articles of the Optional Protocol:</i>	2 (d-e)

1. The author of the communication is Ms. Lauren Henley, an Australian national born on 25 March 1986. She claims to be a victim of a violation 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 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

\* 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 Gabrielli, 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 (1) (c) of the Committee's rules of procedure, Rosemary Kayess did not participate in the examination of the present communication.



television. The first Optional Protocol to the Convention entered into force for the State party on 21 September 2009. The author is represented by counsel.

## **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 endured as a result of a motor vehicle accident in 2006. Since then, the author has advocated for the rights of blind people or visually impaired.

2.2 She submits that she is unable to access free-to-air television in the State party on an equal basis to sighted users, because of the lack of audio description, i.e., the narration of visual elements in television, film and live performance. 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, audio description may be accessed through a separate language track on digital television or through separately provided equipment, such as a set-top box, that has the ability to access receiver-mixed description. The provision of audio description would enable access to television programming that is otherwise unavailable to Australians who are blind or visually impaired. She claims that no audio description is available on free-to-air television. Audio description is neither available on free online “catch-up” television services provided by Australian broadcasters.

### *Exhaustion of domestic remedies*

2.3 On 12 May 2015, the author submitted a complaint before the Australian Human Rights Commission on the lack of provision of audio description in free-to-air television. On 21 August 2015, the Department of Communications responded, explaining that several measures had been taken by the Australian government in relation to trialling or providing audio description content on television<sup>1</sup>. 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, adopting legislation requiring the provision of audio description as a criterion for obtaining a television broadcasting license.

2.4 On 14 March 2016, the President of the Commission informed the author of its decision to discontinue the investigation of 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 administrative review of the Commission’s decision, under the Administrative Decisions (Judicial Review) Act 1977. The Court was restricted to considering whether the Commission made a legal error or did not exercise 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 any legal error in deciding to discontinue the author’s complaint.

2.6 The author did not appeal this decision before the Full 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 a prohibitive costs order had she lost the appeal. The author refers to the Committee’s jurisprudence on communications No. 7/2012 and 13/2013, stating that if the claim for a possible remedy does not have reasonable prospects of success then it is unlikely to provide the author with an effective remedy.

2.7 The author maintains that the Commission was the only complaint mechanism available to her domestically, because “human rights are not typically justiciable in domestic courts in Australia.” The author also refers to the Committee’s decision No. 11/2013 to sustain that even her complaint to the Commission was ineffective as it did not have the

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<sup>1</sup> See para. 4.7 below.

power to compel the Australian Government's fulfilment of the author's rights would not have been required to exhaust all domestic remedies<sup>2</sup>.

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

### **The 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 identification and elimination of obstacles and barriers to accessibility 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. Article 4 (1) provides that States parties undertake to adopt all appropriate, legislative, administrative and other measures for the implementation of rights 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 aims to promote equal opportunities and access for people with disabilities. If such a complaint would not have 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 would have 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 this 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 also 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 further argues that the author's claims under articles 9(1)(b), read in conjunction with articles 4 (1), 4 (2) and 5 (3) of the Convention are without merit.

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<sup>2</sup> See, *Gemma Beasley v. Australia* (CRPD/C/15/D/11/2013), para.7.4.

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 support and accessible structures and systems that enable those 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 also submits that it is its obligation under the Convention to take measures to progressively realise these rights. The obligation to take appropriate measures takes into account resource constraints that States are under and their need to balance a large number of competing national priorities, including service delivery of other accessibility options for persons with disabilities.

4.6 The State party asserts that it has, within its discretion, taken appropriate measures with a view to achieving progressively the full realisation of the right to accessibility in relation to information and communications. These appropriate 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 realise the rights of persons with vision impairment access on an equal basis with others to information and communications include:

a) In June 2008, the later called 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. 167 submissions, including from people with a hearing or vision impairment and their representative bodies were received and considered. In November 2009, the Department released a subsequent discussion report “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 the report “Investigation into access to electronic media for the hearing and vision impaired: media access review final report”. The report included two recommendations directly relating to audio description: i) that the government commissions a technical trial of audio description on the Australian Broadcasting Corporation (ABC) and that ii) the government gives further consideration to the introduction of progressive AD 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 the funding of the State party government, the ABC 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-months trial on the ABC’s online catch-up television service 14 hours per week took place, and a final report was published on 5 April 2017;

e) In April 2017, the State party government announced the formation of an audio description Working Group to examine options for increasing the availability of audio description services. The Working Groups 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 required consideration by the Australian Government and provided a preliminary indication of the processes that would need to occur 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 Australian 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 which drew partly from the trials reflect 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 considers the advantages and disadvantages of some technical options including the preference of older viewers for broadcast television and the challenges that older viewers may have in utilising online platforms, particularly those that are vision impaired and may not have familiarity with the appropriate devices.

4.9 In relation with the author's considerations 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 free-to-air audiences and increasing financial challenges. Australia broadcasting structure is spectrally 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 hence resources.

4.10 Concerning author's consideration that the State party should publically set "soft targets" for broadcasters to provide audio description, it argues that broadcasters have requested government support due to the structural implementation issues facing free-to-air television. For this reason, it is not possible to separate soft targets for broadcasters from some level of Government involvement. Finally, in relation to author's consideration that the State party should develop a publically available comprehensive plan for achieving Convention rights under articles 9 and 30, the State party refers to its National Disability Strategy which is consistent with Australia's margin of appreciation to prioritise certain resource demands, including the delivery of accessibility services for other persons with disabilities, over others. The State party considers that the Convention does not require State 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 withdrew should be viewed as a regressive step. The State party sustains that such a conclusion would discourage State parties from conducting research, trials and testing that ultimately leads to better policy and practical outcomes. This would be contrary to the meaning of the words "to take appropriate measures" or take steps to ensure accessibility.

4.12 Regarding 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 vision impairments in respect of free-to-air television. It submits that "reasonable accommodation" relates to where an adjustment is needed in a particular case as it relates to an individual. It refers to Committee's option that reasonable accommodation duties are different from accessibility duties because while both aim to guarantee 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 [...]" (b) As an *ex nunc* duty [...] The duty to provide

reasonable accommodation is an individualized reactive duty that is applicable from the moment a request for accommodation is received [...]<sup>3</sup>.

4.13 Finally, concerning 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 subjected 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 prioritisation of resources after weighing up relevant considerations. The State party refers to its arguments under article 9 in conjunction with articles 4(1) and (2) to assert that it has taken deliberate and concrete measures with a view to achieving progressively 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) above to sustain that it has not taken measures in respect of implementing audio description 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 submission**

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 only refers 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 Australian government 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 exercise of any power under any Commonwealth law or for any Commonwealth program or the administration of any law or program<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 for audio description services to remain switched on following the trial end-date. She did not receive any response.

5.4 The author also 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 AD, it has failed to show commitment to ongoing funding or provision of audio description on any platform. It has also failed to adopt a plan, strategy or policy framework towards the

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

<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> CRPD/C/GC/6, par. 11.

progressive realization of these rights. The requirements to monitor and devise strategies and plans exist even where there are resource constraints.

5.6 First, the author argues that resource constraints are no excuse for the State party's failure to devise strategies and concrete plans towards the realization of rights. The State party has not provided any evidence of resource or financial constraints. The mere assertion of the existence of such constraints does not make it so. And even if such constraints existed, this does not excuse the failure to provide legislative and monitoring frameworks to ensure that concrete and deliberate steps are made towards the full realisation of Convention rights. It is also revealing that the State party considers "decreasing free-to-air audiences" as a relevant factor for the provision of audio description services. The author submits that the fact that the audience decrease is entirely irrelevant to the obligation. In any case, the author notes that she also submitted a complaint that no audio description is available on free online "catch up" television services.

5.7 Second, as to the State party's argument that setting of soft targets for broadcasters could not be separated from some level of government involvement as broadcasters have 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 the development of a publicly available, comprehensive plan for achieving Convention rights under articles 9 and 30. 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 (para 33 of her communication) are consistent with both the recommendations made by 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 by the Committee in its Concluding observation 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 in showing commitment to ongoing funding of 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 realisation of audio description services, especially given that there appears to be no timeframe for the response to be prepared and made public. This approach is not consistent with the requirements underlying the concept of progressive realization: a) She submits that the measures taken by the State party have not been taken expeditiously or effectively. The measures 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 substantive measures implemented were two trials conducted in 2012 and 2015 respectively neither of which have led to any ongoing funding of audio description

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<sup>7</sup> 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, 25 July 2019, recommendation 44. 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, 15 October 2019, paras. 17-18, see below para. 10.10.

and no deliberate, concrete and targeted plans or strategies have been implemented; b) there is no framework for the continuous monitoring of the development or promotion of audio description; c) there are no timeframes 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; and e) there is no relevant legal framework in place, including no minimum standards or soft targets.

**State party's further observations on the admissibility and the merits of the communication.**

6.1 On 6 March 2020, the State party submitted further observations on the admissibility and the 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 section 24 and 29 of the Disability Discrimination Act. It contends that it would have been possible for the author to make a complaint under this Act regarding the Australian government's actions with respect to broadcasting on the ABC and SBS. It explains that the national broadcasting services include those that are provided by the Australian Broadcasting Corporation (ABC) or the Special Broadcasting Service Corporation (SBS), which are publicly funded national broadcasters and governed by the Australian Broadcasting Corporation Act 1983 and the Broadcasting Service Act 1992<sup>9</sup>. The author could have equally made a complaint under section 29 of the Disability Discrimination Act. Broadcasters are performing a function under the Broadcasting Services Act 1992. ABC and SBS as the national broadcasters are performing a function under a Commonwealth program, which is defined by the Disability Discrimination Act as being a program conducted by or on behalf of the Government. As to the author's submission that no analogous cases have been successful 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.

6.3 Regarding the merits of the communication, the State party submits that on 16 December 2019, the Australian government announced that it would provide the national broadcasters, ABC and SBS, with 1'410'200.00 USD to introduce audio description services by 1 July 2020. The State party reiterates that it is making measureable progress in the exercise of its margin of discretion towards the full realisation of the rights in question. It is doing so with definitive timeframes and through the allocation of adequate resources.

**Author's further observations on the admissibility and the merits of the communication.**

7.1 On 3 July 2020, the author submitted further observations on the admissibility and merits of the communication. She reiterates her arguments that the complaint is admissible as Australian law does not permit neither the Australian Human Rights Commission nor 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 Convention rights.

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 realisation 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 1'410'200.00 USD to introduce audio description services by 1 July 2020. However, this announcement does not demonstrate any deliberate, concrete and targeted step towards realisation of audio description services. First, there is no indication of whether this funding will continue. She notices that no policy, guideline, funding agreement, legislative framework or any other document setting out the circumstances of this funding was published with the media announcement. Second, there is no evidence that audio description services on ABC and SBS will continue after the initial period. She observes that after the trials of provision of services of 2012 and 2015, the provision of audio description services did not continue following the initial funding. There is no legislative requirement to continue to

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<sup>9</sup> Broadcasting services act 1992, section 13.



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 ABC and SBS. No funding has been announced for any other free-to-air broadcaster. No steps have been taken towards the realisation of audio description on any other free-to-air broadcaster.

7.3 There is no formal plan for monitoring progress towards realisation, no prescription of any duties of different authorities and entities, no timeframes 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.

#### **State party's additional observations**

8. In its additional observations dated 18 November 2020, the State party submits that following the State party's provision, 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 people who are blind or visually impaired. 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 audio description content. 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. Committee's consideration of admissibility and the merits**

### **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 has not been and is not 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 Australia's 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 in case his complaint before the Commission had been unsuccessful.

9.4 However, the Committee notes the author's uncontested argument that the Disability Discrimination Act 1992 only provides recourse for limited or particular types of disability discrimination claims in the State party, namely:<sup>10</sup> a) a potential claim concerning the provision of audio description as a service could not be made against the Australian government but only against each individual television broadcaster; and b) 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 program or the administration of any law or program but the absence of any law nor policy related to audio description. In that regard, the Committee observes that the State party does not explain or provide any example on how such a complaint before the Commission and subsequent appeals before the Federal Circuit Court would 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

<sup>10</sup> See above para. 5.2.

author with an effective remedy.<sup>11</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: the author does not sufficiently substantiate in her submission the relevance of the model of "inclusive equality" in her case nor in which way the State party has violated its duty to provide the author with "reasonable accommodation". The Committee recalls that "reasonable accommodation" as defined by 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 base with others of all human rights and fundamental freedoms. "Accessibility is related to groups, whereas reasonable accommodation is related to individuals"<sup>12</sup>. The Committee considers that, in the present communication, the author's claims relate to general accessibility concerns by persons with visual impairments as her, 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) of the Convention, read in conjunction with articles 4 (1), 4 (2) of the Convention. Accordingly, it declares those parts of the communication admissible and proceeds with the examination of the merits.

### **Consideration of the merits**

10.1 The Committee has considered the present 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 the Committee's rules of procedure.

10.2 As regards the author's claims under articles 9 (1)(b) and 30(1)(b), read in conjunction with articles 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 visual impairments, 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 and systematic way. The Committee notes that the author's assertion that in the 11-year period referred in the initial State party's submission, the most substantive measures implemented were only two trials conducted in 2012 and 2015, and that no deliberate, concrete and targeted plans or strategies nor 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, within its discretion, with a view to progressively achieving the full realisation 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 description as this was critical in ascertaining the necessary information 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 the broadcasters; c) State party has a margin of appreciation in considering competing national priorities and

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<sup>11</sup> See, *X. v. Argentina* (CRPD/C/11/D/8/2012), para. 7.4; *Gemma Beasley v. Australia*, (CRPD/C/15/D/11/2013), para. 7.4.

<sup>12</sup> See, CRPD/C/GC/2, para. 25.

resources; and that d) its National Disability Strategy is consistent with its margin of appreciation to prioritise certain resource demands, including the delivery of accessibility services for other persons with disabilities, over others. The Committee also observes that the State party refers to these same arguments to sustain that it has neither 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) that, in any case, resource constraints are no excuse for the failure of the State party to adopt legislation, devise strategies, concrete plans and monitoring frameworks to ensure that concrete and deliberate steps are made towards full realisation of Convention rights; and that 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 AD services in 2020, the Committee notes the author's arguments that this does not demonstrate any deliberate, concrete and 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 ABC and SBS but not to any other free-to-air broadcaster.

10.7 The Committee recalls that, in accordance with article 9 (1)(b) of the Convention, "States Parties shall 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 [...] These measures, which shall include the identification and elimination of obstacles and barriers to accessibility shall apply to [...] information, communications and other services, including electronic services and emergency services". The Committee also recalls that, according to 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 shall 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, according to 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 these rights [...]." The Committee also 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>13</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>14</sup>.

10.8 The Committee also recalls its General Comment No. 2 on Accessibility according to which "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, i.e. 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".<sup>15</sup> It also recalls that persons with disabilities face technical and environmental barriers, such as a lack of information in accessible formats<sup>16</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

<sup>13</sup> CRPD/C/GC/4, para. 40; CESCR, GC No. 3 (1990) on the nature of States parties' obligations, para. 9.

<sup>14</sup> CESCR, GC No. 3 (1990) on the nature of States parties' obligations, para. 2

<sup>15</sup> See, CRPD/C/GC/2, para. 25.

<sup>16</sup> See, F. v. Austria, CRPD/C/14/D/21/2014, par. 8.5.

and create greater demand for access to information and knowledge, particularly in underserved and excluded populations, such as persons with disabilities.<sup>17</sup>

10.9 The Committee also 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 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>18</sup>

10.10 The Committee finally recalls that, in its concluding observations on the second and third report 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.[...]”<sup>19</sup>. 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>20</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 foreseeable measures to demonstrate its commitment to advance in the provision of audio description to persons with visual impairments in a sustainable manner.

10.12 In light of all 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 articles 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 articles 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 to:

(i) Adopt action plans and strategies to identify existing barriers to accessibility – including the provision of audio description services to visually impaired persons-, set time frames with specific deadlines and provide both the human and material resources necessary to remove the barriers, such action plans and strategies should be strictly implemented. The State party should also strengthen their monitoring mechanisms in order to ensure accessibility and it should continue providing sufficient funds to remove barriers to accessibility and train monitoring staff.<sup>21</sup>

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<sup>17</sup> See, CRPD/C/GC/2, para. 5.

<sup>18</sup> See, CRPD/C/GC/2, para. 33.

<sup>19</sup> See, CRPD/C/AUS/CO/2-3, 15 October 2019, para. 17.

<sup>20</sup> See, CRPD/C/AUS/CO/2-3, 15 October 2019, para. 18.

<sup>21</sup> See, CRPD/C/GC/2, para. 35.

(ii) Take the necessary legislative and policy measures with a view to ensuring the provision of audio description services to visually impaired persons.

(iii) 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) Ensure that appropriate and regular training and awareness raising activities on the scope of the Convention and its Optional Protocol, 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 these 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>22</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 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>22</sup> See, CRPD/C/GC/2, para. 35.