

Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

Experiences of people with disability
enforcing rights under the CRPD

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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Recommendation 1 – The Royal Commission should consider Communication No. 56/2018

The Royal Commission should consider the views adopted by the Committee concerning communication No.56/2018 and the Australian Government's response on any actions taken in light of the views and recommendations of the Committee due on 23 March 2023 in assessing Australia's implementation of, and compliance with, the CRPD.

Recommendation 2 – The Royal Commission should find the CRPD has not been fully implemented in Australia

The Royal Commission should find the Australian Government has not fully implemented the CRPD into relevant laws, policies and practices.

Recommendation 3 – Committee recommendations should be implemented

The Australian Government should implement Committee recommendations in full to give effect to Committee decisions and Australia's obligations under the CRPD.

Recommendation 4 – The Australian Government should act as a model litigant in responding to communications alleging breaches of the CRPD

The Australian Government should evaluate its approach in responding to individual communications alleging breaches of the CRPD and ensure it adopts model litigant behaviours.

Recommendation 5 – Develop an appropriate domestic complaint mechanism through co-design

The Australian Government should co-design an appropriate complaint, monitoring and reporting mechanism for measuring compliance with the CRPD in Australia with people with disability and representative organisations.

Recommendation 6: Fund legal advocacy and representative organisations

The Australian Government should fund legal advocacy and representative organisations to assist people with disability to report conduct that violates CRPD rights.

Recommendation 7 – The CRPD should be incorporated in full in Australian law

The CRPD should be incorporated in full in Australian law and to make CRPD rights justiciable and enforceable. This should be in the form of an Australian Charter of Human Rights and Freedoms or federal Human Rights Act.

Recommendation 8 – People with disability to be fully involved in the implementation and monitoring of the CRPD

The Australian Government should meaningfully involve people with disability in the implementation and monitoring of the CRPD. A permanent mechanism to facilitate this should be co-designed with people with disability and representative organisations.

1. Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to provide this submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Royal Commission**).¹

This submission details the difficulties faced by people with disability in making complaints and enforcing rights under the Convention on the Rights of Persons with Disabilities (**CRPD**).²

The Royal Commission's Terms of Reference recognise that:

'Australia has international obligations to take appropriate legislative, administrative and other measures to promote the human rights of people with disability, including to protect people with disability from all forms of exploitation, violence and abuse under the [CRPD].'³

The Commission is inquiring into (among other matters):

'(b) what governments, institutions and the community should do to achieve best practice to encourage reporting of, and effective investigations of and responses to, violence against, and abuse, neglect and exploitation of, people with disability, including addressing failures in, and impediments to, reporting, investigating and responding to such conduct.'⁴

PIAC recently represented Ms Lauren Henley in relation to Australia's failure to provide audio description on free-to-air television. After exhausting domestic complaint avenues, Ms Henley made a complaint to the UN Committee on the Rights of Persons with Disabilities (the **Committee**). On 23 September 2022, the Committee transmitted its decision finding Australia has failed to fulfil its obligations under the CRPD.⁵ The failure to mandate the provision of audio description on free-to-air television requires immediate Government action.

This submission focuses on the barriers that prevent individuals like Ms Henley from enforcing their rights under the CRPD in Australia, including the limited domestic avenues to make complaints and problems with available complaint mechanisms. Our comments are based on PIAC's experience assisting clients with disability, disability advocates and peak representative organisations.

¹ PIAC has also lodged the following submissions: PIAC, Submission to the Disability Royal Commission, *Institutional economic neglect of people with disability and homelessness* (21 April 2022); PIAC, Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Experiences of people with disability accessing air travel and pursuing complaints against airlines and airports* (December 2022); PIAC, Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Experiences of people with disability in immigration detention* (December 2022).

² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').

³ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Commonwealth Letters Patent*, 4 April 2019 <<https://disability.royalcommission.gov.au/publications/commonwealth-letters-patent>>.

⁴ *Ibid* [(b)].

⁵ 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, 27th sess*, UN Doc CRPD/C/27/D/56/2018 (23 September 2022, adopted 15 August 2022 – 9 September 2022) ('*Henley v Australia*').

The failure to fully implement CRPD rights in Australian law and the limited domestic avenues to hold responsible parties to account constitutes neglect on the part of the Australian Government and may ultimately contribute to people with disability experiencing further violence, abuse, neglect and exploitation.

2. Evidence heard by the Royal Commission in Public Hearing 18

On 8 to 9 November 2021, the Royal Commission held Public Hearing 18: *The human rights of people with disability and making the CRPD a reality in Australian law, policies and practices*. This hearing was held to 'examine the extent to which the CRPD is yet to be incorporated into Australian domestic law' and 'consider how the CRPD can be used to enhance the human rights of people with disability.'⁶ The full realisation of CRPD rights in Australia may assist to prevent violence, abuse, neglect and exploitation of people with disability.

Systemic issues raised during Public Hearing 18 included:

- people with disability and the broader community often lack awareness of the CRPD and the rights of people with disability;⁷
- people with disability are not able to obtain relief from Australian courts for alleged CRPD contraventions by Government (unless the Parliament has enacted legislation enshrining the right encapsulated in the CRPD);⁸
- very little of the CRPD has been expressly implemented by legislation in Australia so there are limited avenues for seeking relief;⁹
- the Committee can hear complaints (known as communications) from people in Australia but Australia is not bound to accept or implement the decisions of the Committee;¹⁰ and
- when a person with disability brings a claim attempting to enforce their human rights in Australia, a significant barrier at first instance is proving to the respondent that they actually have that human right.¹¹

⁶ Disability Royal Commission, 'Hearing explores turning the rights of people with disability into a reality' (Media Release, 5 November 2021) <<https://disability.royalcommission.gov.au/news-and-media/media-releases/hearing-explores-turning-rights-people-disability-reality>>.

⁷ Kate Eastman AM SC, 'Opening Address Counsel Assisting – Public hearing 18', *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, 8 November 2021, 6; Transcript of Proceedings, *The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (8 November 2021), P-36, P-46, P-60-P-62 ('Transcript of Proceedings'); Kate Eastman AM SC, Submissions of Counsel Assisting Public Hearing 18, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (14 December 2021) 7-9, 80-81, 115 ('Submissions of Counsel Assisting').

⁸ Ronald Sackville AO QC, 'Chair's Opening Address – Public hearing 18', *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, 8 November 2021, 4 ('Chair's Opening Address') citing *Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416; Submissions of Counsel Assisting (n 7) 47.

⁹ Chair's Opening Address (n 8) 5; Submissions of Counsel Assisting (n 7) 9, 80-82; Transcript of Proceedings (n 7) P-44 (Natalie Wade).

¹⁰ Chair's Opening Address (n 8) 4 citing *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, A/RES/61/106, Annex II (entered into force 3 May 2008); Submissions of Counsel Assisting (n 7) 44, 47, 71; Transcript of Proceedings (n 7) P-88-89 (Andrew Byrnes).

¹¹ Transcript of Proceedings (n 7) P-36-38, P-51–52.

The Submissions of Counsel Assisting Public Hearing 18 dated 14 December 2021 also identified there had been a number of communications made to the Committee in relation to alleged violations of the CRPD by Australia and, at that time, the Committee had issued adverse views against Australia in eight cases.¹²

In examining the manner and extent to which the CRPD has been implemented in Australia, Counsel Assisting Public Hearing 18 submitted:

‘based on the available evidence, it is open to the Royal Commission to find the Australian Government has not fully implemented the CRPD into relevant laws, policies and practices. There presently remains gaps in the implementation of the CRPD to protect, promote and ensure the CRPD rights to prevent violence, abuse, neglect and exploitation of people with disability in Australia.’¹³

The Australian Government’s submissions in response state:

‘... the views adopted by the CRPD Committee in respect of each of the complaints under the Optional Protocol regarding alleged violations of the CRPD by Australia referred to in Counsel Assisting’s Submissions at [236]-[240] were views expressed as to whether Australia, at the relevant point in time for each of the complaints, had failed to fulfil obligations under the CRPD in respect of the specific individuals who had raised their respective complaints. Australia engages in good faith with the individual complaints mechanism under the CRPD and considers the CRPD Committee’s views in each case. Further each of the complaints referred to in Counsel Assisting’s Submissions relates to events that occurred several years ago and that the most recent of the complaints was made some 6 years ago and predates the 2018 Report by more than 2 years. The public hearing did not seek to consider the question of whether and to what extent the laws and practices the subject of each complaint (including the laws and practices of the relevant states and territories) have, in the time since each complaint was addressed by the CRPD Committee, changed in response to the views adopted by the CRPD Committee in respect of each of the complaints. Accordingly, limited (if any) weight can be placed on the facts and matters the subject of those complaints in order to determine whether, in 2022, the Australian Government has not fully implemented the CRPD into relevant laws, policies and practices or whether, in 2022, there remain gaps in Australia’s implementation of the CRPD.’¹⁴

PIAC considers the outcomes of complaints lodged with the Committee and the actions of the Australian Government (and the relevant states and territories) in responding to Committee recommendations are relevant to the Royal Commission’s assessment of the implementation status of, and Australia’s compliance with, the CRPD. The Royal Commission now also has the benefit of the Committee’s recent views in *Henley v Australia* (CRPD Communication No. 56/2018).¹⁵ The Royal Commission should consider this decision as further evidence to support a finding that the Australian Government has not fully implemented the CRPD.

¹² Submissions of Counsel Assisting (n 7) 71 [236]-[241].

¹³ Submissions of Counsel Assisting (n 7) 83 [287].

¹⁴ Australian Government, Submissions by the Australian Government in response to Counsel Assisting’s Submissions in respect of Public Hearing 18, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (15 February 2022) 5-6 [14].

¹⁵ *Henley v Australia* (n 5).

Recommendation 1 – The Royal Commission should consider Communication No. 56/2018

The Royal Commission should consider the views adopted by the Committee concerning communication No.56/2018 and the Australian Government’s response on any actions taken in light of the views and recommendations of the Committee due on 23 March 2023 in assessing Australia’s implementation of, and compliance with, the CRPD.

3. *Lauren Henley v Australia (Communication No. 56/2018)*

Ms Henley has been blind since 2006 and is not able to access television programmes on an equal basis to sighted users in Australia because of the lack of audio description on free-to-air television.

The failure of the Australian Government to take all appropriate measures to progress the provision of audio description on free-to-air television in Australia has adversely affected the enjoyment of a number of Ms Henley’s rights under the CRPD. In particular:

- 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’; and
- Article 30(1)(b) compels States Parties to take ‘all appropriate measures to ensure that persons with disabilities...enjoy access to television programmes...in accessible formats.’¹⁶

The only domestic avenue for complaint available to Ms Henley in these circumstances was to the Australian Human Rights Commission (**AHRC**).

On 12 May 2015, Ms Henley lodged her complaint to the AHRC and requested it inquire into whether the Australian Government had breached the CRPD by failing to legislate minimum targets for the provision of audio described content on television and/or take all appropriate measures to ensure people who are blind or vision impaired enjoy access to television programs in accessible formats.

Between 20 July 2015 and 9 February 2016, Ms Henley and the Department of Communications (**Department**) provided submissions to the AHRC. However, on 14 March 2016, the President of the AHRC advised it would not continue to inquire into the complaint and the inquiry was closed. This decision was made under section 20(2)(c)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) which permits the AHRC to cease investigation of a complaint if it is of the opinion the complaint is misconceived and/or lacking in substance.

On 11 April 2016, Ms Henley applied to the Federal Circuit Court of Australia for administrative review of the AHRC President’s decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**). The Court was restricted to considering whether the President made a legal error or did not exercise her powers correctly; it had no jurisdiction to conduct a review of

¹⁶ CRPD (n 2) arts 9(1)(b), 30(1)(b).

the merits of the decision. On 10 April 2017, the Court confirmed the AHRC President made no legal error in deciding to discontinue Ms Henley's complaint and the application was dismissed.¹⁷

On 2 October 2018, Ms Henley submitted a communication to the Committee in relation to her complaint (**Communication**). The Australian Government provided submissions to the Committee on 30 September 2019, 6 March 2020 and 18 November 2020 and Ms Henley provided submissions in reply on 6 December 2019 and 3 July 2020.

In its response, the Australian Government submitted the Communication should be declared inadmissible for failure to exhaust domestic remedies.¹⁸ In particular, it contended Ms Henley could have filed a complaint to the AHRC under the *Disability Discrimination Act 1992* (Cth) (**DDA**) and, if the complaint could not be resolved after investigation and conciliation, Ms Henley could have commenced legal proceedings in the Federal Circuit Court or the Federal Court of Australia.¹⁹

Ms Henley submitted the Australian Government's submissions were misconceived because:

- a claim under section 24 of the DDA (which relates to discrimination in the provision of goods, services and facilities) could not be made against the Australian Government (or the Commonwealth of Australia) but only against each individual television broadcaster;
- a claim could not be made against the Australian Government under section 29 of the DDA (which relates to discrimination when administering Commonwealth laws and programs) as the complaint does not relate to the performance of any function or exercise of any power under any Commonwealth law or program or the administration of any law or program – it is precisely the *absence* of any Commonwealth law or program or policy that is the subject of the complaint; and
- therefore, there is no remedy against the Australian Government under the DDA and neither the AHRC or a Court could require the Australian Government to adopt measures to progress the provision of audio description (including legislating minimum targets for audio description) in Australia.²⁰

Following these submissions, the Australian Government continued to argue Ms Henley could make a complaint under the DDA with respect to broadcasting on the ABC and SBS. It also argued that broadcasters perform a function under the *Broadcasting Services Act 1992*, being Commonwealth legislation.²¹

Ms Henley reiterated there was no domestic remedy available that would provide effective relief because the remedies she sought - legislated minimum targets for audio description on television and a targeted plan for the achievement of CRPD rights over time - could not be delivered through AHRC or court processes.²² The Australian Government could not be impugned in any domestic proceeding, only the actions of the ABC or SBS could, and whether their conduct amounted to unlawful discrimination would be assessed in the context of all the circumstances of

¹⁷ *Henley v Australian Human Rights Commission & Anor* [2017] FCCA 677.

¹⁸ *Henley v Australia* (n 5) 3 [4.1].

¹⁹ *Ibid* 3 [4.2].

²⁰ *Ibid* 6 [5.2].

²¹ *Ibid* 8 [6.2].

²² *Ibid* 8 [7.1].

the case including as body corporates operating within a statutory framework.²³ Ms Henley also submitted the Australian Government's arguments were misconceived because '[c]ommercial broadcasters do not "perform a function" under the *Broadcasting Services Act 1992*'.²⁴

On 23 September 2022, the Committee rejected the Australian Government's submissions and found Ms Henley's Communication was admissible:

'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 [AHRC] 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 [DDA] would have had a reasonable prospect of success in the present case or would have provided the author with an effective remedy. 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.'²⁵

Turning to merit, the Committee found Australia 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 CRPD and called on the Australian Government to take immediate action to remove barriers to accessibility and implement legislation and policies to ensure audio description is available on free-to-air television.²⁶ The Committee made recommendations on the steps the Australian Government should take to achieve this:

(a) Concerning the author, the State party is under an obligation to afford her [Ms Henley] 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.

(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.

²³ Public Interest Advocacy Centre, 'Response of Lauren Henley to the Australian Government Submission dated 6 March 2020', Submission to the UN Committee on the Rights of Persons with Disabilities in *Henley v Australia*, 3 July 2020, 3-4 [15].

²⁴ Ibid 4-5 [17]-[18].

²⁵ *Henley v Australia* (n 5) 9-10 [9.4] (citations omitted).

²⁶ Ibid 12-13 [11].

(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.²⁷

The Australian Government has until 23 March 2023 to provide the Committee with its written response on the actions taken to implement the above recommendations.²⁸

A copy of the decision is **enclosed** with this submission.

The Committee has called on the Australian Government to take necessary legislative and policy measures to ensure the provision of audio description to people who are blind or vision impaired and to prevent similar violations in the future. The Committee's views support the Royal Commission finding that the Australian Government has not fully implemented the CRPD into relevant laws, policies and practices.

Recommendation 2 – The Royal Commission should find the CRPD has not been fully implemented in Australia

The Royal Commission should find the Australian Government has not fully implemented the CRPD into relevant laws, policies and practices.

Recommendation 3 – Committee recommendations should be implemented

The Australian Government should implement Committee recommendations in full to give effect to Committee decisions and Australia's obligations under the CRPD.

4. Problems with complaints mechanism and enforcement of rights under CRPD

4.1 Admissibility of communications

In accordance with Article 2 of the Optional Protocol, the Committee shall consider a communication inadmissible when:

1. The communication is anonymous;
2. The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention;
3. The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
4. All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;
5. It is manifestly ill-founded or not sufficiently substantiated; or when

²⁷ Ibid 12-13 [11] (citations omitted).

²⁸ Ibid 13 [12].

6. The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.²⁹

As Ms Henley's experience demonstrates, the jurisdictional requirement to exhaust domestic remedies can be particularly contentious and require complainants to go to significant lengths to exhaust domestic remedies and/or respond to the Australian Government's arguments on admissibility. While a complaint will not be considered inadmissible where the pursuit of remedies is unreasonably prolonged or unlikely to bring effective relief, this can be difficult to determine and requires legal advice. Complainants may also need to consider whether judicial review of administrative decisions is necessary to establish they have no further options to seek recourse domestically.

Furthermore, the objections raised by the Australian Government to the admissibility of Ms Henley's Communication were misconceived and required her to lodge detailed submissions to refute and expose the flaws in the Government's reasoning. The Australian Government recognises the competence of the Committee to receive and consider communications under the CRPD.³⁰ However, the Government's approach in the Henley matter demonstrates the technical barriers that must be overcome by individuals pursuing complaints to obtain successful outcomes. These legal arguments can further disempower victims of CRPD violations and delay Committee decisions.

4.2 Length of time to determine complaints

Ms Henley made her original complaint to the AHRC in 2015 and over seven years later, the Australian Government has still not legislated minimum targets for the provision of audio described content on television. Ms Henley's complaint highlights the extraordinary length of time it takes to pursue a complaint and obtain a decision. As stated by the former chair of the Committee, Professor Ron McCallum: 'It takes a great deal of courage and tenacity to stand the course of six or seven years'.³¹

People with disability who allege their rights under the CRPD are not being recognised should have access to domestic remedies and should not have to wait significant periods of time to have their complaints determined. The risk of violence, abuse, neglect or exploitation may be particularly acute in matters involving, for example, liberty, health, or standard of living.

Article 4 of the Optional Protocol permits the Committee to 'request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation'.³² However, such a request is exercised at the discretion of the Committee and doesn't guarantee the State Party *will* take measures to mitigate against harm.

²⁹ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008) art 2 ('*Optional Protocol*').

³⁰ *Ibid* art 1.

³¹ Kate Ashton, 'Lack of audio descriptions on Australian TV a human rights breach, UN committee finds' *ABC News* (online, 1 October 2022) <<https://www.abc.net.au/news/2022-10-01/accessible-television-for-blind-and-vision-impaired-community/101491710>>.

³² *Optional Protocol* (n 29) art 4.

An effective domestic complaints mechanism should be developed and co-designed with people with disability and representative organisations to ensure that complaints are investigated promptly and to prevent ongoing harm to people with disability and the community.

4.3 Resources required to pursue complaints

Ms Henley's complaints to the AHRC, Federal Circuit Court, and the Committee required significant time and effort from lawyers and barristers. Unfortunately, not everyone who may wish to make a complaint has access to legal assistance as there are limited lawyers who practice in this area, have awareness of the relevant complaint mechanisms and provide accessible legal services for people with disability.³³

Where an individual is receiving legal assistance and this is not provided on a pro bono basis, significant costs may be incurred due to the time and effort involved in preparing and progressing a complaint. These significant costs may ultimately dissuade individuals from proceeding with a complaint at a domestic or international level and ultimately prevent the realisation of CRPD rights. There is also a significant adverse cost risk involved in commencing proceedings in the Federal Court.

The limited avenues for domestic complaints and the time, effort and resources required to pursue a complaint under the Optional Protocol means many people with disability who are victims of CRPD violations may be prevented from raising these issues and seeking recourse. This is a significant impediment to reporting, investigating and responding to conduct that breaches the CRPD.

Recommendation 4 – The Australian Government should act as a model litigant in responding to communications alleging breaches of the CRPD

The Australian Government should evaluate its approach in responding to individual communications alleging breaches of the CRPD and ensure it adopts model litigant behaviours.

Recommendation 5 – Develop an appropriate domestic complaint mechanism through co-design

The Australian Government should co-design an appropriate complaint, monitoring and reporting mechanism for measuring compliance with the CRPD in Australia with people with disability and representative organisations.

Recommendation 6: Fund legal advocacy and representative organisations

The Australian Government should fund legal advocacy and representative organisations to assist people with disability to report conduct that violates CRPD rights.

5. Implementing the CRPD in Australia

Counsel Assisting Public Hearing 18 has recommended the Royal Commission 'consider how existing mechanisms can be improved together with considering better or different ways of

³³ Transcript of Proceedings (n 7) P-50 (Natalie Wade).

implementing the CRPD to prevent violence, abuse, neglect and exploitation of people with disability in Australia'.³⁴

PIAC considers the CRPD should be implemented to its full extent in Australia so that rights are justiciable and enforceable within the domestic legal framework.

In a Submission to the Committee on 25 July 2019, the AHRC noted:

'There remain many rights in the CRPD which have not been incorporated into domestic laws. The current gaps and inconsistencies in the legal protection of the rights of people with disability will continue in the absence of comprehensive human rights laws in Australia.'³⁵

...

'The Commission is of the view that a clear coordination mechanism is needed to facilitate whole of Government action to implement the CRPD, including to monitor measures for implementation, develop further measures for implementation and to coordinate the ongoing processes for reporting under the CRPD.'³⁶

While the Australian Capital Territory, Victoria and Queensland have state-based human rights acts, there is no federal equivalent. Stronger legislative protection to improve Australia's human rights framework and enable individuals to challenge governments where CRPD rights are violated is necessary. PIAC agrees legislation must be developed to comprehensively embed CRPD rights in Australia and supports current campaigns to introduce an Australian Charter of Human Rights and Freedoms³⁷ and a NSW Human Rights Act.³⁸ The AHRC has also recently announced it will release a position paper on the need for a federal Human Rights Act in 2023.³⁹

In the Committee's 'Concluding observations on the combined second and third periodic reports of Australia,' the Committee also recommended that Australia:

'Revise existing laws or enact new laws, including a national comprehensive human rights law, to expand and strengthen the scope and power of the Australian Human Rights Commission to perform the task of independently monitoring the implementation of the Convention, in line with article 33(2) of the Convention and the Committee's general comment No. 7.'⁴⁰

³⁴ Submissions of Counsel Assisting (n 7) 83 [288].

³⁵ Australian Human Rights Commission, 'Information concerning Australia's compliance with the Convention on the Rights of Persons with Disabilities', Submission to the United Nations Committee on the Rights of Persons with Disabilities, 25 July 2019, 5 [8] (citation omitted).

³⁶ Ibid 37 [124] (citation omitted).

³⁷ Human Rights Law Centre, 'Join the Campaign', *Charter of Rights* (Web Page, 2022) <<https://charterofrights.org.au>>.

³⁸ Australian Lawyers for Human Rights, 'Join the Campaign', *Human Rights Act for NSW* (Web Page) <<https://humanrightsforNSW.org>>.

³⁹ Rosalind Croucher AM, 'Commission News' (December 2022) *Australian Human Rights Commission*.

⁴⁰ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019, adopted 26 August 2019-20 September 2019) 15 [62(b)].

Restoring the independence and integrity of the AHRC, ensuring it is re-accredited as an 'A'-status National Human Rights Institution and adequately resourcing it to exercise its powers is essential to ongoing and independent monitoring.

The Royal Commission should also remind the Government of its obligation under article 33(3) of the CRPD to involve persons with disabilities and their representative organisations fully in the monitoring process.⁴¹

The 2019 Australian Civil Society Shadow Report to the Committee laments that '[t]here are no permanent or effective mechanisms to ensure active participation of people with disability, including children with disability in implementation and monitoring of the CRPD' and recommends a permanent mechanism be established.⁴² PIAC supports this recommendation.

Recommendation 7 – The CRPD should be incorporated in full in Australian law

The CRPD should be incorporated in full in Australian law and to make CRPD rights justiciable and enforceable. This should be in the form of an Australian Charter of Human Rights and Freedoms or federal Human Rights Act.

Recommendation 8 – People with disability to be fully involved in the implementation and monitoring of the CRPD

The Australian Government should meaningfully involve people with disability in the implementation and monitoring of the CRPD. A permanent mechanism to facilitate this should be co-designed with people with disability and representative organisations.

⁴¹ CRPD (n 2) art 33(3).

⁴² Australian Civil Society CRPD Shadow Report Working Group, 'Disability Rights Now 2019', Australian Civil Society Shadow Report to the United Nations Committee on the Rights of Persons with Disabilities, July 2019, 11, 12, 14, 43 (citation omitted).