



# Opening Address Counsel Assisting – Kate Eastman AM SC

## Public hearing 18: The human rights of people with disability and making the Convention on the Rights of Persons with Disabilities a reality in Australian law, policies and practices

**Virtual, 8 November 2021**

Thank you, Commissioners.

I also acknowledge and pay my respect to the traditional custodians on the lands on which we meet today. I pay my respects to First Nations Elders past, present and emerging, as well as acknowledging all First Nations people following this public hearing.

This public hearing will focus on the human rights of people with disability and the implementation of the *Convention on the Rights of Persons with Disabilities (CRPD)*. The *CRPD*, as I'll call it, is an international law called a treaty or a convention. The *CRPD* is the result of negotiations between countries, including Australia. The *CRPD* sets out a range of human rights for people with disability and it also imposes legal obligations on Australia to ensure and promote the full realisation of human rights.

The *CRPD* has a number of general principles and they include the following:

- respect for inherent dignity, individual autonomy, including freedom to make one's own choices, and independence of persons;
- non-discrimination;
- full participation and inclusion in society;
- equal opportunity; and
- accessibility.

These principles guide the interpretation and the implementation of the specific *CRPD* rights.

The *CRPD* rights are minimum standards, not a final destination.

In Australia, international treaties like the *CRPD* are not automatically part of Australian law. The rights in the *CRPD* cannot be enforced by Australian courts or tribunals. One of the issues this hearing will address is how international human rights become law and enforceable in Australia.

Commissioners, when we talk about the *CRPD*, we are using a lot of abbreviations and a lot of legal terms. I will do my best to try to speak in plain English, but some of these legal expressions come from the United Nations. So we have prepared a document which we hope will assist in working with the abbreviations and the various words. The document which we have called 'Abbreviations and Words' is on the Royal Commission's website, and I encourage everyone to access that document so you can follow along with some of the evidence over the course of the next two days.

Why has the Royal Commission decided to focus on the *CRPD* at this point in time? As the Chair noted earlier, the Royal Commission's terms of reference identify the importance of human rights and the *CRPD* and it is critically relevant to the way in which this Royal Commission undertakes its work. In addition to those parts of the terms of reference the Chair referred to, I also note that there is a requirement that the Royal Commission consider the following:

*...innovative models of preventing, reporting, investigating or responding to violence against and abuse, neglect or exploitation of people with disability.*

Looking at innovative models includes looking at the way in which the *CRPD* could be implemented.

The Chair has touched on the importance of a human rights approach, and I want to say something about a human rights approach. A human rights approach assumes the existence of human rights, but it goes beyond merely enshrining those rights in law. Indeed, a human rights approach is proactive. It doesn't wait to respond after a person's rights have been violated.

A human rights based approach uses the human rights principles to guide and evaluate the development and implementation of laws, policies and practices.

A human rights based approach requires an understanding of laws, systems and policies that affect the lives of people with disability.

Applying a human rights based approach for people with disability poses the following questions. First, does a policy or program have the main objective to fulfil human rights?

Have all policies and programs in all sectors and in all phases of policy-making and programs been guided by the principles and standards derived from international human rights treaties such as the *CRPD*?

A further question is to ask, have the rights holders and their entitlements been identified? The rights holders being identified as the beneficiary of the rights set out in the *CRPD*. Identifying rights holders is one step but a further step is to ask, have the corresponding duty bearers identified their obligations?

So one asks, do the policies and programs work towards strengthening the capacities of rights holders to make their claims and of the duty bearers to meet their obligations? This means, for example, services should be designed and delivered in a manner that respects the recipient's rights. Services that do not pay attention to rights may unintentionally result in future rights violations, ideally that should be avoided.

A human rights based approach is person centred. People with disability are the rights bearers rather than passive recipients. They should be included in the design and the decision making. People with disability are active claimants of rights in relation to the duty bearers. Those duty bearers may be governments, private sector organisations or anyone providing services and supports.

It has been said that the real potential of human rights lies in its ability to change the way people perceive themselves vis-a-vis the government and other actors. A rights-based framework provides a mechanism for re-analysing and renaming 'problems' as rights 'violations', and as such something that should not be tolerated and should be addressed.

Implementing a rights based approach ensures there is a focus on respecting the rights of people with disability but, most importantly, accountability on the duty bearers. Commissioners, we will consider what accountability means in the context of implementing the *CRPD*, and I note there are a range of mechanisms. You will be aware, for example, of the 2019 *UN Disability Inclusion Strategy*, which applies to the work of the United Nations, and to some more recent indicators on the *CRPD* implementation released by the Office of the High Commissioner on Human Rights in November last year.

Can I now turn to the influence of the *CRPD* on the Royal Commission's work to date. The influence of the *CRPD* can be seen in the 13 research papers published on the Royal Commission's website. These research papers address the human rights of people

with disability, and there are two specific research papers that I will focus on in the course of this hearing.

The first is our first project and our first research paper published. It was prepared by Rosemary Kayess and Therese Sands in 2020 and it is entitled *Convention on the Rights of Persons with Disabilities: Shining a light on social transformation*. This report was commissioned to describe the international human rights context in which the Royal Commission operates. You will shortly hear from Ms Kayess and Ms Sands. Ms Kayess is currently the Chair of the Committee on the Rights of Persons with Disabilities. The Committee that monitors the *CRPD*. Ms Kayess and Ms Sands will tell you about their research, their findings and the issues Australia needs to address to better implement the *CRPD* rights in Australia.

The second report was prepared by Emeritus Professor Ron McCallum in 2020. His report is *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*. Professor McCallum was the first Chair of the Committee on the Rights of Persons with Disabilities. His report is a detailed analysis of how Australia has complied with its international obligations. Commissioners, as you are aware, Australia is required to prepare reports for the *CRPD* Committee, explaining how Australia is ensuring and promoting *CRPD* rights in Australia.

When the Committee receives the Australian report, it reviews the report, it asks questions of the Australian Government officials and it publishes its own report called 'Concluding Observations'. It is, in effect, a report card on whether Australia is meeting its obligations. You will hear about Australia's performance and the role of the disability advocacy groups in this process, sometimes called constructive dialogue.

The *CRPD* has also influenced the work of public hearings. The *CRPD* has been raised in a number of public hearings to date. Commissioners, may I remind you of some of the ways the *CRPD* has arisen in the public hearings. At Public hearing 3 concerning the experiences of people with disability in group homes that was held in Melbourne in December 2019, you heard from Naomi Anderson, a solicitor from Villamanta Legal Centre, and she said:

*...rights don't really count for much if they are not legally enforceable. If there is nothing you can do to enforce that right, it actually may as well not exist.*

At the same hearing, Dr Colleen Pearce, the Victorian Public Advocate, was asked about translating human rights from abstract concepts to the practical implementation of those rights. She was asked, can these rights actually make a difference, and she said this:

*I think it makes a difference in the way we approach our work and how we make decisions, how we involve people with disability in work of the office...*

There referring to the Office of the Victorian Public Advocate.

And she said this:

*...I think it is in those very small intangible ways that we see differences in the office and the work we do.*

At Public hearing 4 concerning the health care and services for people with cognitive disability held in Homebush New South Wales in February 2020, Professor Julian Trollor made note of Article 25 of the *CRPD*:

*The right of Australians with disabilities to the 'enjoyment of the highest attainable standard of health without discrimination on the basis of disability'...*

He said this:

*In my opinion, realising this goal for people with intellectual disability and for autistic people requires clinicians, health systems and policies that understand and respond adaptively to the complex and multifaceted impact of these developmental differences.*

At Public hearing 5, concerning the impact on people with disability during the COVID-19 pandemic held in August last year, you heard from the then Special Rapporteur for People with Disability, Ms Catalina Devandas. She talked about the importance of the *CRPD* rights being central to the responses of governments during the time of the pandemic.

At Public hearing 9, concerning the systemic barriers for people with disability seeking open employment, Mr Ed Sianski told you that after 25 years of his son trying to get a job, it had convinced him that there was, as he described, 'a cul-de-sac of neglect'. He said this:

*It is shameful. I didn't realise that Australia had actually signed up to a... Convention on the Rights of People with Disability, and at paragraph 27 of that document, says that everyone has got a right to a job of some kind.*

At the same Public hearing you heard from Dr Ben Gauntlett, Australia's Disability Discrimination Commissioner, and he said the *CRPD* was the primary document which

he needed to refer to when discharging his functions as the Disability Discrimination Commissioner.

This is not an exhaustive list.

The *CRPD* has also been raised in submissions, private sessions and responses to issues papers.

In April 2020, the Royal Commission released its issues paper on rights and attitudes. The Royal Commission wanted to understand the laws, policies, practices and supports that are needed to reduce the risk of violence, abuse, neglect and exploitation and referred to the lack of rights awareness among people, organisations and governments, and also noted the negative attitudes that can shape laws, policies and practices that stigmatise and discriminate against people with disability.

The Royal Commission received 66 responses to the Issues Paper and an overview of those responses was published by the Royal Commission in April this year, and it is on the website. A key theme emerging from the responses was that both people with disability and the broader community lack awareness of the rights of people with disability, which can enable violence, abuse, neglect and exploitation of people with disability.

The submissions addressed concerns that the rights to the full access to education, health, legal services, employment, as well as other relevant areas, was 'not reflected in Australian law'. It was suggested that the 'current laws in Australia are outdated and inadequate, and fail to acknowledge and respect the fundamental freedoms that people with disability should have or provide adequate protection from systemic governmental discrimination, abuse, violence, neglect and exploitation'.

The importance of the *CRPD* in guiding transformation of law and practice was emphasised in the submissions, noting that the *CRPD* provides a human rights lens through which the character and impact of 'social wrongs', including marginalisation, segregation and exclusion of people with disability in all spheres of society may be understood and addressed. It was suggested that the *CRPD* provides a blueprint and a framework through which to transform societies from a state of disability exclusion to one of disability inclusion.

The submissions included suggestions for change and a way of translating Australia's obligations under the *CRPD* into Australian law. We will address some of those suggestions during the course of the hearing.

Commissioners, in June last year you received the paper from the Australian Government, described by the Australian Government as a background paper that set out Australia's position and interpretive approach to the *CRPD*. A copy of that paper is on the Royal Commission's website. The Government said that the paper was intended to assist the Royal Commission and focuses on the Australian Government's interpretation of its obligations under the *CRPD*. We will examine the approach taken by the Australian Government at this hearing.

It is for these reasons that it was opportune for the Royal Commission to conduct this short hearing. This very short hearing over two days will examine the relevance and significance of the *CRPD* to people with disability in Australia. We will pose the question, how can international human rights law be more than a slogan and a symbolic gesture? What needs to happen to turn rights into reality for people with disability?

May I stress that over these two days we will not seek to answer all of the questions. The purpose of this hearing is to understand how international human rights can become part of Australian law, practices and policies and the way in which the *CRPD* rights could be stronger and more effective in Australia.

Can I turn to this hearing. As I said, you will shortly hear from Rosemary Kayess and Therese Sands. Commissioners, at Public hearing 3, you may recall that Ms Kayess provided us with a very clear and extremely helpful overview of the operation of the *CRPD*, so I will not ask Ms Kayess to repeat her evidence from Public hearing 3, but we will focus on the research paper. I will ask Ms Kayess and Ms Sands about a number of issues arising from their research. They will tell you the *CRPD* has modified, transformed and added to the traditional human rights. They challenge the suggestion that the *CRPD* does not create any new rights and they will tell you that the *CRPD* has codified a human rights model of disability. This model rejects the historical treatment of people with disability on the basis of exclusion and segregation, that people with disability should enjoy their rights as citizens, and a person's disability is not a justification for the denial of rights.

We will have a break after hearing from Ms Kayess and Ms Sands

Then, Commissioners, we will turn to examine the awareness of the *CRPD* in the broader community, and some examples about how people with disability can understand and know more about their rights. Mr Ian Cummins and Ms Rachel High from Our Voice SA have pre-recorded some evidence from a discussion with me last week, and they will tell you what human rights means for them.

Commissioners, we have also had an opportunity to talk to Children and Young People with Disability Australia (**CYDA**), and over the course of the coming weeks we will ensure that you can also hear about the experience of young people and their approach to human rights and the *CRPD*.

Later today, you will hear from Ms Natalie Wade. She is a respected legal practitioner with an established background in human rights law and advocacy, and she has particular expertise in disability rights and public law. She will tell you how the *CRPD* is relevant to her work, her experience of how people with disability and those people and organisations responsible for supporting people with disability apply the *CRPD*. She will also tell you about some of her law reform work and projects. In fact, her book was published late last week, and she will share her recent publication with you.

On the topic of advocacy, Commissioners, in the Interim Report you noted the importance of advocacy. You said:

*Disability advocacy is acting, speaking or writing to promote, protect and defend the rights of people with disability. Independent advocacy by people with disability plays an important role in implementing and monitoring the CRPD.*

You will hear about the work of the Disabled Peoples Organisations (**DPOs**) and the Disability Representative Organisations (**DROs**). Damian Griffis, June Riemer from First Peoples Disability Network Australia (**FPDN**) will tell you about the experience of First Nations people and the extent to which the *CRPD* addresses the rights of First Nations people with disability. They will be joined by Kelly Cox and Frances Quan Farrant from People with Disability Australia (**PWDA**), and you will hear about their advocacy at both an international and local level. We will examine the relationship between the range of international human rights laws, Chair, that you have described, and those specifically concerning the rights of First Nations people.

We have very kindly been assisted in the preparation for this hearing by a discussion with the Australian Federation of Disability Organisations (**AFDO**). AFDO and some of its members shared their experiences with the *CRPD* and the nature and extent of their



advocacy work in various areas. They have highlighted the importance of DPOs and DROs being funded to be able to deliver effective advocacy services and supports. They told us that people with disability may have no knowledge about their rights, and they have said that it is often until a person with disability is at a point of crisis that they may become aware of their rights.

Commissioners, we need to address the relationship between international human rights treaties like the *CRPD* and Australian law. You will hear later this afternoon from Emeritus Professor Andrew Byrnes, who is one of Australia's leading international human rights lawyers. He will tell you about the nature of international treaty law, how it converts into Australian law, and we will talk to him about some of the concepts and interpretation of rights. We will also ask him about the Commonwealth's Parliamentary Joint Committee on Human Rights and its role in scrutinising proposed laws against the international treaties, including the *CRPD*.

Commissioners, you noted earlier the models called dialogue models, and you will hear tomorrow from Dr Helen Watchirs OAM, the President and Human Rights Commissioner for the ACT Human Rights Commission, and Ms Karen Toohey, the Discrimination, Health Services, Disability and Community Services Commissioner, about the experiences of the dialogue model in the ACT.

We need to look at other models and consider both the strengths and weaknesses of other models so that we can consider a range of perhaps innovative approaches for Australia.

Commissioners, it is well accepted that meeting human rights obligations on a day-to-day basis and in day-to-day life is not just the responsibility of governments. The private sector and business impact on the rights of people with disability in a wide range of areas: education, employment, the media, technology, superannuation, insurance, transport, housing, and access to premises. Specifically, the *National Disability Insurance Scheme Act* refers to the *CRPD* and other international human rights treaties.

Commissioners, as you are aware, the *NDIS Act* is a model that regulates government agencies but also private corporations that provide supports and services to people with disability.

Commissioners, you may recall at Public hearing 13 that you heard that the directors of Sunnyfield Disability Services received training in relation to the *CRPD* and the relevance of the *CRPD* to the work of that particular service provider. So it is an important

opportunity to consider how the *CRPD* rights apply in Australia with respect to corporations and businesses; in effect, the private sector.

Over the past 20 years there has been an increasing movement to hold corporations accountable if business decisions and their actions impact on the human rights of individuals. You will hear tomorrow from Professor Justine Nolan, the Director of the Australian Human Rights Institute at the University of New South Wales, about recent developments for business and human rights, including modern slavery laws. Professor Nolan will address how a human rights approach has developed through the 2011 UN *Guiding Principles on Business and Human Rights*, which were unanimously endorsed by the UN Human Rights Council. She will explain how the *Guiding Principles* operate.

People with disability do not feature prominently in those *Guiding Principles*. But having said that, in 2017 the United Nations and the International Labour Organisation released a *Guide for Business on the Rights of Persons with Disabilities* to assist business respect and support the rights of persons with disabilities and benefit from inclusion. So we will touch on some of the work done by the International Labour Organisation.

Commissioners, the participation of people with disability in organisations, including government, corporate and the business world, is also an important consideration. The participation of people with disability is one of the core tenets of the *CRPD*. People with disability should have a seat at the table when decisions about them are being made. You will hear tomorrow from Christina Ryan, the Founder and Chief Executive Officer of the Disability Leadership Institute, about how the *CRPD* and a rights based framework applies in the context of leadership, and particularly she will address Article 29 of the *CRPD* concerning participation in political and public life.

Commissioners, finally, there will be an opportunity to hear from the Australian Government. We expect that you will hear from Sue Robertson, the First Assistant Secretary, International Division of the Attorney-General's Department; Mr Andrew Walter, the First Assistant Secretary, Integrity and Security Division of the Attorney-General's Department; and Luke Mansfield, Acting Deputy-Secretary, Disability and Carers, in the Department of Social Services.

We will ask the representatives of the Australian Government about a range of issues arising from the background paper and the implementation of the *CRPD* in Australia. The government has provided answers to a series of questions that we had asked them prior to the hearing.

The issues that we will explore with the Australian Government officials will include the following: the steps Australia takes when it accepts international treaty law obligations such as the *CRPD*; the Australian Government's understanding of what the *CRPD* obligations would mean for Australia at the time it ratified the *CRPD* in July 2008; at that time, whether the Australian Government undertook a review of Australian laws and practices to determine what needed to be addressed when the *CRPD* obligations commenced; we will ask the Australian Government about its approach to interpreting and understanding the *CRPD* rights, including such concepts as what is 'progressive realisation', and what is a 'margin of appreciation'.

We will ask the Australian Government about its understanding of and application of a human rights based approach to address violence, abuse, neglect and exploitation of people with disability. We will ask about the impact of parliamentary scrutiny processes on proposed Australian laws that directly and indirectly impact on people with disability. We will ask the Australian Government how it has developed, if it has a focal point, and how that operates across the government. We will ask about the ways the *CRPD* has been incorporated into Australian laws, policies and practices, including the NDIS and the National Disability Strategy. We will ask the Australian Government about the way it has developed awareness of *CRPD* rights, including education about human rights. We will ask the Government about how it includes people with disability, the DPOs and the DROs, in the way it seeks to implement the *CRPD*. We will ask the Australian Government whether it considers the *CRPD* rights apply to corporations and private sector entities and, if so, what it has done to date in relation to the private sector. We will ask the Australian Government how it measures and evaluates its compliance with the *CRPD* within specific agencies and departments concerned with the *CRPD* and more generally. We will ask the Australian Government's views about the gaps in the protection of the *CRPD* rights in Australia. We will ask about the responses to the *CRPD* Committee's concluding observations and its responses to complaints made to the *CRPD* Committee under the optional protocol. This is an opportunity for a person who has exhausted all of their domestic remedies to petition or make a complaint to the international body.

Finally, we will ask Australia whether it considers the experiences of other jurisdictions should be considered to better protect, respect and fulfil the *CRPD* rights.

Commissioners, I conclude by observing a comment made in response to the Rights and Attitudes Issues Paper. The person who made the submission said this:

*The CRPD should become more than just an aspirational exercise but something that is genuinely adhered to in day-to-day life.*

Commissioners, a human rights approach means that people with disability are entitled to voice their concerns and hold the duty bearers accountable when their rights are not respected.

For people with disability, a human rights based approach affirms they are entitled to enjoy all human rights and simply live a life free from violence, abuse, neglect and exploitation. It is a right to be included.

Commissioners, I will conclude by reminding those following the proceedings about the protections for witnesses in the *Royal Commissions Act*. I have said now on many occasions, section 6M provides a protection to any witnesses, and outlines the consequences for those who engage in any conduct that uses, causes, inflicts or creates any disadvantage to a person on account of that person having appeared as a witness before the Royal Commission, given evidence or produced documents to the Royal Commission.

Thank you, Commissioners.