AUSTRALIAN FEMINISTS FOR WOMEN'S RIGHTS

Submission to the Federal inquiry on Australia's Human Rights Framework

Executive summary

Australian Feminists for Women's Rights (AF4WR) welcome the opportunity to provide input into this Inquiry. We are a feminist group whose object is research-based advocacy on women's rights.

Consistent with our remit, our primary focus in this submission is **the human rights of women and girls**, which implies not only human rights protections available to all but also protections that are specific to our sex, in line with the provisions of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, 1979) and other "soft" international human rights instruments such as the 1993 Declaration on the Elimination of Violence Against Women (DEVAW) and the UN's twelve critical areas of concern for women, dating from the 1995 Fourth World Conference on Women. Of these twelve areas, we focus in particular in this submission on Women and Health, Violence Against Women, Human Rights of Women, Women and the Media and the Girl Child.

We are of opinion that, in the absence of broad ranging constitutional protections of human rights such as exist in some other comparable countries, Australia urgently needs a Federal Human Rights Act (FHRA). In this, we are in agreement with the position put forward by the Australian Human Rights Commission (AHRC 2022a, 2023a), although we consider some matters to be insufficiently addressed by the AHRC, as we discuss in this submission.

We are also of the opinion that to be effectively applicable, any future FHRA needs to be supported by **robust public mechanisms for both oversight of the application of human rights law and adjudication and arbitration in the case of human rights claims and disputes**, whether those claims and disputes are made against public or private entities or between individuals. These mechanisms need to be accountable to both parliament and to civil society stakeholders, and accessible to the latter in both procedural and financial terms, consistent with the **participation duty** outlined by the AHRC (2022a). Existing structures are, in our opinion, insufficient, and insufficiently resourced, to ensure accountability and accessibility outcomes, and participation is inadequate to ensure that a range of perspectives are heard and taken on board in policymaking and rights education.

We are particularly concerned at the **retreat from public responsibility for human rights outcomes** in many areas, including but not limited to public resourcing to support equality of access to rights. The cost imposition on individuals seeking to defend their rights can be extremely high, and often incurred by those least able to afford it.

Current laws and mechanisms are also inadequate to appropriately address conflicts of rights. The AHRC (2022a) proposes broad principles for addressing conflicts of rights, but is weak on detail, and barely mentions rights related to sex, gender, and sexual orientation. Yet political and societal discussions of sex, gender and sexual orientation, including in relation to other rights areas such as the rights of children and of those with disabilities, as well as women's health, are currently dogged by such conflicts, due to insufficiencies of legal instruments and institutional mechanisms for addressing them. This matter is of particular concern to us.

We are further concerned at **the lack of adequate protections of freedoms of opinion, expression, association and assembly** as set out in Articles 18-22 of the International Covenant on Civil and Political Rights (ICCPR). It is a matter of some urgency that these freedoms are given clear legal protections, subject to only those reasonable and proportional limits that are necessary to enable participation of all and/or protect the common and/or public good.

From our perspective, the process of enacting robust Federal human rights legislation begs the following questions, all of which we address with the specific sex-based rights constituency of women in mind:

1. **In what areas does Australia currently fall short of its international human rights obligations and how can these shortfalls be addressed?**

2. **What principles should inform the new FHRA? How are rights constituencies to be identified and protected?**

3. **How is the diversity of rights constituencies and associated needs to be acknowledged while ensuring that the same fundamental human rights principles obtain for all? How are these different constituencies to be protected, notably in the case of actual or perceived conflicts of rights?**

4. **How are the rights of particularly vulnerable populations to be protected? This section focuses on children's rights and in particular those of girls, as one of the UN's post-Beijing 12 critical areas of concern.**

5. **How are protections against vilification and incitement to violence to be balanced with the fundamental freedoms of conscience, opinion, speech, association and assembly?**

6. **How is compliance with the Paris Principles and international treaty obligations, notably as concerns equality of access to rights justice, to be handled?**

The core treaties to which we refer in this submission are:

- International Covenant on Civil and Political Rights (ICCPR,1956)
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965)
- International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979)
- Convention against Torture and other cruel, inhuman or degrading treatment or punishment (CAT, 1984)
- Convention on the Rights of the Child (CRC, 1989)
- Convention on the Rights of Persons with Disabilities (CRPD, 2006)
- Refugee Convention (1951)

We also reference the Universal Declaration of Human Rights (UDHR, 1948), which is not itself a treaty but elaborates the human rights principles set out in the UN Charter and is thus considered a foundational document, informing the abovementioned treaties. Other relevant documents are the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) and the Declaration on the Elimination of Violence Against Women (DEVAW, 1993).

List of recommendations

Core recommendations

Recommendation 1: **That the Australian government legislate a Federal Human Rights Act (FHRA), in consultation with all stakeholders and ensuring inclusion of strong provisions for rights participation, education, application and redress mechanisms.**

Recommendation 2: **That the new FHRA include standalone articles as a tool both to protect past gains and improve the situation for women and for children. The articles and intent of CEDAW and CRC must be stated and embedded using unambiguous language and concepts in all relevant articles.**

Other recommendations

Recommendation 3. That the new FHRA **reassert the rights to health, water, housing and justice** particularly to those groups who are likely to find such services difficult to access in a market system.

Recommendation 4. That the new FHRA and any new associated Framework **mandate that the default is for public services that ensure the protection of fundamental human rights to be delivered by the public service** as per the recommendation of the independent report of the Special Rapporteur on Extreme Poverty and Human Righrs.

Reccommendation 5. That the new FHRA and any associated Framework **ensure that the AHRC is a well-resourced and independent public service that is immune to government interference**. The AHRC must be above political partisanship and able to provide frank and fearless advice to Federal and State governments.

Recommendation 6. That the new FHRA **include strong articulation of the preventative and protective principles** articulated by the AHRC (2022a).

Recommendation 7. That the new FHRA and any new associated Framework **provide for effective dialogue between the executive, legislative and the judiciary and reinforce the role of the AHRC** as the key advisory body on human rights.

Recommendation 8. That the new FHRA do more than simply incorporate the terms of the ICCPR. It **must unambiguously guarantee protection ot rights constituencies that are the focus of other UN treaties to which Australia is a signatory, notably CEDAW, CERD and CRC, as well as UNDRIP.** These constituencies and the extent and limitations of their rights must be clearly defined.

Reeommendation 9. That the new FHRA **provide for the more recently emerged constituencies of homosexuals, intersex people and people with a gender identity**. These groups must appear clearly as discrete rights constituencies and are not conflatable with each other: that is, ***sexual orientation, intersex*** **and** ***gender identity*** **must be framed as distinct human rights considerations.**

Recommendation 10. That the **duty of participation** in the new FHRA be **explained to mean that a range of perspectives from a range of stakeholders must be heard and incorporated into design processes** so as to diminish diminish the likelihood of consultations being a form of uncritical rubber stamping of government policies that privilege particular points of view and ignore conflicts of rights. **Consultation must be genuine:** that is, *all* relevant stakeholders are engaged prior to a final decision being made.

Recommendation 11. That the new FHRA **include a clear, science-based definition of the word woman and contain clear references to women as a discrete rights constituency** towards whom the state has a responsibility under the terms of CEDAW.

Recommendation 12. That the new FHRA **incorporate clear definitions of sexual orientation and gender identity** and guide reforms to the SDA to that effect.

Recommendation 13. That the new FHRA **ensure that both the AHRC and court structures have the capacity to offer protection to particular groups** where there is significant evidence that there are inadequate human rights protections for those groups.

Recommendation 14. That the new FHRA **provide clear guidelines for dealing with conflicts of rights**, imcluding consultation with stakeholders. This consultation must be entered into in good faith with all impacted groups, such that the rights of one constituency are not privileged at the expense of the rights of another.

Recommendation 15. **That a non-partisan study of the practice of so-called "gender affirming" medicine on minors be undertaken,** drawing on evidence-based and scientifically rigorous research, such that all medical and legal practitioners and all courts involved with these matters benefit from comprehensive and non-politically-motivated access to information.

Recommendation 16. That the new FHRA **attach more importance to children's rights and include a standalone article on children's rights** and reference their rights where appropriate in other articles.

Recommendation 17. That the new FHRA **create mechanisms that ensure the Family Court address the conflicts of interests** created by novel definitions of concepts.

Recommendation 18. That the new FHRA **require a national review of any existing or proposed state legislation containing a high risk or incidence of violations of children's rights.**

Recommendation 19. That the new FHRA **explicitly incorporate the freedoms of opinion, expression, assembly and association set out in the ICCPR Articles 18–22.** This includes those restrictions to these freedoms—and only those restrictions—that are necessary to protect the rights and freedoms of others and to guard against vilification or hostility that lead to, or constitute, incitement to violence or discrimination, notably against the protected rights constituencies that will be specifically mentioned in the Act.

Recommendation 20. That the new FHRA **subject any limits on freedom of speech and assembly to both the proportionality test and the reasonable person standard,** in order to ensure the objectives of diagonal accountability and participation. Ambiguous language such as "insult" or "offend" and even the term "hate speech" must be avoided, as these terms are imprecise and leave the way open for highly subjective and even idiosyncratic interpretations by policymakers, courts and individuals or groups wishing to make complaints.

Recommendation 21. That the new FHRA **ensure that groups that are typically marginalised, whether politically, societally, culturally or economically, have access to meaningful political communication** through, for example, strict directives concerning the political independence of, and community access to, public institutions including government, human rights oversight bodies and publicly controlled media and educational institutions.

Recommendation 22. That the new FRHA **include clear definitions of cyberbullying, cyber-stalking and cyber-abuse**, which stop short of thought-policing or overfocusing on "trigger words" of the sort that social media algorithms are currently set up to censor automatically. Such policing leads to idiosyncratic and heavy-handed censorship while often, paradoxically, leaving untouched more serious forms of cyber-bullying, particularly of women and girls.

Recommendation 23. That the new FHRA reflect the fact that **Australia has human rights obligations as one national state and needs one set of mechanisms for complaint and remedy being handled at Federal level, initially by the AHRC.** Where jurisdictional questions arise, the complaints-handling body should be empowered to expedite referral to the appropriate State or Federal authority through, among other things, the provision of clear guidance to complainants concerning next steps if a conciliation process is terminated.

Recommendation 24. That the new FHRA **provide for human rights information and education to be provided** not only to public service actors but also to the private sector and to individuals and groups seeking redress. This information and education should be available in accessible format for all.

Recommendation 25. That the new FHRA **centre the AHRC as the body administering human rights research, advocacy and mediation in consultation with the community.** The FHRA should provide for periodic reviews of the powers, funding and structure of the AHRC, such that it continues to be fit for purpose as the key human rights agency in a continually evolving sociopolitical context. An evidence-based approach must be taken to ensure the people administering programs to promote and protect human rights in Australia are representative of the Australian community.

Recommendation 26. That the new FHRA contain a **formal government commitment to meaningful international human rights engagement**, including appropriate resourcing of international or regional human rights commitments.

Recommendation 27. That **the previous level of Commonwealth funding for legal aid services be restored**, and that overall funding be increased, such that the theoretical equality of access to rights be given material weight for those that are currently most disenfranchised, **including those deprived of liberty within the prison or other detention system, and including asylum seekers.**

Recommendation 28. **That the independence of the Family Court be restored** and its funding increased, and its regulations and procedures reviewed such that both vulnerable women and children have full access to the protection of their rights, notably the right to live free from violence and abuse.

Recommendation 29. That the new FHRA **explicitly include provisions for the protection of the human rights of asylum seekers** incorporating the provisions of the ICCPR as well as the Refugee Convention, and that **a comprehensive review of the current** regime in relation to asylum seekers be undertaken as a matter of urgency.

Introduction : the state of women's rights

In 2013, when the amended Sex Discrimination Act (SDA, 1984), discussed in Section 3 below, was enacted, Australia ranked 23rd in the World Economic Forum's Global Gender Gap Report when measuring the gap between men and women in health, education, work and politics (WEF 2013). In 2022 the ranking had dropped to 50th place out of 156 countries (WEF 2022), and in it was estimated that it would take Australian another 135 years to achieve substantive equality between women and men in these areas (Devlin 2021). It is apparent that

existing instruments such as the SDA, other antidiscrimination legislation and the scrutiny of legislation by human rights bodies have not sufficiently protected or prevented the undermining of the human rights of women as a sex class.

Seventy years have passed since women's right to equality was enshrined in the Universal Declaration of Human Rights (UDHR), while the groundbreaking Convention on the Elimination of all forms of Discrimination against Women (CEDAW) was adopted 40 years ago. It has been 30 years since the Vienna Declaration and Programme of Action established that women's rights are an indivisible part of human rights. The same year, the Declaration on the Elimination of Violence Against Women (DEVAW) was signed. These instruments provide both legal and moral frameworks for the articulation and protection of the rights of women and girls as an indivisible part of human rights.

The widespread discrimination experienced by women by virtue of their sex was the impetus for the development of CEDAW. It is the one international treaty to unequivocally affirm the fundamental human rights of women and detail the meaning of equality for women and an agenda to secure those rights. The historical, entrenched and ongoing discrimination women and girls experience because of their sex violates the principles of equality of rights and respect for human dignity in the equal rights of women and men. This standalone treaty, ratified by 186 UN member states, is a testament of its value and importance in addressing the limitations of treaties such as the ICCPR for the protection of the human rights of women and girls.

However, as noted above, progress since CEDAW has been patchy and there has been regression in some areas. In particular, the COVID pandemic resulted in social and economic policies and strategies with unequal outcomes for women. At the start of the pandemic childcare was free, but short lived, ending abruptly in early July 2020. A week later, childcare workers, 97 percent of whom are female, were the first to be removed from the JobKeeper scheme. The Homebuilder scheme was announced at the same time, to *assist the residential construction market*, where males make up 88 percent of workers (Priestley 2021).

In January 2020, the Sex Discrimination Commissioner, Kate Jenkins, handed down her report on workplace sexual harassment, "Respect @Work" (AHRC 2020). This report examined the nature and prevalence of sexual harassment in Australian workplaces and made 55 recommendations to make workplaces safer for women, but the government of the day did not deliver any of the recommended legislative changes.

Women in Australia continue to experience discrimination in every part of their lives, as evidenced by the Australian government's 2023 Status of Women Report Card (Department of Prime Minister and Cabinet 2023).

AF4WR is deeply concerned that despite the evidence of need, CEDAW was not one of the international treaties considered foundational by the Australian Human Rights Commission (AHRC) in its framing of a proposed Federal Human Rights Act (FHRA) (AHRC 2022a).

Despite one of the major aims of the Commission's 2022 position paper being to identify the gaps in Australia's current framework, the lack of detail on the specificity required to advance women's rights remains a serious failure.

CEDAW declares the principle of equality by requiring States parties to take

> all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men (CEDAW, Article 3).

CEDAW recognises that when a concept of *equality* is used without full consideration of the differences between men and women, then the rights of women and girls are impaired. This core principle remains unarticulated in the AHRC's position paper and so its proposed FHRA falls short of implementing key rights for women and girls, which are already inadequately protected in Australia.

A new FHRA presents an opportunity for Australia to redress the shortcomings of existing domestic law and policymaking and demonstrate a much stronger commitment to protecting and advancing women's rights such that half of the Australian population is brought clearly into focus in human rights concerns. However, the proposals in the AHRC position paper do not keep women's rights clear and apparent to the Australian population or the Executive. The sex-based discrimination experienced by women is minimised, ignored, or overridden by other constituents' rights. This is the current situation for women and girls; it was significantly worsened by the 2013 amendments to the SDA (see Section 3.1 below).

The AHRC's proposal treats CEDAW in the same manner as other international conventions such as the CRC and CRPD, which are labelled "thematic instruments". It appears that the rights of women and girls will be addressed by a single clause that "requires the Human Rights Act to be interpreted in light of international human rights instruments" and "embedding key overarching principles from these instruments through the inclusion of a 'participation duty' and a related 'equal access to justice duty' in relation to the Executive (AHRC 2022a, 17).

The AHRC argues that key elements of Australia's obligations arising under thematic treaties beyond ICESCR and ICCPR

> have already been implemented federally through anti-discrimination laws including CERD via the racial discrimination Act and CEDAW via the Sex Discrimination Act 1984 (C'th). However anti discrimination acts only reflect a partial implementations of these thematic instruments.
>
> The Commission has therefore proposed embedding key principles from thematic instruments through the inclusion of a participation duty and a related equal access to justice on the executive (AHRC 2022a, 108).

AF4WR notes the Commission accepts that the antidiscrimination legislation of SDA does not fully implement CEDAW. The serious shortcomings in the protection and promotion of these rights in domestic laws cannot, however, be remedied by including *participation duty* and *equal access to justice* on the executive.

AF4WR therefore has serious concerns that the new FHRA will codify rights and adopt implementation processes in a way that diminishes protection for women and children. We argue that the rights at greatest risk are those that are *already inadequately protected* in Australia as outlined throughout this submission.

CEDAW is also the only human rights treaty that identifies sex-role stereotyping as a significant structural factor in the violation of many of women's and girls' human rights including freedom from sex-based violence, right to health, education, work, freedom of expression and political participation. Article 5 states:

> States Parties shall take all appropriate measures… to modify the social and cultural patterns of conduct of men and women, to achieve the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Rigid gender stereotyping and dominant forms of masculinity are implicated in the violence perpetrated by men on women (Peroni and Timmer 2016). Promoting and enforcing rigid and hierarchical gender stereotypes reproduces the social conditions of inequality between the sexes that underpin violence against women. In particular, socially dominant stereotypes of masculinity play a direct role in driving men's violence against women.[1] Violence against women and girls is a human rights violation, and the physical, sexual, social, and mental consequences for women and girls are devastating and too often include death.

Violence against girls and women is a violation of their human rights: it reduces women's well-being and prevents them from fully participating in society, whether in employment, education, recreation, or enjoyment of cultural and family life. A woman's family, community, and the country as a whole suffer negative consequences as a result. Addressing the factors that reproduce the damaging stereotypes underlying violence against women and girls is a major element in the articles of CEDAW.

Excluding standalone articles on women's rights (and children's rights, as discussed in Section 4 below) means that public authorities will be required to implement an Act with unbalanced human rights settings. In the context of a discussion of freedom of religion, Paul Taylor argues that, from an initial reading of the AHRC position paper, some rights are likely to be diminished and some rights favoured over others, contrary to ICCPR standards. Although Taylor was arguing from the point of view of freedom of religion and from a perspective somewhat different to that of AF4WR, we share his concerns with relation not only to the ICCPR but also CEDAW and CRC (Taylor 2023).

1. The current Australian Human Rights regime: provisions and shortfalls

1.1 Existing laws and their application

As many others advocating for a FHRA have observed, Australia's Constitutional rights protections are minimal, and reflect preoccupations at the time of Federation. They are five in number:

- the right to vote (Section 41)
- protection against acquisition of property on unjust terms (Section 51[xxxi])
- the right to a trial by jury (Section 80)
- freedom of religion (Section 116)
- prohibition of discrimination on the basis of State of residency (Section 117).

[1] Our Watch. https://www.ourwatch.org.au/the-issue/. Accessed 25 June 2023.

In addition, the High Court has inferred a constitutional freedom of political communication primarily from sections 7 and 24 of the Constitution, relating to the Senate and House of Representatives respectively. These provisions require that members of the Parliament be "directly chosen by the people", and the High Court's interpretation "rests on the notion that deliberation on 'political matters' is inherent in the representative and responsible form of government that the Constitution establishes" (Gelber 2017, 206; see also Twomey 2016). However, as Adrienne Stone has noted, the "freedom of political communication" implied by the High Court doctrine "is weak across two axes: it covers only a narrow category of expression [relative to Federal parliament and members of Federal parliament, and related matters] and it provides relatively weak protection for that expression" (Stone 2011, 79-80; see also Stone 2001, 2006).

Apart from this doctrine, there is no constitutional protection of freedom of opinion, expression, assembly or association, and only very limited and minimal references to them in Federal legislation. This absence is worrying when one considers how the freedoms of expression, association and assembly one may expect to enjoy in a robust democracy may be—and have indeed been—limited or even shut down by state actors. (For discussion of this point, see Section 5 of this submission).

Apart from these abovementioned constitutional protections, Australia has no constitutional Bill of Rights and no regional or supranational council or court of rights, such as the European Court of Human Rights of the Council of Europe, the Court of Justice of the EU (in the case of matters arising under the Charter of Fundamental Rights which is part of EU law), or the Inter-American Court of Human Rights, to which individuals may appeal or matters may be referred by states. Australia is, moreover, "the only liberal democracy that does not have an act or charter of rights at the national level, and there are currently very few legal protections for the fundamental rights of Australians" (AHRC 2023b, statement in support of its proposal for a FHRA).

Other human rights codified in the abovementioned international treaties are variously but incompletely covered in a range of Federal laws:

- the Racial Discrimination Act (RDA, 1975), which was the focus of a highly controversial Inquiry into Freedom of Speech in Australia (see Section 5.1 of this submission);
- the Sex Discrimination Act (SDA 1984, as amended 2013): ironically, the term "sex" is not defined in this Act (see Sections 2 and 3 of this submission);
- the Age Discrimination Act (ADA 2004);
- the Disability Discrimination Act (DDA 1992) (see Section 4 of this submission);
- the Fair Work Act (FWA, 2009); and
- Australian Human Rights Commission Act (AHRCA 1986).

Seeking adjudication or arbitration in rights matters arising under these Acts is far from straightforward. Apart from the Fair Work Commission, which is empowered to both conciliate and arbitrate in industrial relations matters, the Australian Human Rights Commission (AHRC), is the Federal body to which human rights claims are brought by individuals under the above Act. However, it is not empowered to arbitrate, only to conciliate. If the AHRC is unable to resolve discrimination matters through conciliation then rights litigants must appeal to the Federal Circuit Court and Family Court—but matters must be articulated as issues of *discrimination* under the above Acts, not as *human rights* matters per se. Yet, some such cases are less straightforward than, or qualitatively different from, a claim that *A* is discriminating against *B*. As the AHRC itself notes, "unlike complaints alleging unlawful discrimination, if the Commission cannot conciliate a human rights complaint, the person cannot then bring court proceedings, nor obtain any enforceable remedies" under current legislation (AHRC 2022a, 11).

Indeed, the human rights of protected constituencies can come under threat when Federal or State anti-discrimination laws are invoked by members of a dominant class against members of a less powerful class. A case in point is that of McIver's Ladies Baths, better known as Coogee Women's Pool. In 1994, the same year the Pool was listed on the National Trust's Heritage Register a male made a complaint to Randwick Council under the NSW Anti-Discrimination Act (1977), claiming that he was discriminated against on the basis of his sex, as the Pool was women-only. The Baths took the case to the Anti-Discrimination Board, "arguing it was the only place women of certain religious beliefs or disabilities could comfortably bathe. In 1995, the McIver's Ladies Baths was granted an exemption under the Anti-Discrimination Act 1977" (McIver's Ladies Baths website).[2]

Two aspects of this case are striking. First, in order to have a safe, protected space to exercise their rights of freedom of assembly among women and freedom from sexual harassment, women had to obtain an *exemption* from anti-discrimination legislation, which demonstrates that such legislation can often be a blunt instrument in addressing the safety and other needs of vulnerable or disadvantaged rights constituencies. Second, what won the case was not *women's* needs per se, but the needs of religious minorities and the disabled. *It was not enough* to be female and wishing to bathe free from the risk of sexual or other forms of harassment from men, which is a daily experience of women when in situations of partial undress or otherwise rendered vulnerable. More recently, the pool has once again been the focus of action around discrimination, this time in relation to gender identity, and the case is one of many that highlights the conflicts between sex-based rights claims and gender-identity-based rights claims. This particular conflict is urgently in need of a coherent legal framework for resolution that respects the rights of all, as will be discussed in subsequent Sections.

As concerns the highest court of appeal, the High Court, its role is "to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts" (High court website).[3] Appealing to the High Court is exceptionally onerous for any litigant or defendant in rights claims, who need to make the case that the matter falls within the abovementioned remit of the Court, and who need to find the funds to pay for court costs and barrister's fees.

In short, the expertise and finances needed to appeal to either the Federal Court or High Court are extensive, which effectively makes it difficult for individuals to have human rights claims adjudicated at the highest level. These barriers effectively undermine the participatory framework of human rights mechanisms advocated by the AHRC (2022a).

Three subnational Australian jurisdictions have, at the time of writing, adopted Human Rights laws, of which the ACT Human Rights Act 2004 was the first, the Victorian Charter of Human Rights 2006 the second and the most recent, adopted in 2019, is the Queensland Human Rights Act. These state laws have significantly greater coverage of the full range of human rights than existing Federal legislation, picking up, often word-for-word, key elements of the core UN treaties.

However, these three laws only apply to the state or territory in which they were adopted and focus exclusively or primarily on human rights compatibility of laws and on rights claims made against public authorities. Of course, like any law, they are are all subject to parliamentary intervention through amendment or repeal; in addition, all three also provide for override or

[2] https://www.mciversladiesbaths.com/history. Accessed 25 June 2023.
[3] https://www.hcourt.gov.au/about/role-of-the-high-court. Accessed 22 June 2023.

limitation provisions that enable parliaments to set aside the provisions of the laws (Debeljak 2022). In other words, there is no mechanism independent of parliament that has oversight and responsibility for ensuring application of these laws, and nothing to prevent human rights considerations being set aside if parliament deems it necessary in the public or some other interest.

In short, as noted in the AHRC's December, 2022 position paper, in which the Commission presents its model for a proposed FHRA, "Australia has a patchwork legal framework of human rights protection. The rights that are protected are located in scattered pieces of legislation, the Constitution and the common law. It is incomplete and piecemeal" (AHRC 2022a, 11). We can but concur.

1.2 The Paris Principles and Australia's 2010 Human Rights Framework

This section considers the UN's Principles Relating to the Status of National Institutions (Paris Principles, PP) against Australia's 2010 Human Rights Framework (the Framework) (UN 1993; Commonwealth of Australia 2010). This analysis occurs as the AHRC has failed to be accredited "A" status with the Global Alliance of National Human Right's Institutions (GANHRI) as confirmed on the Commission's website (AHRC 2022b). Considering the approach that was taken with the current Framework this outcome may have been predictable.

The Framework should centre the AHRC as the NHRI for Australia, and provide a clear pathway for the NHRI to embody pluralism, independence and functional plans to ensure the Australian NHRI is effective.[4]. However, the 2010 Framework lacks explanation of a central mechanism and thus does not provide a clear pathway for the Australian government to meet the state's obligation to promote and protect human rights in the Australian community. The Framework is insular and the impression could be formed that it was used as a means to announce funding programs to appease certain groups as opposed to focusing on the serious business of ensuring human rights obligations are met in theory and practice.

As articulated above, it is our view that a notable failing of the Framework is that the AHRC is not centred, and where the AHRC is referred to there is a lack of depth in addressing the interactions between the Commission and the delivery of the Framework. The Framework does not provide clarity of purpose or process for the AHRC or the outcomes that a NHRI is seeking to achieve.

It has never been more important to be clear and methodical in the consideration of the current human rights regime against these principles.

The following assessment is not an attempt to assess the AHRC on compliance with the Paris Principles but rather a statement on the Framework's clarity and function in relation to these principles.

[4] Global Alliance of National Human Rights Institutions (2023), Paris Principles page. https://ganhri.org/paris-principles/#:~:text=The%20Paris%20Principles%20('Principles%20Relating,are%20pluralism%2C%20independence%20and%20effectiveness. Accessed 27 June 2023.

1.2(i) Table: Analysis of the Paris Principles against the existing Framework

Principle	Framework coverage
Broad mandate	The Framework affirms a focus on educational programs to be managed by AHRC, however it also divests responsibility for these programs beyond the public service to non-government organisations. The Framework refers to Government protection of human rights; however it does not clarify the role of the AHRC in this respect
Broad functions	The Framework does not provide a structured view of the advice, reporting and monitoring function of the AHRC, nor does it provide a statement of intent on the complaints handling authority of the AHRC. The Framework does refer to human rights education programs.
Independence from government	The Framework does not provide clarity on how the AHRC is supported in legislation. The Framework does provide a position on the Administrative Review Council which was independent from Government; however the council has now been disbanded.
Pluralism	The Framework is silent on pluralism in the administration, management and protection of human rights initiatives and mechanisms.
Adequate powers	The provision of powers to the AHRC is not an expected outcome of a human rights Framework.
Adequate resources	The Framework does not assure that the resources Government provides to administer and manage human rights is focused on the provision of public services. The provision of adequate resources is not within the power of a Framework. The Framework outlines funding levels for some educational programs.
Cooperative work	The Framework does not provide a clear structure for stakeholder engagement and consultation with the community on human rights matters.
International engagement	The Framework does provide a summary on international engagement.

1.2(ii) Assessment of the Framework against human rights outcomes

As per the Commonwealth Evaluation Policy, to assess the effectiveness of the Framework against human rights outcomes the following is required:

- Robust data collection providing a baseline on the existing human rights outcomes across the Australian community
- A plan to evaluate the current state against the proposed future state
- Adequate provision to enable the data collection through the life of the framework is established
- The processes for monitoring human rights outcomes and evaluating the efficacy of the Framework is documented and agreed by relevant parties (Department of Finance, 2021).

The Framework does not provide for these key elements of evaluation: in fact it does not even mention data or evaluation. The National Action Plan refers to a Baseline Study that was utilised to inform the content of the Action Plan but there is a considerable lack of information about this Baseline Study publicly available at this time: it appears to be inaccessible online. We recommend that the Commonwealth Evaluation Policy be used to inform any new Framework developd in application of the new FHRA, and that details regarding the collection of data are transparent and subject to rigorous scientific analysis. As a result of the current Framework's silence on data and evaluation it is difficult to conduct analysis in any further detail.

It is noted that the key failings as identified here show a pattern whereby the Framework appears to be silent or largely silent on key aspects of what the community in general and women in particular would expect a human rights framework to focus on, namely, centring the national human rights institution and a focus on evaluating outcomes as per the Commonwealth Evaluation Policy.

1.3 Human rights as a public service to ensure efficacy, integrity and independence

The Framework provides some indication that there is an intention to move away from the delivery of the functions of the AHRC to the non-government sector. For example, the Framework includes a funding program that appears to outsource the development of human rights education. It also provides for a number of other educational initiatives but does not stipulate how they will be delivered, leaving the door open to privatisation. This is of concern given the AHRC has indicated that it has resourcing issues and that these may be related to the deferral of the accreditation against the Paris Principles referred to earlier in this submission (AHRC 2022b).

In this section, we highlight the arguments and recommendations of the **2018 report of the Special Rapporteur on Extreme Poverty and Human Rights**, presented to the 73rd session of the UN General Assembly. The report raises concerns about the interaction between the privatisation of public services and human rights (Alston 2018). Its conclusion was that "Existing human rights accountability mechanisms are clearly inadequate for dealing with the challenges presented by large-scale and widespread privatization" (Alston 2018, 2). This submission adopts the meaning of privatisation as per this report in broad terms, recognising that the private sector can be "involved in or displace the public sector in various ways, including through ownership, financing, management, and service and/or product delivery" (Alston 2018, 5).

The Special Rapporteur's report makes important points about the efficacy of privatisation on a number of criteria, the most relevant of which is the impact on the realisation of human rights outcomes. In particular the report confirms that privatisation has detrimental impacts on the reduction of poverty and the access to services that assure human rights to the poorest groups in the community (Alston 2018, 12 ff). Key public services that are raised as areas of concerns are prisons, public protection, social security, and infrastructure.

The recommendations from this report are directly relevant to the new FHRA and any associated new Framework. The report calls on organisations protecting and pursuing the realisation of human rights to acknowledge and understand the impacts of privatisation on the functions of public services in the context of human rights (Alston 2018, 24-25). The report further calls for a focus on the problems of privatisation, given the evidence that the global wave of privatisation that began in 2012 had not abated in 2018 (Alston 2018, 4). This submission agrees that human rights organisations should return to the basic values of equality, society, the public interest and shared responsibilities (Alston 2018, 21). We share the concerns in this report that the interaction of human rights and the neoliberal philosophy that taxation should be reduced as a matter of principle needs to be challenged as a threat to a well resourced public service impacting the ability of governments to appropriately provide public services that are independent of corporate and capital interests (Alston 2018, 18).

The report highlights that governments pursue privatisation due to the belief that it is more efficient and economical (Alston 2018, 4). However, if a consequence of privatisation is that the state then needs to monitor human rights outcomes and adherence to relevant contractual clauses to ensure obligations are met this may be an argument, among others, that such efficiency is a

myth. In the context of the application of international law, Adam McBeth concludes that where states have privatised social services and become the *ensurer* of these services rather than the *provider*, actions that are required could include:

- supervision
- inspection
- permanent monitoring
- imposition of contractual obligations
- provision of financial incentives to comply with human right obligations
- accessibility assurance
- intervention when failure is detected including the termination of a contract and as such the capacity to provide for a contingency for this scenario (McBeth 2004, online).

The current Australian Framework does not clearly state that public services must be kept in public hands, and thus provides an open door to public monies intended for the promotion and protection of human rights to be allocated to the private sector.

1.4 Case study: Health services: commercialisation and assurance of human rights

The right to health is protected by Article 12 of the ICESCR and is presented here as a case study due to the clarity and scale of the right to health care services, and the impacts of privatisation on access to that right. By definition, private service providers focus on profits and will prioritise services with the lowest expenditure and highest possibility for profit. These services are unlikely to be the same as those that are most important to assure the equitable access to healthcare (Lacy-Nichols et al 2023, online). McBeth cites the example of epidemics, and we have seen the impacts on equitable access over the years of the COVID pandemic (McBeth 2004, online). A simple statement of intent in the context of a human rights framework would be: the state must intervene if any private health care system or service results in the degradation of access to or quality of health care services for the most vulnerable groups in society.

If a failure against this statement of intent indicates that the state has already failed to protect human rights then a model of prevention of these impacts of privatisation must be considered. A model for prevention of the degradation of the human right to health care services may be more effectively pursued through assessments of the commercial determinants of health indicators. This model is colloquially referred to as a "follow the money" assessment (Lacy-Nichols et al 2023, online). Australia has been committed to this approach, as evidenced by the successful campaign against Big Tobacco (Department of Health and Aged Care 2018). To implement a successful preventative model it would be important to ensure a broad consideration of the commercial determinants of health including the privatisation of hospital services and the pharmaceutical industry (Lacy-Nichols et al 2023, online). A commitment to understanding the commercial determinants across the Australian health care system is not only a discrete recommendation of this submission but also provides an example of the type of substantive initiatives that a modern human rights framework should include.

1.5 Recommendations

Recommendation 3. That the new FHRA **reassert the rights to health, water, housing and justice** particularly to those groups who are likely to find such services difficult to access in a market system.

Recommendation 4. That the new FHRA and any new associated Framework **mandate that the default is for public services that ensure the protection of fundamental human rights to be delivered by the public service** as per the recommendation of the independent report of the Special Rapporteur on Extreme Poverty and Human Righrs.

Reccommendation 5. That the new FHRA and any associated Framework **ensure that the AHRC is a well-resourced and independent public service that is immune to government interference**. The AHRC must be above political partisanship and able to provide frank and fearless advice to Federal and State governments.

2. Which protections for which rights constituencies?

The new FHRA must, as the AHRC 2022 position paper sets out, establish clear and unambiguous rights parameters that include:

- first, the sets of rights that are internationally understood as being fundamental to human wellbeing, both individually and collectively;
- second, specific articles concerning those rights constituencies in need of special attention due to historical and continuing patterns of exclusion from the full enjoyment of rights; and
- third, the principles and procedures that inform the efficacy of any future laws and mechanisms. These principles and procedures include the participation of rights constituencies in national dialogues concerning their rights.

The parameters so established need to be consonant with the international treaties to which Australia is a signatory and sufficiently comprehensive to both serve as a rights yardstick against which any current or future legislation or policies can be measured, and provide effective guidance (and indeed requirements) for both public and private actors, as well as effective remedy in the case of human rights complaints. At the same time, they cannot be so detailed as to close off future conversations about the substance and practice of rights, or to open the way for excessive, and excessively vexatious, rights litigation. Setting these parameters along the three axes outlined above is not a simple nor self-evident process. It requires extensive reflection by policy actors and consultation with the rights constituencies in question. We are concerned that this reflection and this consultation may be lacking in some specific areas and look forward to those gaps being addressed by the current Federal government.

At the same time, a future FHRA cannot presume to create, in one national context, idiosyncratic understandings of human rights that are not recognised as such in international treaties, or are currently the subject of contestation. Three such instances of contestation that come to mind,

which directly concern women and in most cases children, are (a) prostitution, (b) procurement of children through surrogacy, whether remunerated or so-called "altruistic", and (c) body altering drugs and surgeries to produce an outward physical approximation of a presumed inner gender identity. There is no right of men to use women, children or indeed other men in prostitution, nor a right of women or men to prostitute themselves (scenario a); no automatic right to a child that contains (usually) the father's DNA and is produced by "outsourcing" fertilisation and pregnancy to another woman or women (scenario b); and no right to use medically unnecessary drugs in experimental ways without them having been properly tested and assessed, nor to cosmetic surgeries, most of which involve the removal or significant alteration of otherwise healthily functioning body parts (scenario c).

In all three cases, however, the people involved *do* enjoy both negative and positive human rights such as freedom from violence or torture; the right to be employed in "just and favourable conditions" (ICESCR Article 7); the right to bodily integrity and freedom from constraint over the uses to which one's body may be put; the right to found a family; and the right to enjoyment of physical and mental health, irrespective of other choices made or situations of constraint in which individuals find themselves.

These three scenarios are often posited as "wicked problems", those societal problems that have no straightforward solution, or where the solution may create other unforeseen problems (the term was originally coined by Rittel and Webber 1973, in relation to town planning, but has since been applied to a range of situations). It is noteworthy that those societal issues framed as "wicked problems" often most severely impact on marginalised or otherwise vulnerable populations (poverty, the environment), or frequently concern the bodies of women and children and the uses to which those bodies are put or requirements placed upon them by men who have power over them.

As concern homosexual rights, these are not currenly encoded in any human rights treaty; however, they can be inferred from some parts of CEDAW as well as from the ICCPR, as evidenced from Nicholas Toonen's successful petitioning of the then UN Human Rights Committee in 1991, claiming that Articles Sections 122(a), (c) and 123 of the Tasmanian Criminal Code then in force, which penalised male homosexuality, contravened Articles 2(1), 17 and 26 of the ICCPR. The HRC found that Toonen's right to privacy was breached.[5] (Privacy rights can open another can of worms, however, if considered as "identity" rights, as we discuss below.) Over the last fifteen years we have also seen the emergence of a "SOGI" human rights doctrine in the UN Human Rights Council, SOGI meaning "sexual orientation and gender identity". The foundational document for the development of that doctrine is the Yogyakarta Principles, discussed in Section 2.1 below. This doctrine and these principles are not, however, encoded in any human rights treaty.

The ICCPR also forms, along with the ICESCR, the core reference for the AHRC's 2022 position paper, with additional mentions of the CRC, CRPD, and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as relevant to specific rights constituencies within the Australian population, notably as concerns the participation duty of the State (discussed further in Section 6). CEDAW and CERD are also mentioned as pertaining to specific rights categories but not discussed in detail.

[5] The full text of the complaint and the decision can be found at http://hrlibrary.umn.edu/undocs/html/vws488.htm. Accessed 24 June 2023.

The AHRC paper mentions in passing the inclusion of sexual orientation and gender identity in the Sex Discrimination Act (SDA) from 2013, and the inaccurate statement that until a law change in 2017, "LGBTIQ+ Australians could not marry" (AHRC 2022a, 86). In fact, only the L and the G were prohibited from marrying their chosen sexual partner; anyone else in that grouping could participate in heterosexual marriage.

The current widespread confusion—as evidenced in public political and media debate in recent years in most liberal democracies including Australia— surrounding sex, sexual orientation, gender identity and Differences in Sexual Development (DSD, more commonly known as intersex), is thus reproduced in the AHRC paper. Moreover, the AHRC includes in its mini-alphabet "Q" (Queer, or, sometimes, Questioning), and "+" (any other sexual or gender self-identification that departs culturally from normative gender-stereotype-conforming monogamous heterosexuality) as *rights* constituencies. They are not. They are cultural descriptors which are at best ambiguous and at worst unintelligible and thus meaningless as descriptors of rights categories.

This discussion of the "LGBTIQ+" mini-alphabet may at first glance appear trivial or tangential to our more substantive discussion of a proposed FHRA from the point of view of the constituency of women. We argue, however, that on the contrary, it highlights a significant blind spot in current political discussions of rights and appropriate identification of rights constituencies. We argue in this Section and Section 3 that any FHRA must include clear definitions of sex, gender, gender identity, sexual orientation, and DSD/intersex. These definitions are necessary to render discrete rights constituencies meaningful under law and enable human rights legislation and mechanisms to provide for addressing rights claims made by individuals or groups within those constituencies, including possible conflicts of rights (see Section 3 below).

2.1 The question of identity in relation to human rights

We further argue that not only is it demonstrably impossible to list every identity category as a "rights" constituency, but that *identity* is not itself a "human right". This is notwithstanding the claim made in March 2023 by 28 UN member states, including Australia, in a statement to the UN Human Rights Council, that "identity" is itself a rights category. The first paragraph of that statement reads as follows:

> Thirty years after the adoption of the Vienna Declaration,[6] we reaffirm that human rights derive from the dignity and worth inherent in the human person, and are universal, inalienable and indivisible. As such, each person's self-defined gender identity is integral to their personality and a manifestation of self-identification, dignity and freedom.[7]

Both the conceptual leap from the first to the second sentence and the choice of vocabulary in the latter are interesting. Contemporary international human rights architecture can in one sense be understood as constructed around ideas of the human as a identity category: human rights are what enable the full realisation of selfhood (Marshall 2014, 2 ff). Specific rights claims and rights constituencies have, however, come into being not as specific identity claims but as a result of the *denial, deprivation* or *lack of full access to the enjoyment* of those very humanity-defining rights. Thus, CEDAW came into being as a result of the realisation that the sex category of women was excluded from the full range of human-defining enjoyment of rights: indeed, a celebrated essay

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[6] Declaration issued at the close of the World Conference on Human Rights, Vienna, 25 June 1993. https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action. Accessed 24 June 2023.

[7] Statement read by Argentina and published by the Permanent Mission of Argentina to the UN.

on the relationship of women to the human in rights discourse is titled, tellingly: "Are Women Human? It's not an Academic Question" (Peterson and Parisi, 1998). In other words, human rights are called into being, somewhat paradoxically, by their absence.

Specific or minority rights constituencies are thus clearly *relational*, in that they are produced within a certain world, national, economic, political and social order, as decades of research on human rights has more or less consensually demonstrated. However, legal interpretations of individual rights or constituency group rights frequently frame those individuals or groups as *identity* or even *personality* categories, as analyses of caselaw in various contexts, notably albeit not only caselaw invoking the right to private and family life, have shown (see for example, for analyses of European Court of Human Rights caselaw in this respect, Marshall 2014, 2022; Al Tamimi 2018). As law professor Jill Marshall argues:

> Identity, as a product of social relations and cultural understandings, requires more than a demand for a right to one's identity group politics or of one's right to self-ownership. These identities are themselves products of socially and historically specific practices and relationships that are contingent and dynamic (Marshall 2014, 243).

As soon as human rights become framed as *identity* rights, then, not only are the socioeconomic and political conditions that produce the rights deficit in the first place lost from view, but rights become framed as a fixist, individualistic and often commercialised question of personal property, and worse, *essence*. An Australian Muslim, for example, does not have rights *as a person of Muslim identity*, and certainly is not *of Muslim "essence",* but *does* have a constitutional right in terms of freedom of religion, an inferred constitutional right in terms of poltical communication, and legal rights to freedom from harassment, vilification and so on under Australia's Racial Discrimination Act. Moreover, the Muslim in question can at any time decide to cease to practise Islam in any form, or change the form of religious practice, or change her or his personal relationship to Muslimness as an identity category, without either changing the circumstances of her or his birth or losing any general or constituency-specific rights under either the Constitution or the RDA.

Rights of specific constituencies must thus *necessarily* be defined as relational: it is context that is productive of denial of rights, not "identity" per se. Thus, if a woman faces obstetric violence within an Australian hospital setting—which is, alarmingly, the experience of an estimated one in ten Australian women during pregnancy and birth (Keedle et al 2022)—it is not because of her *identity* or *essence* as a woman or a mother. It is because the conditions, within her specific context, that grant her full access to enjoyment of human rights on an equal footing with men and indeed other women who are not pregnant or giving birth, are not being met.

None of this discussion negates the cultural significance of group identities for any rights constituency, including those with a gender identity, and does not negate the right of any Indigenous peoples to affirm cultural identity (UNDRIP Articles 2, negative right to freedom from discrimination, and 33, positive right to self-determination). It is, however, notable that no international human rights treaty codifies *identity* as a right, beyond questions of nationality, right of residency and parentage (Refugee Convention Articles 27 and 29; Convention on the Rights of the Child Article 8a). As for the codification of identity within UNDRIP , it is specific to the situation of Indigenous peoples as having "suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests" (UNDRIP, Preamble). The identity right of Indigenous peoples is thus also *contextual* within a situation of unequal power relations: it derives from a historical situation of systematic and systemic injustice, not from an individual or group "essence".

This discussion is relevant to the current fraught political context in Australia where sex-based rights claims come into conflict, or are perceived to come into conflict, with the affirmation of gender identity. It is a conflict that cannot be resolved by the construction of identity categories, but rather by asking the very question that has created previous rights constituencies: what rights are being denied to the proposed constituency? and, assuming denial of rights, what redress measures are necessary such that access to rights is enabled *without* undermining any rights of other specific rights constituencies?

Before addressing these questions more fully in Section 3, a brief examination of the highly influential Yogyakarta Principles will help provide some insight into how individual "identity" has been fashioned into a particular rights constituency.

2.2 The question of identity and the conflation of rights constituencies under the Yogyakarta Principles

The full title for the Yogyakarta Principles (YP) is The Yogyakarta Principles on the Application of International Human Rights Commissions and Governance Rights Law in Relation to Sexual Orientation and Gender Identity.[8] They were developed in 2006 by a group of human rights activists, lawyers and some UN personnel, meeting in November 2006 in Yogyakarta, Indonesia. The YP were launched at the UN Human Rights Council (HRC) in Geneva on 26 March 2007.

The first YP were added to in 2017, and these additional principles became known as YP+10.[9] However, only 25 UN member states signed up to the YP, and just 28 to the updated version YP+10 in 2017.

The YP do not have any legal status in international law nor the support of the UN General Assembly. Nevertheless ARC International (Allied Rainbow Communities International, set up in 2015), and ILGA (Interntional Lesbian, Gay, bisexual, trans and intersex Association, first set up as the International Gay Association in 1978), aggressively promote them to UN bodies and national governments through their various human rights commissions.

Despite this non-legal status, the YP, "and their interpretation of 'gender', are extremely influential internationally" (Bindel and Newman 2021, online). They are used as if they are an international treaty and as a justification for laws and policies adopted by governments and for lobbying by NGOs primarily from Western and other liberal democracies. These governments and NGOs are consistent in their use of the YP terminology, concepts, and approach to gender identity.

Part of the political strategy behind the YP is the linkage in advocacy and policy of gender identity with sexual orientation, known by the acronym of SOGI, which is now routinely used by UN bodies and national governments alike. Despite SO snd GI being diametric opposites in relation to body politics, this strategy has been very effective in relation to public and media support for the conversion therapy laws and so-called Self-ID laws that are discussed below. There has been resistance to but little political evaluation of the embedding of YP into such legislation in Australia.

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8 https://yogyakartaprinciples.org/. Accessed 29 June 2023.

9 https://yogyakartaprinciples.org/principles-en/yp10/. Accessed 29 June 2023.

If on one level the YP provided an important charter of rights for gay men and lesbians, it also immediately undermines those same rights by positing an equivalence between sexual orieintation and gender identity. Foregrounding gender identity endangers those very rights that the YP were ostensibly developed to protect.

The views of Sonia Corrêa, Brazilian co-chair of the YP+10 committee, lend weight to this argument. Corrêa believes the biological differences between men and women are a "fundamentalist" and "a 19th-century Western construct.". She promotes the Yogyakarta Principles to the UN *"as a model for laws because they do not mention the word woman"* (Singer 2022, online, emphasis added).

The YP have actual and potential negative effects on women and girls, including their right to live free from violence and the consequences of laws and policies that prioritise gender identity over sex in classifications. To date, state human rights instruments have privileged the YP, which have no international legal status, but paid scant attention to the international treaties CEDAW or CRC when reviewing legislation affecting women and children.

Australian laws and policies have implemented this model for various pieces of legislation as will be discussed below, as well as in legislation of sole and direct concern to women such as the 2019 NSW Bill to decriminalise Abortion, from which the word "women" was missing, the word "person" being used instead:

> Former NSW Liberal minister for women Tanya Davies said it was "beyond belief" a bill framed around women's reproductive rights had effectively "silenced women" by making them "invisible" ». e word 'person 'is used throughout the Bill instead of woman (Le Messurier 2019, 7).

In 2011 at the National ALP Conference the Yogyakarta Principles were incorporated into Labor Party policy, as follows:

> That there be inserted in the section headed "Human rights", after 51 on p182, as new paragraphs, the words:
>
> Under Labor, Australia will support the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity and will continue to sponsor and promote resolutions in support of the implementation of human rights protections for lesbians and gay men and bisexual and transgender and intersex people at the Human Rights Council and the General Assembly of the United Nations.
>
> Australia under Labor will … encourage steps to implement the actions required by the Yogyakarta Principles.[10]

The ALP has since removed some of the YP detail from its national platform and at the time of writing the 2023 draft platform, which will be voted on at the ALP National Conference in Brisbane in August, has been criticised by gender identity advocates as being too "bland". One activist, Alistair Lawrie, repeated the now familiar trope of associating women's rights activists (described by the slur TERFs—trans-exclusionary radical feminists) with "Nazis" (Lawrie 2023). (See Section 5 below for further discussion of this inaccurate and vilifying labelling.) Lawrie's comments were subsequently cited at length in the media (e.g. Karp 2023). However, there is nothing in the draft policy that contradicts previous commitments; it is simply less detailed.[11]

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[10] https://ouralp.net/2011/12/04/all-the-motions-from-national-conference-2011/

[11] ALP Consultation Draft, 2023 National Policy, 19 May 2023. Distributed to members but not available online at the time of writing as the consultation period has closed.

It is difficult to assess the reasons for this removal of detail, but given the extreme polarisation of public debate at this time, the changes may be motivated by concerns about overreach to the advantage of one constituency and the disadvantage of others, who may have made their concerns known. This comment, however, is pure speculation. Notwithstanding this recent removal of explicit detail beyond broad rights commitments (including a commitment to consultation with relevant stakeholders), the YP continue to inform policy positions and legislation in Australian states and territories, all of which are ALP-governed at the time of writing, with the exception of Tasmania.

The AHRC has been no exception to the generalisation of the YP within Australian discourse and policy. Its 2015 report on SOGII (adding "intersex" to "sexual orientation and gender identity") states that:

> The Yogyakarta Principles are not legally binding themselves, but are an interpretation of already binding agreements from the viewpoint of sexual orientation and gender identity. Therefore, the Yogyakarta Principles are persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people who are sex and gender diverse (AHRC 2015, 82).

Yogyakarta Principle 3 has been particularly influential. It states that :

> Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.
>
> States shall …
>
> … Take all necessary legislative, administrative and other measuresto ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity …
>
> … Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy.[12]

One of the original 29 signatories of the YP in 2006, Robert Wintemute, Professor of Human Rights Law at King's College, London, has since become critical of them, particularly in their "+10" iteration from 2017. In a speech to the LGB Alliance UK conference in 2021, Wintemute argued that "the transgender rights movement has gone well beyond seeking equal rights. It seeks to remove the legal protections of the birth sex of women without their consent or even from the recording of their birth sex" (cited in Singer 2022, online).

LGB Alliance was set up in the UK in 2019 to advocate for the sex-based rights of lesbian, gay and bisexual people on similar grounds to women's rights activists, and protest the priority afforded gender identity over biological sex in law, policy, Human Rights Commissions, and social practices. Many other countries, including Australia, have since set up LGB Alliances.[13] It is only one of a large and growing number of sex-based rights groups that have been formed in recent years in many countries of the world, including Australia, specifically in response to the impact of the institutionalisation of gender identity on women's and gay rights. Many of them are

[12] https://yogyakartaprinciples.org/. Accessed 29 June 2023.
[13] https://www.lgballiance.org.au/. Accessed 28 June 2023.

explicitly aligned with the political left (such as the signatories of the Labour Women's Declaration, who include both parliamentary and rank-and-file members of the UK Labour Party), giving the lie to the commonly made allegation that this is an issue only "right wing bigots" are concerned about (see Section 5 below). A number of those organisations, and several thousand individuals, from at least 40 countries, have signed the Women's International Declaration of Sex-Based Rights (WDI), which was drawn up to reaffirm and elaborate on the principles of CEDAW on women's rights as a sex class.[14]

Wintemute admitted in an interview that at the time of drafting the YP he had "'failed to consider' that trans women still in possession of their male genitals would seek to access female-only spaces [and] he should have challenged references to 'self-defined gender identity'". He further acknowledged that during the drafting of the original YP, women's rights were not even raised (cited in Singer 2022, online). On one level this is not surprising because the overwhelming majority of people drafting YP were male, including those who were trans-identified. However, with the participation of human rights experts, including notable women's rights advocates Elizabeth Evatt from Australia and Mary Robinson from Ireland, it is not unreasonable to expect that the impacts on women's rights might have been discussed.

Wintemute provides a telling insight as to why this omission probably was the case. He said,

> The issue of access to single-sex spaces largely affects women and not men. So it was easy for the men (and trans-identified men) in the group to be swept along by concern for LGBT rights and ignore this issue (cited in Singer 2022, online).

It has been left to largely unfunded women's rights and LGB activists to attempt to remedy a situation where the lobbying for YP and its concepts, by very well-funded organisations (including a number that benefit from considerable public funding, such as Stonewall in the UK or ACON in Australia), is extremely successful in liberal democracies, including Australia.

2.3 Vital principles and mechanisms for protection of the rights of women and girls

As concerns the rights of women and girls in particular, there is a need to fully consider the preconditions for developing and implementing an FHRA. The new Act needs to move beyond mirroring the articles of ICCPR, as is largely the case of the HR laws in Victoria, Queensland and the ACT, as these articles provide insufficient protections for women and girls. AF4WR strongly supports the preventative principle outlined in the AHRC Position Paper (2022a, ch. 1 & 3) and underpinning much of CEDAW because, without a comprehensive consideration of human rights in the early stages of decision-making, human rights breaches may only be apparent after extensive damage has already occurred, resulting in significant human and financial costs (AHRC 2022a, 15).

An examination of shortcomings of legislation, policy, and the role of Human Rights Commissions, which encompasses more factors than case law, is essential. A critical review of the language and evidence base of current laws and policy in relation to the human rights of women and children is fundamental to both the *preventative and protective principles* (the latter ensuring that the most vulnerable do not "fall through the cracks" [AHRC 2022a, 15]) in the framing process.

[14] https://www.womensdeclaration.com/en/declaration-womens-sex-based-rights-summary/. Accessed 15 June 2022.

We further endorse the AHRC's emphasis in these principles on people knowing and understanding exactly their rights and how to protect them.

> The current rights framework in Australia is not easily explainable, or readily comprehensible, to all people in Australia. The [current] patchwork of rights is difficult to explain to everyday Australians, whose rights are meant to be protected. Not only should the law afford appropriate protection to the people of Australia, but it should be capable of being understood by all (AHRC 2022a, 12).

However, these laudable aims of prevention, protection and comprehensibility are unachievable if the concepts and terms in explanatory notes and legislation attached to these rights are not commonly understood or reflective of people's material realities. The use of terms like *woman, sex, gender, gender identity,* and *sexual orientation* in legislation and policy is currently contradictory, misleading, and unscientific (and thus incomprehensible). All of these terms are central to the protection and promotion of the rights of women and children—and indeed male homosexuals and people with a gender identity. However, their meaning and use are currently contested in Australia and undermine the preventative and protective principles. The abovementioned confusion, by AHRC itself, over the mini-alphabet "LGBTIQ+" in its position paper is glaring evidence of the need for clearer terminology and clearer understandings of which rights constituencies are being assumed.

Currently imprecise or contradictory language is adversely affecting the rights of women, children, and more generally of disadvantaged groups. When conflicts of rights arise, the interpretation of women's rights by courts and HRCs becomes more challenging, and objectivity is compromised by issues of ambiguous legal definitions and terminology derived from particular ideological assumptions rather than clearly articulated in ways that are comprehensible for all. This increases the length and complexity of cases as well as the costs and court time. This problem is fully acknowledged in the AHRC paper and—as discussed further in Section 3 below—is being faced by Sall Grover in a case involving the conflict between the rights of females and those of males who identify as women.

The legislative *dialogue model* detailed in the AHRC position paper is based on a nexus "between the executive, legislature and judiciary, with each branch of government sharing responsibility for respecting and protecting human rights. Dialogue models also strongly focus on the 'upstream' arena of decision-making and policy development"(AHRC 2022a, 16). The significance of concepts, terms, and definitions to this nexus and shared responsibility cannot be overstated. The language used in the new FHRA will need to be meticulous in describing the nature and scope of rights for women, for children, for homosexuals and for people with a gender identity. Similarly, the terms of limitation or qualification applicable to each right will need crafting and scrutiny in language that leaves no ambiguity and is easily understood across society.

Protection for women and children from the current and various threats identified in this submission will only be secured by close attention to concepts such as who is a woman, what is sex, and what is gender in determining the scope and the terms which identify any restrictions on rights. The actual and potential negative impacts on the lives and welfare of women and girls from the prioritisation in laws and policies of gender identity over sex could be remedied in an FHRA that clearly identifies rights constituencies and provides procedural guidelines for dealing with conflicts of rights in ways that are not onerous, either financially or in terms of time, for rights claimants (see Section 6 below).

2.4 Recommendations

Recommendation 6. That the new FHRA **include strong articulation of the preventative and protective principles** articulated by the AHRC.

Recommendation 7. That the new FHRA and any new associated Framework **provide for effective dialogue between the executive, legislative and the judiciary and reinforce the role of the AHRC** as the key advisory body on human rights.

Recommendation 8. That the new FHRA do more than simply incorporate the terms of the ICCPR. It **must unambiguously guarantee protection ot rights constituencies that are the focus of other UN treaties to which Australia is a signatory, notably CEDAW, CERD and CRC, as well as UNDRIP.** These constituencies and the extent and limitations of their rights must be clearly defined.

Reeommendation 9. That the new FHRA **provide for the more recently emerged constituencies of homosexuals, intersex people and people with a gender identity**. These groups must appear clearly as discrete rights constituencies and are not conflatable with each other: that is, ***sexual orientation, intersex*** **and** ***gender identity*** **must be framed as distinct human rights considerations.**

Recommendation 10. That the **duty of participation** in the new FHRA be **explained to mean that a range of perspectives from a range of stakeholders must be heard and incorporated into design processes** so as to diminish diminish the likelihood of consultations being a form of uncritical rubber stamping of government policies that privilege particular points of view and ignore conflicts of rights. **Consultation must be genuine:** that is, *all* relevant stakeholders are engaged prior to a final decision being made.

3. Provision for the diversity of rights constituencies, and management of actual or perceived conflicts of rights

The fundamental condition for protecting different rights constituencies is to provide unambiguous definitions of terms such that it is comprehensible to all who is, and is not, a member of a particular rights constituency, and how conflicts between rights claims are to be addressed. At the moment, as noted above, the terms *woman, sex, gender, sexual orientation* and *gender identity* are not clearly and consensually defined in law. In fact, the terms *woman* and *sex* are not defined at all, not even in Australia's Sex Discrimination Act (SDA), which is startling to say the least. Nor, for that matter, is *gender,* although *gender identity, intersex and sexual orientation* all are. However, without the primary referents of *sex* and *gender* it is difficult to understand how these latter definitions can be transparent.

In this section, then, we argue for clarity of concepts, terms and definitions to be inscribed in any future FHRA.

3.1 Woman

The historic shared meaning of the word *woman* is now contested due to the adoption of the notion of gender identity. Earlier this year, for example, when questioned on the meaning of this term, the Qld Attorney General (AG), who was also the Minister for Women and Minister for the Prevention of Domestic Violence, replied that anyone who identified as a woman was a woman (Lehmann 2023, online).

The question arose in relation to the introduction of changes to birth certificate legislation, commonly referred to as Sex self-ID or Self ID. The legislation replaces biological sex markers of *F* and *M* with "sex descriptors" based on the person's choice of "gender identity" such as genderqueer, nonbinary, or one of many other gender identity terms (see 3.2 below). In 2022 the AG declined to meet women's rights advocates to discuss the impacts and unintended consequences of this legislation for women, because women were not considered stakeholders in relation to the changes.[15] LGBTIQ+ groups and the Queensland Human Rights Commission were considered the main stakeholders, despite 51 percent of the population being directly affected by changes that would permit men to change their birth certificates to indicate they were born female or any gender identity of their choice. This refusal was clearly a breach of Article 7b of CEDAW concerning women's participation in the formulation of policy, and contradicts the duty of participation so clearly articulated (albeit not specifically in relation to women) by the AHRC (2022a; see Section 6.3 of this submission).

This conceptual confusion has arisen following the 2013 amendments to the SDA (1984). Since that time, a nonbiological assumed meaning of the terms *woman* and *girl* that includes males as well as females has been incorporated into legislation, policy, media, and major institutions across Australia, including HRCs.

Across cultures and across centuries, the meaning of *woman* references female biology. Standard dictionaries define a woman as an adult human female and a girl as a female child. This commonly understood and widely accepted definition has nothing to do with being "Western" or "essentialist", as Sonia Corrêa, cited in Section 2.2 above, would have it. It is a simple reflection of the fact that humans are sexually dimorphic mammals and this dimorphism has a range of material consequences. It is precisely because of the biological realities of this sexual dimorphism that women have historically been, and are still, disadvantaged and vulnerable to

[15] Personal communication, April 2022.

male violence of various forms, and it was this disadvantage and this vulnerability that led to CEDAW and to other international instruments such as DEVAW. In short, when *woman* means an adult human female, then there is a material, unchangeable and verifiable characteristic common to everyone in the group, and the discriminations and violence suffered by this group can be clearly understood and, one hopes, constructively addressed.

The inclusion, since the generalisation of the Yogyakarta Principles, of people with male biology in the definition of woman renders the word meaningless. This novel and ideologically based definition, when utilised in legislation and policy, has serious and detrimental impacts on the human rights of women. Programs addressing violence against women such as domestic violence shelters and sexual assault services, as well as targeted policies to reduce inequalities between women and men, are all compromised.

When *women* is defined as the group of all adult human females AND the humans who declare themselves to be women, then the definition of *woman* dissolves entirely. If male humans who identify as women are women, then the only common characteristic across the group called women is that they are all human. There is no characteristic apart from *human* that is shared; thus the existence of women as a discrete rights constituency, which necessitated the creation of CEDAW, DEVAW and the UN's twelve critical areas of concern for women in the first place, is rendered null and void.

All of which begs the question: What is the definition of this "woman" category that some men are identifying into?

Answering this question leads us into circular arguments. Obviously, the answer does not lie in periods of bleeding once a month or pre-menstrual tension (PMT); wanted or unwanted pregnancies; endometriosis; pap smears; mammograms; menopause; career interruptions related to preganancy, childbirth and care of children or other family members, leading to lower superannuation in retirement; greater risk of domestic violence at all ages and of homelessness in old age; sporting performances that cannot surpass those of men; or any other other sex-specific experiences. In fact, the "woman" category into which males are identifying seems to elude definition, apart from wanting to do whatever women do in whatever spaces women are in, many of which were originally created with a view to realising the *preventative* and *protective* principles the the AHRC (2022a) has so strongly articulated.

This erasure of women as a protected rights constituency through the introduction of Self-ID laws has significant material impacts. Policies based on these laws or introduced even in their absence allow males to gain unrestricted access to female facilities if they identify as women or transwomen. This violates women's and girls' rights to privacy and bodily autonomy and puts women's and girls' safety at risk. These facilities include prisons, shelters, hospitals and clinics as well as homecare, public showers, sports, and school changing facilities and sleeping arrangements during school camps.Women's and girls' bodily privacy and autonomy are similarly violated by policies that allow males who identify as women or transwomen to conduct a body search or medical examination when female personnel are requested.

Conversely, policies may exclude female transgender people (transmen) from women's prisons, shelters, and other accommodations, leaving them open to abuse and violence from men. It is a fallacy that the experience and impacts of trans-identification are the same for biological females and biological males, as is discussed in part in Section 4 below. Moreover, it is noteworthy that the public debate around gender identity largely consists of the erasure of vocabularly that refers speficially to women as a sex, as discussed below; on the demand of biological males with a

"woman" gender identity to have access to women's spaces, activities and protected rights; and on the vilification of women who speak up in defence of these spaces, activities and rights.

3.2 Sex, gender and gender identity

Aritcle 1 of CEDAW states:

> For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made *on the basis of sex* which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. (emphasis added).

The Convention recognises that being born female is the foundation of the oppression of women as a sex class by men as a sex class, namely: sexual abuse and violence against women and the many documented discriminations and inequalities experienced by girls and women across the life span and across cultures. In 2020 the UN Secretary-General's Policy Brief on the impact of COVID-19 on women noted that

> across every sphere, from health to the economy, security to social protection, the effects of Covid-19 are much worse for women and girls simply by virtue of their sex… The pandemic has deepened pre-existing inequalities, exposing vulnerabilities in social, political and economic systems which are in turn amplifying the impacts of the pandemic." (UN 2020, 2).

It is important to treat biological sex and gender as distinct concepts because the economic, social and cultural oppression of women and girls throughout history is, as we have seen above, founded on the physical realities of female biology. For instance, because of their female biology over 150,000, mostly unmarried, Australian women and girls suffered harsh treatment and life long trauma from forced adoption policies and practices from 1951 to 1975.[16]

Gender is a different concept to sex, even though they are often used interchangeably in everyday discourse. Gender refers to social, not genetic characteristics, and means, according to the World Health Organisation (WHO):

> the characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviours, and roles associated with being a woman, man, girl or boy, as well as relationships with each other. As a social construct, gender varies from society to society and can change over time.[17]

In other words, *gender* refers to social and cultural expectations and behaviour that are often based on *sex-role stereotypes*, which as we have seen are identified in CEDAW as a major ideological factor in the violation of women's rights.

The Australian Bureau of Statistics (ABS) 2016 Standard for Sex and Gender Variables makes it clear that sex and gender are distinct concepts:

> The concept of sex is based on the physical or biological aspects of a person's body while the concept of gender relates to the way a person feels, presents and is recognised within

[16] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13/commcontribformerforcedadoption/report/index. Accessed 26 June 2023.

[17] https://www.who.int/health-topics/gender#tab=tab_1. Accessed 26 June 2023.

> the general community and may refer to outward social markers such as their name, outward appearance, mannerisms and dress (ABS 2016).

Despite this Standard, the ABS conflated the concepts of sex and gender for the first time in the 2021 census. The term *non-binary sex* was added as a third option for the sex question. The ABS stated the addition of the non-binary sex option was for people whose sex was not accurately described by male or female. This format changed the meaning of *sex* from a discrete measurable and binary concept, to one that included the subjective, feelin-based gender identity concept of non-binary "sex''. This option also allowed a free choice of term to describe one's "sex".

The census responses included a mishmash of :

- gender identity terms such as: agender, demiboy, gender fluid, trans woman;
- sexual orientation terms such as: gay, lesbian and pansexual;
- and variations of sex characteristics/DSD terms, such as: as intersex or 47XXY/Klinefelter syndrome.

The inclusion of this "non-binary" gender concept did not end up providing meaningful or useable data (ABS 2022a), This outcome highlights how precious public resources can be squandered in developing, testing and producing public documents when confusing and contradictory concepts around sex and gender are used. This shortcoming needs to be overcome in the drafting of the new FHRA.

It is crucial to collect accurate data on biological sex so it is consistent with the scientific and material reality of human sex differences, which are the foundation of not only good laws and policy but also of the different life outcomes and human rights violations experienced by girls and women.

As concerns the term *gender identity,* it is often included in glossaries that fail to define the term *gender* on which it is based. In the SDA, gender identity is defined as:

> the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

Yet the SDA defines neither sex nor gender, so we are none the wiser. The SDA's definition draws on the definition in the Introduction to the YP, which also fails to define the term *gender* from which the concept of *gender identity* is drawn:

> gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[18]

Defining a concept using the concept itself is a circular process that at the very best produces an imprecise meaning. This confusion is apparent in the quite different definitions of gender identity in legislation in different states and language glossaries across Australia. For example, the Victorian Equal Opportunity Act 2010, as amended, has imported word-for-word the YP definition. Other examples include:

[18] https://yogyakartaprinciples.org/introduction/. Accessed 25 June 2023.

- In the AHRC glossary:

  > **Gender identity**: Refers to a person's deeply held internal and individual feeling of gender.[19]

So, gender identity is a feeling of gender. Again, a circular and opaque definition.

- In the Queensland Antidiscrimination Act:

  > gender identity, in relation to a person, means that the person—
  >
  > (a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or
  >
  > (b) is of indeterminate sex and seeks to live as a member of a particular sex.[20]

In this case, one *only* has a gender identity if one wishes to identify into the opposite sex or is intersex/has DSD and wishes to identify into one or the other sex. Tbis definition is illuminating in that it tacitly acknowledges that some members of the population and possibly the majority do *not* have any "gender identity" at all, as "gender identity" is a social construct and not an inherent characteristic of human persons, unlike sex.

- In the Australian Institute of Family Studies' (AIFS) glossary (widely useful in the public service):

  > **Gender/gender identity**: one's sense of whether they are a man, woman, non-binary, agender, genderqueer, genderfluid, or a combination of one or more of these definitions. Gender can be binary (either a man or a woman), or non-binary (including people who have no binary gender at all and people who have some relationship to binary gender/s).[21]

In rhis case, it seems that gender identity can be anything and everything, but is nonetheless something to do with that as-yet undefined term "gender".

3.3 The SDA as amended 2013: material impacts

The case of Tickle vs Giggle and Grover, referred to above, began in 2022 and has progressed to a hearing in Federal Court scheduled for April 2024. The background to this case is as follows: Roxanne Tickle, a transgender-identified male, was removed from the independent female-only social media app called Giggle for Girls. The app was created by Sall Grover as a safe, secure way for women around the world to chat and meet, without the intrusion and harassment by men.

The Tickle vs Giggle and Grover case deals directly with the conflict of rights arising from legal ambiguity around sex and gender. It will determine if the rights attached to the concept of a declared gender identity override rights attached to a woman by virtue of her female sex. It can be argued that the transgender person was removed from the app because that person was male, not because of a transgender identity. The opposing argument is that Tickle was removed because as someone who "identifies" as a woman, Tickle qualified for inclusion in the chat app.

This case highlights the previous, and ongoing, conflicts with and threats to women's rights arising from the 2013 amendments to the Sex Discrimination Act (SDA) by the then Federal Labor government, following the ALP's 2011 adoption of the Yogyakarta Principles as noted above. The concepts of *sexual orientation, gender identity, intersex status*, and *relationship status*

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19 https://humanrights.gov.au/our-work/lgbti/terminology. Accessed 30 June 2023.
20 https://www.legislation.qld.gov.au/view/html/inforce/current/act-1991-085. Accessed 25 June 2023.
21 https://aifs.gov.au/resources/resource-sheets/lgbtiqa-glossary-common-terms. Accessed 25 June 2023.

were added as protected characteristics, but as noted above, none of the terms *woman, gender* or *sex* are defined in the Act.

According to the Federal Attorney General's (AG's) Department, the addition of "gender identity" necessitated the *removal* of some definitions from the previous SDA. The Explanatory Memo, issued by the then Attorney General (and current AG as of 2023), Mark Dreyfus, states:

> 18. These items will repeal the definitions of "man" and "woman" from subsection 4(1)... These definitions are repealed in order to ensure that "man" and "woman" are not interpreted so narrowly as to exclude, for example, a transgender woman from accessing protections from discrimination on the basis of other attributes contained in the SDA.
>
> 19. It is not intended that by repealing these definitions the SDA would be limited in its application to only adult persons, but that "man/men" and "woman/women" continue to refer to all males and females respectively (Commonwealth of Australia 2013, 13).

This reconceptualising of woman as a *subjective identity* rather than referring to immutable female biology, is reinforced by another statement in the memorandum:

> 15. The definition recognises that being intersex is a biological condition, not a gender identity… The definition is not intended to create a third sex in any sense. *It does, however, recognise that sex is not a binary concept* (Commonwealth of Australia 2013, 12; emphasis added).

This statement is scientifically false. True intersex (also known as true gonadal intersex) is extremely rare, and an abnormal condition. Most other people referred to as intersex are biologically either male or female but have non-typical primary or secondary sexual characteristics. This observation does not negate the rights claims of intersex people (for example, not to be surgically interfered with at birth unless life is at risk), but nor does it negate that humans are sexually dimorphic, just as the fact that some individuals are born with one extra finger (a far more common condition than intersex) does not mean that numbers of fingers in normal healthy humans is on some sort of "spectrum".

Crucially, the removal of the biological sex- based concept of binary sex (female or male) meant that men declaring themselves to be women would be considered females with the protected right to access all single-sex female services, facilities, activities, spaces, and opportunities, including: domestic violence refuges; women's change rooms; lesbian dating apps; prisons; addiction rehabilitation groups; intimate health procedures/care, including disability care; awards, prizes and scholarships reserved for women, and more.

In other words, the material reality of human sexuality as a biologically determined binary was abandoned in favour of an ambiguous social and feeling-based concept, that is largely, among adults, to the advantage of men and the disadvantage of women. This change is significant because the SDA at the time had been Australia's most important piece of Federal legislation to protect women from discrimination because of their sex.

In the leadup to the amendments to SDA, submissions by women (published as "comments" on the AHRC website) to the 2010 "Consultation on protection from discrimination on the basis of sexual orientation, sex and/or gender identity" raised concerns about the negative impact on the welfare and human rights of women and girls if the SDA were to be amended to include a broad concept of woman based on the concept of a self-declared gender identity and made no distinction between sex and gender identity (AHRC 2010; see for example the detailed submission by Erinyes). These concerns were ignored.

The amended SDA did exempt *one* activity from the intent of 'inclusion" in the Act. Males could lawfully be excluded from female sports if those sports included the elements of strength, stamina, and physique (Commonwealth of Australia 2013, 21). So in this one circumstance, male biology was deemed an impediment to entry to single-sex female sports. This exemption, however, has had limited impact, as we discuss in 3.5(iii) below.

It is overwhelmingly females who have experienced the negative consequences of this law and the related policies that followed. It is not males who are disadvantaged if a female who identifies as a man plays in the opposition hockey or volleyball team. It is not males who would be disadvantaged if a female transgender person were to be located in their prison cell, but the reverse. The negative outcomes disproportionally impact on the rights, safety, wellbeing and opportunities of women and girls.

3.4 Sexual orientation

In the SDA as amended sexual orientation is defined to mean:

> a person's sexual orientation towards:
>
> (a) persons of the same sex; or
>
> (b) persons of a different sex; or
>
> (c) persons of the same sex and persons of a different sex (SDA Part I, Section 4).

Even if this definition once again uses a coneept—"sexual orientation"—to define a concept, namely, "sexual orientation", it nonetheless makes it clear that at that time the Federal government defined sexual orientation as a concept based on biological *sex*, not gender identity. It is unambiguous and affords protection of the human rights of women and girls in antidiscrimination legislation, where *sex* is a protected characteristic. This is especially relevant for same sex attracted women and adolescents.

Unfortunately, the AG's explanatory memo muddies the waters somewhat:

> The definition does not use labels, such as homosexuality, lesbianism, bisexuality or heterosexuality, which some people find offensive and can be inaccurate. However, it is intended that the definition covers each of these sexual orientations. The definition, along with other provisions in the Bill, uses the terminology "different sex", instead of "opposite sex" as is currently used in the SDA [in force prior to the amendments]. This is consistent with the protection of gender identity and intersex status, which recognises that a person may be, or identify as, neither male nor female (Commowealth of Australia 2013,13-14).

This paragraph is confusing, in introducing in its final sentence the notion of *gender identity*, which one could infer, in the context of the government's argument, to have something to do with "different sexes". Be that as it may, the definition of sexual orientation in the Act as amended includes no reference to "gender" or "gender identity".

However due to the increasing influence of the YP, both Qld and Vic jurisdictions changed the above widely accepted definition as set out in the SDA. In line with the YP and principle 31 in YP+10, the word *sex* is replaced by *gender*. The removal of the term *sex* misrepresents and confuses the nature of same-sex orientation, a central concept in the objects of laws to protect same-sex attracted people from conversion therapy and conversion practices.

Thus, the Victorian Equal Opportunity Act 2010, as amended, definies sexual orientation as "a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different *gender* or the same *gender* or more than one *gender*" (emphasis added).[22]

Definitions of sexual orientation that remove *sex* become meaningless and misrepresent the material realities of the sexual orientation of all people but especially of lesbians and gay men. Sexual attraction is not experienced on the basis of a person's gender identity, however defined. This is another area where a conflict of rights arises because of the conflation of the concepts of sex and gender and the use of inaccurate concepts in legislation.

The AIFS definition attempts to add "precision" by substituting *gender identity* for gender when defining same sex orientations:

> **Lesbian:** an individual who *identifies as a woman* and is sexually and/or romantically attracted to other people who *identify as women*.
>
> **Gay:** an individual who *identifies as a man* and is sexually and/or romantically attracted to other people who *identify as men*. The term gay can also be used in relation to women who are sexually and romantically attracted to other women.[23]

The use of these inaccurate, desexed meanings make it difficult to resolve conflicts of rights or designing policies to protect the rights of same-sex attracted people.

As a result of this framing, gay men and lesbians are not only disappeared as homo*sexuals,* but lesbians, as women, are rendered particularly vulnerable to sexual harassment by some transgender-identified males who remain sexually attracted to women, or to demands by such persons to be included in spaces and activities hitherto reserved for lesbians. Lesbians who object to the gender-identity framing of their sexual orientation are also subjected to vicious online and often in-person abuse and vilification.

As US jurist Tina Minkowitz put it, in her 2016 submission to the Committee on the Elimination of All Forms of Discrimination Against Women for its Update of General Recommendation No. 19 (concerning violence against women) :

> Lesbians and other women who gather in female-only environments face intense pressure to open those spaces to males who identity as lesbian or transwomen, resulting in the loss of unique spaces where women and girls are supported to heal from systemic misogyny and male violence, share knowledge, and experience self-acceptance, freedom and safety with other women and girls. This includes rape crisis centers, women's centers on college campuses, women's sports activities, women's universities and independent women's cultural institutions (Minkowitz 2016).

Lesbians are also discriminated against in access to resources and to public fora when peak LGBTIQA+ organisations and their communities exclude them and fail to respect their distinct sexual identity as females who are sexually interested exclusively in other females. This exclusion happens when LGBTIQA+ organisations and government bodies define lesbians in terms of gender identity rather than sex.

For example, in 2020 the Sydney Gay and Lesbian Mardi Gras withdrew support for a Lesbian Sexuality panel event featuring Arielle Scarcella along with other women. She is a US lesbian (i.e. a same-sex attracted woman) and the biggest producer of lesbian content on YouTube with over 600,000 subscribers. The "cancellation" occurred just 24 hours after a

[22] https://www.legislation.vic.gov.au/in-force/acts/equal-opportunity-act-2010/029. Accessed 26 June 2023.
[23] https://aifs.gov.au/resources/resource-sheets/lgbtiqa-glossary-common-terms. Accessed 25 June 2023.

petition claiming she was a transphobe was circulated on social media, because she did not include men in her dating pool and had produced a video called "stop pushing lady dick on lesbians". After the petition other speakers pulled out. Actor Kelsie Adelaide said they could "not in good conscience attend" alongside Scarcella. because "[w]e must always strive to be kind and love one another, support and value those most vulnerable in our community". (The vulnerability of lesbians to sexual harassment by men did not seem to be a factor in Adelaide's reasoning.) The event was held with Scarcella and a different panel at another venue (Fain 2020, online; Powys Maurice 2020, online).

3.5 Case studies

3.5(i) Males in women's prisons

On 5 July, 2022, a transgender-identified male, Lisa Jones, who was serving a sentence for violent sexual assault was moved to the women's Dame Phyllis Frost Correctional Centre in Victoria. The women inmates were traumatised and concerned for their safety, and petitioned the Minister for Corrections and the Ombudsman, for Jones's immediate removal (Gluck 2022, online). To date, their petition has been ignored. Media coverage of the assault referred to Jones as a woman, used female pronouns, and some journalists reported the sexual assault had been "woman on woman" violence (Schelle 2021).

Yet there is ample evidence to support the women's claims of physical or psychological harm when male transgender people, and in particular sex offenders, are housed in a women's facility:

- women inmates have high rates of sexual abuse victimisation histories;
- women enter prison extremely disadvantaged, in relation to mental health, re-victimisation, substance abuse frequently as as the consequences of past histories of abuse/assault;
- situations of power and control are often re-traumatising for female offenders with a sexual abuse victimisation history (AIFS 2012).

These 2012 findings are confirmed in a more recent study by Monash University, which found that that the majority of the female prison population is socioeconomically marginalised (one third are Indigenous) and an estimated 85 percent have experienced violence at some point in their lives (Meyer 2021) .

The Victorian women protestors also relied on the history of what does happen when male sexual offenders claim a "woman" identity and are transferred to a women's prison. In the UK in 2017, for example, the transfer of a male sexual offender to a women's prison resulted in that person assaulting female inmates, leading to a public outcry (Parveen 2018). In early 2023, an outcry over another male sex offender being sent to a women's prison in Scotland prompted a change in policy, putting an end to this practice in Scotland (Brooks and Carrell 2023).

In the context of her argument that males should never be sent to women's prisons, Julie Bindel noted that it is fact "more likely that the victim of a rape will end up in prison as a result of the trauma inflicted upon her than that the rapist will end up in prison as a result of the rape he committed" (Bindel 2023, online). The overwhelming majority of those committing and imprisoned for sexual assault are male, and that number has risen over the last five years. One third of sexual offenders are re-offenders (ABS 2022b). The number of offenders in this category has also risen among women, but as some males with a "woman" gender identity are now included in statistics concerning women, it is likely that some male offenders are erroneously

included in the statistics concerning violence by women (see for example, as concerns the case of violent offender Evie Amati, McKinnell 2019).

Further, an Australian psychiatrist who visits prisons expressed his concerns:

> We've been through heated debates about the trans issue in elite sports and in our schools, but prisoners are not a group that is flush with advocates. Biological female prisoners are some of the most victimised people on Earth. The vast majority have experienced sexual abuse or physical violence, chaotic upbringings, and foster care… (Ahmed 2022, online).

The policy of accepting declared identification as a woman has become established in most of the Australian criminal justice system but the protection of the human rights of women prisoners depends somewhat on their state of residence. NSW, Victoria, Tasmania, Western Australia and the ACT have policies that allow men to be housed with women based on Self-ID. South Australia, the Northern Territory, and Queensland assess inmates on a case-by-case basis. However, none of these policies have been incorporated into common law; they have thus not been subjected to the usual parliamentary oversight and debate.

Women prisoners are entitled to enjoy all the rights in the ICCPR subject to "restrictions that are unavoidable in a closed environment" (General Comment Nº 21), and the AHRC position paper includes the right to "humane treatment when deprived of liberty" (2022a,18). For the Victorian women it is apparent that their right to be treated with humanity, dignity and respect and not be subjected to inhuman or degrading treatment while in detention, is being violated by the presence of a male sex offender. These rights are set out in articles 7 and 10 of the ICCPR, article 37 of the Convention on the Rights of the Child (CRC) and in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The patchwork of state policies in relation to women prisoners highlights the need for a FHRA that makes a clear distinction between biological sex and sex acquired via declaration and that can support national policies in this area. In addition, given the overrepresentation of women having been subjected to violence, poor women and Indigenous women in the Australian prison system, particular attention needs to be paid both to their "humane treatment" and to their "rights in criminal proceedings"—another area foregrounded by the AHRC (2022a, 18)

3.5(ii) National Women's Health Policy

At the Federal level, the National Women's Health Policy 2020-2030 deals with another area of major importance to women but uses the word woman to also mean men. The policy identifies "LGBTI women" as one of the priority groups of women and girls. It states: "This group includes female-identifying individuals and individuals assigned female at birth and may include transgender men and women, intersex, non-binary and gender diverse people" (Department of Health and Aged Care 2019, 15).

Since the adoption of "gender" health policies, replacing sex-specific policies in areas where sex is relevant to health outcomes (which is the case across a range of health needs, not only in the areas of reproductive health) has serious conssequences for women's health. In particular, women's and girls' right to accurate knowledge of their own bodies, which supports their ability to exercise sexual and reproductive autonomy, is being undermined by informational materials that contain misleading descriptions of female and male anatomy. Such descriptions frequently prioritise gender identity over sex, such as references to breasts as "chest", e.g. "chest binder", which actually flattens and binds the breasts and can cause multiple health problems and damage, or "chest feeding", which apart from anything else is anatomically incorrect. Vocabulary that is arcane to many women, such as "cervix havers" or embarrassing, such as "menstruators", is

routinely used in contexts such as health information posters and leaflets, where simplicity and clarity of health information is vital. Mothers are now referred to as "birthing persons". Few, if any, of these vocabulary changes impact on men: men are rarely euphemised as "penis havers" and fathers are rarely if ever referred to as "ejaculating parent" or "inseminating parent", for example.

3.5(iii) Women's sports

The abovementioned sport exemption in the SDA has come under challenge, both nationally and internationally. Advocates for removal of such exemptions use antidiscrimination legislation and social justice arguments that prioritise concepts of "inclusion" over equality, safety and fairness for female athletes. Numerous human rights organisations and the Australian Institute of Sport are involved in these campaigns to include male-bodied transgender people in female sports. In 2019, the AHRC produced National Guidelines for the inclusion of transgender and gender diverse people in sport, which is in line with the political agenda set back in 2013 with the amendments to the SDA (AHRC 2019).

The framework of the AHRC Guidelines is based on the SDA and highlights the unlawfulness of discrimination on the basis of gender identity and victimisation. It offers:

> practical guidance for promoting inclusion in line with fundamental human rights-based principles:
>
> - equality
> - participation in sport
> - freedom from discrimination and harassment
> - privacy (AHRC 2019, 11).

The Foreword by Sex Discrimination Commissioner Kate Jenkins also asserts that "[p]articipation in sport is a human right" (AHRC 2019, 5), despite the fact there is no *specific* human right to sport beyond the provision of UDHR Article 27, reiterated in ICESCR Article 15 (a), that "[e]veryone has the right freely to participate in the cultural life of the community", of which sport can be understood as a subset. There is certainly no human right to self-declare into any particular category of sport.

It is accepted, for example, that sighted people do not have a human right to enter sport for blind athletes, nor do heavyweight boxers have a human right to enter featherweight divisions. Male transgender athletes are not prevented from playing sport because they are free to participate in the male category, or in mixed-sex categories where these exist. *At no point are the competing rights of female athletes discussed or considered.* Biological sex differences matter in sport and it is women's human rights to safety, health and privacy that are jeopardised if male transgender athletes are included. Beyond the grossly unfair advantage to men in those sports where greater bone density, muscle mass and lung capacity confer an advantage in terms of strength, speed and endurance (which is all athletics and swimming and most team field sports), inclusion of males in female sports categories greatly increases the risk of injury to women in team sports.[24] It further leads to violation of sex-segregation needs among some ethno-religious minority communities:

[24] See for example this account of complaints made to NSW Football League One about the participation of trans-identified males, and Riley Dennis in particular, in amateur women's sport: "Thousands of Complaints Filed After Trans YouTuber Allowed To Play On Women's Football League, Reportedly Injured Players". *The Glinner Update,* 30 April 2023. The article cites Dennis, who identifies as a lesbian, stating that lesbians' sexual preference for "women with vaginas" over "women with penises" is "cissexist".

some anecdotal accounts suggest girls in these communities are starting to self-select out of sports when boys are admitted into girls' teams.

The Australian Institute of Sport's recent policy on transgender athletes in elite female competitions is similarly based on the concept of the gender identity of male-bodied athletes. (AIS 2023). The policy prioritises gender identity over birth sex and recommends the inclusion of transgender athletes based on a testosterone limit of 2.5 nanomillimoles (AIS 2023, 9). However, this limit can be ignored and instead set by National Federations. In addition, the guidelines are not compulsory, even though the recommended barriers to participation for male-bodied trans athletes are very low and entirely flexible. These guidelines relied on the following laws at the Federal level and the fact that "the Australian Human Rights Commission has statutory responsibilities under them": Sex Discrimination Act 1984; Privacy Act 1988 (AIS 2023, 14).

Similar to the other policies addressing transgender and gender diversity, these sport guidelines do not consider or discuss the rights of non-trans female athletes. Priority is given to the inclusion of trans athletes in women's sport. The document also dismisses the scientific reviews that have led to blanket bans on male transgender athletes in women's sports by the world governing bodies in swimming, athletics and rugby union.

After conducting extensive scientific reviews of performance factors in their specific sports, these world governing bodies have all established policies that simply exclude males from the female categories in their sports.The Australian policy is at odds with these international bodies and argues that imposing a blanket ban on trans eligibility may infringe upon various Commonwealth and state and territory discrimination laws that include gender identity.

3.6 Recommendations

Recommendation 11. That the new FHRA **include a clear, science-based definition of the word woman and contain clear references to women as a discrete rights constituency** towards whom the state has a responsibility under the terms of CEDAW.

Recommendation 12. That the new FHRA **incorporate clear definitions of sexual orientation and gender identity** and guide reforms to the SDA to that effect.

Recommendation 13. That the new FHRA **ensure that both the AHRC and court structures have the capacity to offer protection to particular groups** where there is significant evidence that there is inadequate human rights protections for those groups.

Recommendation 14. That the new FHRA **provide clear guidelines for dealing with conflicts of rights**, nconsultation with stakeholders. This consultation must be entered into in good faith with all impacted groups, such that the rights of one constituency are not privileged at the expense of the rights of another.

4. Protection of the rights of children and in particular the girl child: a case study of gender-affirming medicine (GAM)

The Convention on the Rights of the Child (CRC) is the most widely ratified of all UN human rights treaties. This standalone Convention is a global acknowledgment of the importance of keeping the human rights of children at the forefront of each country's laws and practices. AF4WR strongly supports the prominence given to children's rights internationally and we argue that the proposals in the AHRC position paper regarding children's rights in Australia are inadequate (AHRC 2022a).

As for women's rights, the AHRC's proposals do not keep children's rights distinct and visible to the Australian population or the Executive branch of government, but groups them with other human rights treaties as "thematic instruments". This lack of specific attention to children's rights minimises the importance of safeguarding children (AHRC 2022a, 17; see also the Introduction to this submission).

This low-visibility approach to children's rights largely reflects the standard process and expectations of the status quo. It is the current status quo and statements of compatibility that are failing to protect children from serious and lifelong harm in the GAM. While the AHRC recommends an overarching *participation duty* (AHRC 2022a, 19 ff), discussed in 6.3 below, as an aspect of the binding positive duty on public authorities, it will not contribute significantly to the protection and welfare of children, as is proposed to be non-binding as concerns legislation. (AHRC 2022a, 21). In the case of children, the principle of "best interests of the child" will be considered as part of the participation duty as is usual.

The CRC took effect in Australia in 1990 and recognises two main principles: the requirement for children to have special safeguards and care because of their physical and mental immaturity, and the best interests of the child. There are approximately 4.7 million children (0-14 years) in Australia and large numbers face serious disadvantages and harm. Among other things, approximately 1.2 million, that is, some 25.5 percent, live in poverty (ACOSS & UNSW 2023). These disadvantages, when considered concurrently with the abovementioned two principles, indicate that children as a significant proportion of the Australian population require the protection of clearly stated inclusion in standalone articles rather than a single general clause. The articles in the proposed FHRA must demonstrate an awareness of and a commitment to much stronger protection of children.

In December 2013 a Royal Commission was established to inquire into institutional responses to child sexual abuse and related matters. The report detailed the scope and findings of the 5-year inquiry:

> Over 16,000 individuals have contacted the Royal Commission and by the time we conclude our work we expect to have heard more than 8,000 personal stories in private sessions. Over 1,000 survivors have provided a written account of their experience…We have also heard from parents, spouses and siblings about the abuse of their relatives, many of whom have died, sometimes by suicide. We now know that countless thousands of children have been sexually abused in many institutions in Australia. In many institutions, multiple abusers have sexually abused children. We must accept that institutional child sexual abuse has been occurring for generations (RCIRCSA 2017, 1).

This is without considering the sexual assault of children that occurs within families, which are two-fifths of all *recorded* sexual assaults against children (the *actual* proportion is likely to be much higher as a large number of such assaults go unreported). Among these recorded assaults, girls are four times more likely than boys to be sexually assaulted by a (male) family member (AIHW 2022). The Royal Commission report did, however, emphasise the right of all children to a safe and happy childhood and society's responsibility to provide it.

Another serious threat to the wellbeing of increasing numbers of children in Australia is the practice of treating their psychological distress manifesting as gender dysphoria using an approach called Gender Affirming Medicine (GAM), discussed below. A major review of this practice in the UK, which raised multiple concerns (Cass et al 2022), led to a complete overhaul of the National Health Service's (NHS) approach to treating children and teenagers with gender dysphoria and to the closure of the major clinic practising GAM, the Gender Identity Development Service (GIDS) at the Tavistock and Portman NHS Foundation Trust. In Australia, the opposite path is being pursued.

The need for specific articles for children in an FHRA is demonstrated by the context and serious nature of the rights violations associated with GAM demonstrate. The current human rights mechanisms, especially reviews and compatibility statements, have failed to adequately protect children's short and long-term health and safety. The evidence base of the permanent and life-long harms comes not only from researchers and health professionals but directly from young people treated by GAM. All of them were treated in those Western countries and other liberal democracies where the concept of *gender identity* has been incorporated into legislation and the health care of distressed children.

4.1 Gender Dysphoria and Gender Affirming Medicine (GAM)

Although GAM is one option for treating gender dysphoria in both children and adults it has a dominant position in Australia. *Gender dysphoria* refers to unease or distress because of a mismatch between birth sex and an internal sense of a "gender identity". This approach is both encouraged, even mandated, and contested globally in Western countries and other liberal democracies, including Australia. Where conflict between parents arises over the use of GAM, the Family Court deals with them.

The main clinical criteria for the diagnosis of gender dysphoria in both girls and boys are set out in the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), produced in the US and used globally as an authoritative source. According to DSM-5, "gender dysphoria in children [is] a marked incongruence between one's experienced/expressed gender and assigned gender, lasting at least 6 months, as manifested by at least six of the following (one of which must be the first criterion)":

1. A strong desire to be of the other gender or an insistence that one is the other gender
2. A strong preference for wearing clothes typical of the opposite gender. In boys a strong preference for wearing or simulating female attire, and/or a resistance to wearing traditional masculine clothing. In girls, a strong preference for wearing typical masculine clothing, and/or a resistance to wearing traditional feminine clothing
3. A strong preference for cross-gender roles in make-believe play or fantasy play
4. A strong preference for the toys, games, or activities stereotypically used or engaged in by the other gender
5. A strong preference for playmates of the other gender

6. A strong rejection of toys, games, and activities stereotypical of one's assigned gender
7. A strong dislike of one's sexual anatomy
8. A strong desire for the physical sex characteristics that match one's experienced gender (cited by the American Psychiatric Association)[25]

The DSM reproduces here the myth of a "gender" being "assigned" at birth rather than a *sex* being *observed and documented* (which these days, thanks to ultrasound technology, often happens well before birth). Moreover, five of its eight "diagnostic" criteria are based on the child not conforming to outdated traditional feminine or masculine stereotyped behaviour, appearance, or activities. Yet as we have seen, CEDAW identifies sex-role stereotyping as a major factor in the subordination of women, and explicitly requires States to counter such stereotyping in the education of children. Its Article 10b states:

> The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.

The ideological and clinical position of pathologising children based on narrow stereotypes and their reversal is clearly at odds not only with CEDAW itself but also with important Federal and State government initiatives in line with their obligations under CEDAW. STEM programs, for example, aim to have more girls and women explore and take up careers in non-traditional areas by breaking down traditional stereotypes that activities involving science, technology, engineering, and maths are masculine.

The diagnosis of gender dysphoria is derived from the ideological belief that sex roles are *not* socially constructed but are the basis of an innate "gender identity", and children's bodies are altered medically in accordance with this belief. A recurring element in this belief system is the narrative of *born in the wrong body,* which was initially popularised in a 1974 autobiography by Jan Morris, *Conundrum* (Morris 2018). The opening sentence of this book says " I was three or perhaps four years old when I realized that I had been born in the wrong body, and should really be a girl". Similarly, 7-year-old Jazz Jenning repeats "I have a girl brain in a boy body" in the reality TV series *I am Jazz* (see also Herthel et al 2014).

Gender identity theory is the theoretical foundation of GAM and has contributed to its rapid adoption over the past 10-15 years. The core beliefs of the theory are:

- Gender identity is inherent and fixed: an innate sense of being male or female (RCH, 2020 online);
- Gender identity is what makes you a woman/girl or man/boy, or neither, *not* your biological sex; and
- The existence of trans people imposes a moral obligation on governments to recognise and legally protect gender identity and not biological sex (Stock 2022, 18).

The developmental stages of childhood are irrelevant to this theory because unproven *innateness* is a core belief of the theory and therefore outside of the science of human psychological growth and development. This theoretical position, popularised by DSM-5 and the American Psychiatric Association as seen above, is also held by the Australian Psychological Society.[26]

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[25] https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria. Accessed 15 May 2023.
[26] https://psychology.org.au/about-us/position-statements/mental-health-practices-affirm-transgender. Accessed 25 June 2023.

The evidence of harm, such as sterility, to children treated for gender dysphoria, ought to have resulted in urgent and much better protection of children by their governments. Despite various calls for a national inquiry into this treatment model in Australia—including in 2019 from the National Association of Practising Psychiatrists[27]—GAM continues to be protected and promoted by state legislation. However, variations in state laws mean that who and what is protected depends on the child's state of residence, rather than Federal protection.

GAM begins with a declaration by the child that, for example, she or he was born in the wrong body, or believe they are trans or the other sex. This declaration *by a child of any age* is to be accepted by parents, teachers, and health professionals *without question*, and the child's new identity affirmed by following these four steps:

- Social transition with changes to name, clothing, and hairstyle at any age, including as young as 3 (the Royal Children's Hospital in Melbourne accepts clients of this age);
- The blocking of the developmental changes of puberty with off-label drugs (that is, used in ways not medically approved by the Therapeutic Goods Adminsitration) starting at Tanner Stage 2 of physical development of the child (the onset of puberty), usually between 9 and 11 years of age;
- The administration of opposite-sex hormones at around 16, and continued for life; and
- (In many cases) surgery after 16 years: including removal of breasts (or breast implants for males) and modification of external genitalia.

The drugs used as puberty blockers in GAM are gonadotropin-releasing hormone agonists or GnRHAs. These are sex hormone suppressants, and go by a variety of brand names, one of the most common of which is Lupron. They are approved in many countries to treat some cancers such as prostate or breast cancer, or in some cases to slow down extremely precocious puberty in very young children. They are not approved as puberty blockers for the treatment of children with gender dysphoria, in Australia or elsewhere, and they are not certified as a safe or effective treatment for gender dysphoria by the manufacturers who have refused to conduct clinical trials.

The harms and effects of PB include the following (Biggs 2020):

- reduction in bone growth, decrease in bone density and premature osteoporosis;
- decrease in mental acuity including lowering of IQ by up to 10 points;
- fatigue, insomnia, headaches and muscle aches;
- emotional lability and significant behavioural changes;
- precocious menopause at the normal age of puberty for girls, with associated perimenopausal symptoms (Olson 2018);
- liver damage;
- abnormalities in breast tissue;
- idiopathic intracranial hypertension, resulting in loss of vision. The US Food and Drug Administration now requires GnRHAs to carry a warning against this last side effect.

The World Professional Association for Transgender Health (WPATH) publishes a manual and standards of care for children (Coleman et al 2022). It is co-written by activists and recommends the affirmation-only model of care (that is, gender affirmation without consideration of comorbid factors such as autism, depression, anxiety, experience of sexual abuse and so on). The Australian Standards of Care are produced by the Royal Children's Hospital Melbourne (RCH) and closely follow WPATH's international manual. Both claim that not affirming the child's declaration inflicts more harm than the side effects of puberty blockers and cross-sex hormones.

[27] https://napp.org.au/2019/10/gender-dysphoria-national-enquiry. Accessed 4 July 2023.

Despite the theoretical assumptions of the manuals, reviews of various research papers show that between 50 and 98 precent of trans-identified children and young people desist from a trans identity in adulthood, and many albeit not all of them will turn out to be homosexual (see for example Ristori and Steensma 2016; Singh et al 2021; Schwartz 2021). Crucially, doctors *cannot* diagnose which children will outgrow their gender distress because diagnosis is based on a declaration by the child *before* the child has the capacity to understand the implications of the treatment practices (Kenny 2019). For instance, child reality TV star Jazz Jennings, mentioned above, was born male and at age four diagnosed with gender dysphoria, becoming one of the youngest publicly documented people to be identified as transgender. However, at 22, Jennings talked of struggles with mental illness, weight gain, binge eating, and lack of sexual pleasure.(Migdon 2021).

Four principles are needed in addition to standard informed consent principles used for medical treatment. They are:

1. The diagnosis has near certainty of being accurate.
2. The procedures/treatments being offered are based on scientific evidence and a body of established research.
3. The likelihood of serious irreversible harm is known and negligible.
4. The person giving consent has the capacity to understand the risks, as well as the short- and long-term consequences of the treatment (Haysom and Narsai 2019).

All of these principles are absent in the case of GAM for minors. In a 2021 journal article and a followup report published in 2023, a medical team at the Gender Service of the Westmead Children's Hospital found that

> clinicians … who work in gender services are coming under increasing pressure to put aside their own holistic (biopsychosocial) model of care, and to compromise their own ethical standards, by engaging in a tick-the-box treatment process. Such an approach … puts patients at risk of adverse future outcomes and clinicians at risk of future legal action (Kozlowska et al 2021, online).

They concluded that GAM lacks a solid evidence base and that "the current evidence suggests the need for a much more nuanced and complex approach" (Elkadi et al 2023, online).

4.2 GAM and vulnerable groups

Research in several countries shows that Rapid Onset Gender Dysphoria (ROGD) among children and teenagers has increased dramatically in recent years. The term ROGD was coined by Lisa Littman to describe an unusual social phenomenon observed among minors, notably girls: a sudden onset of gender dysphoria in ever increasing numbers. Social media and peer influence would appear to be playing a significant role in this dramatic increase (Littman 2018). In the UK, referrals to the nation's then 14 gender identity clinics between 2011 and 2016 increased by up to several hundred percent. In Sweden, there was a 1,500 percent increase in gender dysphoria among teenage girls between 2008 and 2018 (Orange 2020). Data from various countries indicate that three to four times more girls than boys are presenting with gender dysphoria.

Indicative data from five gender clinics in Australia between 2014 and 2021 show an increase of several hundred percent in children enrolled in such clinics, with an even sharper increase in those taking puberty blockers. Between 2009 and 2020, the referrals of children to the RCH in Melbourne rose from 8 to 473, which is an over 5,000 percent increase. There were 1,120 children enrolled there in 2021, including ongoing patients and new referrals (Kenny 2022).

These dramatic increases over the last fifteen years suggest that the aggressive marketing of the supposed "cure", GAM, is in fact the primary source of this problem. Moreover, it is a problem that is disportionately affecting particularly vulnerable groups of young people, including girls in general; children of both sexes who are same-sex attracted (and often do not conform to stereotypical gender presentation); and children with autism.

In a culture that imposes impossible "feminine" beauty and personality standards, many girls—particularly at the onset of puberty—suffer from poor body image and low self-esteem. The low self-image is exacerbated for a significant number by experiences of sexual abuse. Girls have long acted out their distress against themselves, through behaviours such as eating disorders or cutting. In the current sociocultural context, for girls who do not gender-conform or who are more likely to be lesbian, becoming trans appears as a valorising solution to what may otherwise be a situation of social stigma (Robinson 2021).

In fact, GAM reinforces heteronormativity in that it influences gender non-conforming young people to alter their bodies to align with stereotypes of masculinity and femininity. From this point of view, the marked increase of gender dysphoria among young people in recent years and the offered solution of transgender affirmation can be seen as having regressive consequences. Rather than changing social attitudes to include a range of physical presentations, personalities and individual tastes among boys and girls, boys and girls are being persuaded to change their bodies and social identities to fit stereotypical and heteronormative gender prescriptions.

GAM, in suppressing puberty, also often results in the suppression of the sexual orientation of same-sex-attracted youth. This was the case, for example, for Keira Bell in the UK (see below) and Max Robinson in the US (Robinson 2021), and is a very common element in the experiences of detransitioners. If the outcome is the suppression of same-sex attraction in adolescents, and if a practice is not based on scientific evidence but false claims, *then it is in fact a conversion practice* and ought to be deemed as such under Australian legislation that bans conversion therapy. Yet the opposite is the case, due to the influence of LGBTQA+ lobbyists and stakeholders such as ACON, and the absence of compatibility statements with the CRC.

The first judicial review of the ability of minors to consent to the practices associated with gender transition was conducted by the High Court in the United Kingdom in the case *Bell and Mrs A v Tavistock* (2020). This case was one of the major factors prompting the abovementioned NHS review of GAM in the UK.

At the children's gender clinic GIDS, Keira Bell had had her declaration of a trans identity affirmed when she was 15, but stopped identifying as a transman at age 21. Her case against the Tavistock and Portman Trust onsidered whether young people at the clinic could meaningfully consent to the medical interventions of GAM. A key issue was that doctors do not know and cannot diagnose which children will want to stop identifying as a different sex.

Bell's experience is typical of that of girls who are dealing with poor self esteem and shame at feeling same-sex attracted:

> By the time I was 14, I was severely depressed and had given up: I stopped going to school; I stopped going outside. I just stayed in my room, avoiding my mother, playing video games, getting lost in my favourite music, and surfing the internet.
>
> Something else was happening: I became attracted to girls. I had never had a positive association with the term "lesbian" or the idea that two girls could be in a relationship. This made me wonder if there was something inherently wrong with me ….I told [her father's partner] that I thought I was a boy and that I wanted to become one.

> By the time I got to the Tavistock, I was adamant that I needed to transition. It was the kind of brash assertion that's typical of teenagers. What was really going on was that I was a girl insecure in my body who had experienced parental abandonment, felt alienated from my peers, suffered from anxiety and depression, and struggled with my sexual orientation.
>
> After a series of superficial conversations with social workers, I was put on puberty blockers at age 16. A year later, I was receiving testosterone shots. When 20, I had a double mastectomy… As I look back, I see how everything led me to conclude it would be best if I stopped becoming a woman …
>
> I was an unhappy girl who needed help. Instead, I was treated like an experiment. I want the message of cases like mine to help protect other kids from taking a mistaken path. This year, I helped create the first Detrans Awareness Day, on March 12.[28] I hope that, in years to come, this day can be a beacon to empower others (Bell 2021, online).

The decision of the UK High Court was that it was "doubtful that a child aged 14 or 15 could understand and weigh the long-term risks and consequences of the administration of puberty blockers" (Bell and Mrs A v Tavistock 2020, para. 151).

As part of the judicial review in the Bell case, Dr Christopher Gillberg, a professor of child and adolescent psychiatry and specialist in autism, was an expert witness. Gillberg said that during his 45 years of treating children with autism, it was rare to have patients with gender dysphoria, but their numbers started exploding in 2013, and most were biological girls. Gillberg told the court that what was happening at the children's gender clinic was a "live experiment" on children and adolescents (Grifitths 2021, online).

Research undertaken by a team at the University of Cambridge found that people with autism are three to six times more likely *not* to identify with their birth sex (Warrier et al 2020). The team's findings confirm Gillberg's clinical observations. In a Scottish study, the prevalence of autism was reported to be 1.9 percent in Scottish children aged 0-15 years overall, while among children at gender clinics, the rate is 24 percent (Rydzewska et al 2019).

Neurodiversity adds to the risk of misdiagnosis of distress and ensuing harm and it is imperative to protect these children from the automatic affirmation of a new identity under GAM. Article 7 (2) of the CRPD states that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

4.3 GAM in Australian law

The protocols of GAM are followed in every state and territory but have only recently been incorporated into laws known as Conversion or Suppression/Change Therapies in Queensland, Victoria, and the Australian Capital Territory. Other states have plans for similar legislation.

While there are variations in scope and penalties for breaches of the laws, they all privilege gender identity over sex. In addition, the Yogyakarta Principles are often referenced to justify the imposition of GAM, which ignores sex or conflates sex with gender identity.

[28] https://www.detransawareness.org/. Accessed 15 May 2023.

For instance, the Qld HRC submission on the Health Amendment Bill covering conversion therapy stated:

> The Yogyakarta Principles (the Principles) were developed to inform state parties' understanding of how existing human rights apply to LGBTIQ+ people. With respect to the right to recognition and equality before the law as it relates to LGBTIQ+ people, the Yogyakarta Principles include the following statement:
>
> No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity, [Principle 3] And
>
> Passing the Bill would contribute to ensuring the human rights of LGBTIQ+ people in accordance with international human rights obligations as articulated in the Principles (Qld HRC 2019).

At a time when there was already grave international concern about the evidence base and harms of GAM, the Qld HRC supported the conversion therapy bill without any discussion of conflicts with numerous Articles in the CRC.

It is the concept of a gender identity that is presumed to be knowable by children from a very young age that has informed the legislation to allow or, in the case of Victoria, *require* the experimental medical practices of GAM. The majority of the content of these laws is devoted to defining what is *not* a conversion practice, because although the laws prohibit biomedical practices on same-sex-attracted people, which is the public rationale for them, *at the same time they condone or even mandate major biomedical practices on children distressed about their birth sex.*

These laws contain a major contradiction that impacts the welfare of children. The contradiction is the result of the diametrically opposed realities of same-sex-attracted people and transgender people as discussed in Section 3 above. The laws rightly make it illegal to use medical and psychological practices to try to change the same-sex attraction of lesbian women and gay men. However, these *same* laws make it *legal* to use experimental medical and psychological practices on children who believe they have the wrong body: in other words, to *convert* healthy sexed bodies into trans bodies.

In Victoria, it is now a crime for anyone, including parents, *not* to affirm the child's belief with social and medical interventions. Health professionals and/or parents, friends, teachers and others who do not affirm a child's identity as the other sex, face imprisonment, fines and charges of child abuse or neglect. A parental conversation urging a cautious wait-and-see approach with no medical intervention until the child is 18 would be an illegal suppression practice under Victorian law, and the child can be removed from the parents on the grounds of abuse. Fines for not gender-affirming a child of *any* age vary from $218,088 for individuals to a massive $1,090,440 for organisations.[29]

In 2019, the Human Rights Law Alliance (HRLA) was contacted by a Queensland father who was taken to court by his daughter for refusing to refer to her as a male and to use her preferred names and pronouns. The daughter, who was in her early twenties, had announced that she was transgender and demanded that her father recognise her as male. She applied for a Domestic Violence and Protection Order against her father which was supported by a psychotherapist stating that refusal to use a new name and pronouns was violence that caused psychological harm. The application was dismissed as the daughter did not appear; the judge commented that

[29] Change or Suppression (Conversion) Practices Prohibition Act 2021. https://www.legislation.vic.gov.au/in-force/acts/change-or-suppression-conversion-practices-prohibition-act-2021/001. Accessed 10 July 2022.

there was no basis for a restraining order and a parent could not be compelled to support his or her child's decision to transition (Steenhof 2021).

However, parents in Victoria can be legally compelled to support GAM and have lost their right to determine what they consider to be in the best interests of their child. Even in States without conversion laws, Education departments use anti-discrimination laws to enforce policies of gender affirmation of children. Schools must place children on Step One of the GAM (social transition) and affirm the child's new identity with name, pronoun, and activity changes, even without a parent's consent or knowledge.

The introduction of conversion therapy laws from 2020 on has led medical indemnity insurer MDA National to change its policies to disallow claims arising from gender-affirming treatment of a child under 18, including the prescribing of hormones. MDA National President, Dr Michael Gannon, explained the decision:

> the insurer's decision was motivated both by monitoring of developments overseas, as well as member feedback, It is difficult to price the risk in this clinical area … we don't think we can accurately and fairly price the risk of *regret*.
>
> One of the problems with long tail insurance is that you might make a decision, or there might be a clinical matter that's dealt with, and then it takes five, 10, 15, 20 years before that turns into a clinical problem. We're talking about people who are making life changing decisions. So, our feeling is that that is a very high level of risk for an individual GP to take (cited in Tsirtsakis 2023, online).

4.4 GAM and the CRC

As it stands GAM involves violations of the following Articles detailed in the CRC:

> **Article 6**: Maximising healthy development is breached by the widespread administration of off-label drugs to permanently block the child's natural development through puberty while cross-sex hormones are irreversibly destructive of fertility, voice and bone structure.
>
> **Article 9:** Not to be separated from parents. Recent conversion therapy laws, give the Family Court the power to remove children from their families and children can be alienated from their families as a result.
>
> **Article 13:** The right to seek, receive and impart information is breached by clinics denying children, including adolescents, vital information and education on their sexual functioning and pleasure, and reproductive health and futures. None supply information about detransitioning if the child changes her or his mind. A crucial right is informed consent.
>
> **Article 14**: The duty of parents to provide direction can be overridden by Conversion therapy legislation, and parents cannot object to school policies that prioritise the rights of transgender children in all school activities.
>
> **Article 19**: Right to be protected from all forms of physical and mental abuse. The Conversion practices laws in Qld, ACT and Vic fail to protect children from the social and other harms caused by misdiagnosis and biomedical practices based on experimental treatments that have not been subject to rigorous clinical trials and peer review. Clinicians are unable to tell (diagnose) which children will outgrow their childhood/ adolescent distress and which children will not.

> The overwhelming majority of young children will outgrow their distress if they are not socially transitioned, and do not have any social medical or surgical gender-affirming treatments. There is actual physical, social, and mental harm to those children who would have grown comfortable with their sexed bodies if nonmedical treatment options had been used. It is alarming that despite the scientific evidence of serious harms to girl children, the AHRC reported as a positive change for children's rights, that "Australian transgender and gender diverse children can now access Stage 2 medical treatment without court authorisation" (AHRC 2019). Stage 2 means puberty blockers.
>
> **Article 24:** Right to the highest attainable standard of health. The legislated GAM clearly breaches this right. The administration of puberty blockers as soon as females develop breast buds under the areola, usually between 10 and 11, despite the drugs not having TGA approval, reduce the attainment of the best standard of health.
>
> The child's initial psychological distress is medicalised and no alternative explanations are explored. Co-morbidities remain untreated and established psychological therapies used for all other forms of distress in children are ignored. GAM pathologises social behaviour that is not stereotypically feminine or masculine, that is, for girls: not playing with stereotypical "feminine" toys like miniature kitchens, soft toys and Barbie dolls, but instead preferring stereotypical "masculine" toys like trucks and swords. Instead of this non-conforming behaviour being seen as the normal development of children's interests, it has become the basis of pathologising children with a diagnosis of gender incongruence.

The current legislation and practice of GAMS also arguably qualifies as torture under the international Convention Against Torture, which requires states to criminalise infliction of pain and suffering by a public authority or with the consent or acquiescence thereof, through intimidation or coercion "or for any reason based on discrimination of any kind" (Article 1).

Currently, the protection of children's rights relies upon their state of residence. AF4WR believes it is a Federal responsibility to develop mechanisms to ensure this is not the case and rights of children are protected regardless of their state of residence. One of those options would be for the FHRA to identify options through national health policy, national sports policies, and the regulation of medications.

For the Family Court, as a Federal body that deals with disputes between parents about GAM, a FHRA could be of benefit to those legal processes. Recently there was a dispute between the parents of a primary-school-age child over the use of puberty blockers. It was the first time an Australian judge had the benefit of multiple expert arguments against the case for GAM. It was significant because the children's gender clinic capitulated and withdrew its claim of puberty blockers as safe and reversible (Lane 2023).

Further, as national health policy is the responsibility of Federal government, specific FHRA articles on the rights of the child would be of great benefit and could unequivocally support basic children's rights in relation to their health and education, in the face of the many violations identified above. A mechanism must be created in the interest of protecting the rights of all children in Australia connected to standalone Articles on children's human rights.

4.5 Recommendations

Recommendation 15. **That a non-partisan study of the practice of so-called "gender affirming" medicine on minors be undertaken,** drawing on evidence-based and scientifically rigorous research, such that all medical and legal practitioners and all courts involved with these matters benefit from comprehensive and non-politically-motivated access to information.

Recommendation 16. That the new FHRA **attach more importance to children's rights and include a standalone article on children's rights** and reference their rights where appropriate in other articles.

Recommendation 17. That the new FHRA **create mechanisms that ensure the Family Court address the conflicts of interests** created by novel definitions of concepts.

Recommendation 18. That the new FHRA **require a national review of any existing or proposed state legislation containing a high risk or incidence of violations of children's rights.**

5. Freedoms of conscience, opinion, expression, association and assembly and their interaction with anti-vilification legislation

This section focuses on how the new FHRA and associated mechanisms might uphold the above freedoms, as set out in Articles 18-22 of the ICCPR, all the while balancing them against checks on discrimination, vilification and incitement to hatred or violence. The AHRC position paper lists these freedoms as proposed inclusions in a future FHRA (AHRC 2022a, 12).

Both the freedoms and what checks are, or should be, placed on them have rarely been far from Australian public debate over the last two-plus decades, but the passion with which this debate is often carried on demonstrates that we are very far from resolving the apparent tensions between the two. "Perhaps in part due to the lack of an explicit protection of freedom of speech in federal statute or the Constitution", argues Katharine Gelber, "the place of freedom of speech within Australian political culture has often been uncertain. On the one hand, opinion surveys have tended to show that a broad spectrum of the population supports the principle of freedom of speech. On the other hand, that support tends to fracture quite easily in the context of controversial or difficult issues" (Gelber 2017, 203).

Gelber wrote these words in the context of her discussion of the perceived tensions between anti-vilification laws and freedom of expression, with specific reference to the debate around Section 18(C) of the Race Discrimination Act (RDA), discussed in 5.1 below. We have seen several instances of the fracturing of either or both of general public and institutional support for freedom of speech in the case of deeply polarising issues, such as terrorism, security and "Muslimness" in the two decades following 9/11, and, more recently, the debates around gender identity.

While some federal laws do place checks on discrimination and, to a lesser extent, vilification and incitement to hatred or violence to enable freedom of expression in some circumstances, neither the Australian Constitution nor Australian Federal law contain explicit protections of the freedoms set out in the ICCPR.

This lack of constitutional or legal codification, alongside what is perceived as a certain lack of clarity in balancing freedoms and checks, has a number of implications. First, lawsuits for defamation proliferate in the absence of strong protections of freedom of speech and of the press, to the extent that in 2019 the President of the Victorian Bar Association characterised Australia as the "defamation capital of the world" (Collins 2019). (Collins made this statement two months after actor Geoffrey Rush was awarded a record payout of $2.9 million in his defamation case against The Daily Telegraph, which had published allegations of sexual harassment against him.)

Even if truth is a defence against defamation suits (and a high-profile half-hour interview by actor Yael Stone with the ABC's 7.30 Report on 16 December 2019 explicitly suggests that conclusion in Rush's case), the burden of proof is nonetheless on the defendant. By contrast, in France, for example, freedom of the press and freedom of expression are legally and constitutionally protected, and truth and publishing in good faith are both defences in defamation suits, with the burden of proof residing rather with the complainant. The very different outcomes in Australia and France of defamation suits arising out of claims made in the context of the #Metoo movement exemplify the material impacts of these differences, and their not negligible implications for women's ability to publicly denounce sexual harassment (Winter 2020).

Second, parliaments have considerable powers to limit freedoms, as we have seen, for example, in the case of the 82 "anti-terrorism" laws adopted in Australia between 2001 and 2015 (McGarrity and Blackbourn 2019), or some state laws against protests, which undermine freedom of assembly (see 5.1 below).

Third, measures to limit "hate speech" may result in overreach or the pursuit of particular political agenda. Lack of clarity about the role and powers of the current eSafety Commissioner is a case in point, as is the current framing of some proposed "hate speech laws" in some Australian states (see 5.2 below).

Fourth, diagonal accountability is undermined as citizens' ability to engage in public debate without fear or favour and on an egalitarian footing is compromised without legislated free speech protections. Gelber defines diagonal accountability as

> the kind of public accountability generated when the public are aware of, and monitor, the actions governments take in their name to ensure their legitimacy. In that sense, freedom of political speech is not merely a component of the ways in which the public is able to hold government accountable. Rather, it is the instantiation of it, in the sense that free speech is the mechanism by which democratic accountability occurs and citizens are able to check government (Gelber 2017, 206).

Diagonal accountability is achieved through the sorts of activities commonly recognised as exemplifying the individual and collective freedoms set out in the ICCPR: spread of information; free participation in public debate; holding various gatherings and protests; forming associations to advance the interests of specific constituencies; and so on.

At the same time, a point of consensus in human rights dialogues is that these freedoms do not equate to "free-for-alls" in a discursive or associative punch-up in which those with the greatest financial, social or cultural capital hold sway while other groups are at best excluded from the democratic conversation or at worst punished for even attempting to participate in it.

Hence the existence of limitations to freedoms that usually take the form of variations on anti-vilification laws, along with other checks and balances such as anti-monopoly laws as concerns the media, such that diagonal accountability is achievable for all. Gelber again: "speech can

justifiably be regulated where it imperils the conditions required for individuals to develop their own capabilities [in a Nussbaumian sense] and instantiates antidemocratic practice and discourse, thus preventing the very communications required to perform democracy from being uttered" (Gelber 2017, 206-7).

Gelber here references Martha Nussbaum's "capabilities" approach to human rights. Nussbaum explains her approach as follows:

> The aim of the project as a whole is to provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires. … [T]he best approach to this idea of a basic social minimum is provided by an approach that focuses on *human capabilities,* that is, what people are actually able to do and to be—in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being (Nussbaum 2000, 5).

Nussbaum further argues that this approach posits persons as an *end* rather than a means, which is particularly important for women as "[w]omen have all too often been treated as supporters of the ends of others, rather than as ends in their own right" (Nussbaum 2000, 5-6). Each capability also has a threshold level "below which it is held that truly human functioning is not available" (Nussbaum 2000, 6).

This approach to the encoding of human rights forces us to ask the question of what *enables* and *disables* the enjoyment of rights. Among the ten central capabilities set out by Nussbaum is "control over one's environment", not only materially but politically: being able to participate effectively in political life. What is it, then, that *enables* and *disables* that participation? What is the right balance between freedom of expression and checks on uses of that freedom that could *disable* the capability of others to participate effectively?

As a way into this discussion, a brief review of some questions arising during the highly controversial 2016 Inquiry into Freedom of Speech focusing on Section 18C of the Racial Discrimination Act is potentially illuminating.

5.1 The 2016 Freedom of Speech Debate

5.1(i) The context

On 8 November 2016, then Prime Minister Malcolm Turnbull announced a parliamentary inquiry into the Racial Discrimination Act to determine whether it imposed unreasonable limits on free speech and to recommend whether the law should be changed. Debate around the inquiry, and submissions to it, focused in particular on Section 18(C)(1) of the Act, which reads

> It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

It was the words "offend" and "insult" that caused consternation about possible overreach and limitations to free speech, and the majority of Coalition MPs wanted them removed. The then president of the AHRC, Gillian Triggs, was also of the opinion that the terms were ambiguous

and their removal could strengthen rather than weaken the Act, in lessening the potential for vexatious complaints (cited in Norman 2016).

Most of the submissions also considered whether Section 18(D), "Exemptions", provided sufficient protections of freedom of speech to guard against the sort of vexatious complaints that raised concerns for many. The Section reads as follows:

> Section 18C does not render unlawful anything said or done reasonably and in good faith:
>
> (a) in the performance, exhibition or distribution of an artistic work; or
>
> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
>
> (c) in making or publishing:
>
> (i) a fair and accurate report of any event or matter of public interest; or
>
> (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

A total of 418 submissions were made to the PJCHR, by a range of individuals and associations as well as law and academic experts. The Committee's Report on whether or not 18(C) should be modified was inconclusive, with a range of differing opinions presented, and the Act remained unchanged (PJCHR 2017). The arguments presented, however, warrant consideration here as the issue of balancing freedom of speech and protections against vilification remains as thorny today as it did seven years ago. This is evidenced, first, by the 2019 French review into academic freedom, which led to most Australian universities adopting charters of academic freedom, and second, by the current debate about "hate speech" and "inclusion" versus women's rights to freedom of expression and assembly.

5.1(ii) The arguments concerning freedom of expression and reasonable limits thereto

The 2016 Inquiry was flawed for two main reasons. The first was that it was politically motivated, in a context of debate over racial insult and freedom of speech following a number of controversial matters that were either upheld or dismissed: the 2011 Bolt case (complaint upheld by the Federal Court); the 2016 QUT case (dismissed by the Federal Circuit Court after being terminated by the AHRC); and the 2016 complaint about a cartoon by Bill Leak (terminated by the AHRC and then withdrawn by the complainant). Ironically, it is in the wake of two complaints being dismissed or withdrawn—which would appear to indicate that vexatious complaints are *not* encouraged—that the Inquiry was launched.

The second flaw concerns the focus of the Inquiry, which for many was too narrow. For example, the submission by the Media, Entertainment and Arts Alliance (MEAA), which covers entertainment industry workers and media workers, drew attention to a range of laws and legal interventions that muzzle journalists and silence whistleblowers. MEAA maintained that the "Committee's 'inquiry into two matters regarding freedom of speech in Australia' should not operate in isolation of the other threats to freedom of speech in Australia" and "urge[d] the Committee to consider holding an inquiry into the raft of issues that have arisen in recent years that threaten and undermine freedom of speech" (MEAA 2016, 4). Other commentators further drew attention to anti-protest laws introduced in some Australian states, which impinged on both freedom of expression and freedom of assembly (Gelber 2016a; Naser n.d., probably 2022 or 2023).

The Arts Law Centre (ALC), in its submission to the Inquiry, noted that Section 18(D) is "one of the few provisions in Australian legislation which explicitly protects the interests of free speech",

and "consider that this section is a vital lynchpin of the regime, maintaining the vigorous and at times 'politically incorrect' nature of public discourse in Australia" (ALC 2016, 4). Like a number of others making submissions, the ALC found that the caselaw, including the procedures followed by the AHRC, did not suggest that the words "offend" and "insult" led to a proliferation of vexatious complaints and those vexatious complaints that were made were quickly dismissed. MEAA, for its part, suggested that replacing these words with the term "vilify" would provide greater clarity but that 18(C) was important in a context of a rise in hate speech, notably in social media, and that such hate speech was "antithetical to ethical journalism, and in particular to MEAA's *Journalistic Code of Ethics* (MEAA 2016, 3).

In her submission, constitutional law professor Anne Twomey notes that racial vilification as set out in 18(C) does not constitute a *criminal* offence but that many state laws *do* penalise hate speech or speech otherwise deemed offensive as criminal offences (she gives the example of NSW). She further notes that "[s]ome States also have racial vilification laws that may be applied as criminal offences, although they are rarely used and criminal prosecutions have generally not proved successful" (Twomey 2016, 3).

As concerns legal interpretation of the terms "offend" and "insult", Twomey points out that the High Court has set a very high bar for their interpretation, in the light of its doctrine concerning an implied freedom of political communication as outlined above. She summarises the High Court's position as interpreted through the caselaw as follows:

> First, the level of offence or insult involved must be very serious. Mere slights or hurt feelings would not be enough. Secondly, the prohibition of offensive or insulting behaviour must not be broad and unqualified. There must be exemptions and the law must be narrowly tailored. Thirdly, there needs to be a legitimate reason for the law that goes beyond protecting people from insult or offence. Finally, a proportionality test (now set out in *McCloy v New South Wales*) must then be applied to test the validity of the law (Twomey 2016, 5).

Similarly, Katharine Gelber, in her discussion of what she calls "policy confusion" around incitement to hatred in the context of countering terrorism, stresses that "hate speech [must do] more than offend its targets; it harms them in tangible ways by enacting discrimination through expression" (Gelber 2018, 30).

In other words, the speech in question must do more than simply upset someone: it must *occasion tangible and demonstrable harm* to a person or group of people. The protection of freedoms of journalists to report, of satirists to satirise, of politicians, academics and a range of civil society actors to comment and debate, depends precisely on this understanding of what is and is not "hate speech" sanctionable by law.

The concept of proportionality is key to resolving the apparent tension between freedom of speech and protection of persons or groups of people from vilification or incitement to hatred or violence. The Australian Law Reform Commission, referencing a 2014 work on the jurisprudence of proportionality, outlines the key elements of the proportionality test of whether a limitation to a right is justified:

1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
2. Are the means in service of the objective rationally connected (suitable) to the objective?

3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?
4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right? (ALRC 2015).

Consideration of this concept is key to discussion of some recent events and debates in Australia that suggest, at best, misrepresentation of interests, actions and harms. At worst, they suggest considerable double standards if not hypocrisy—not to mention disregard for women's rights—in our current political landscape as concerns freedoms of speech and assembly on the one hand and limits to those freedoms in order to guard against hate speech on the other hand. Any future legislative provisions on "hate speech" need to pass this proportionality test with flying colours, if politically-motivated censorship and encouragement of vexatious complaints is to be avoided.

5.2 Freedom of expression and assembly, political purges and framing of "hate speech"

5.2(i) Academic freedom

Although academic freedom is a specific subset of freedom of expression, the bullying and marginalisation of some feminist academics in this country stands out as a particularly eloquent case study to show up the sorts of double standards that currently inform freedom of expression on the one hand and protections against vilification and violence on the other hand.

Academic freedom has frequently been the subject of contestation in recent years: for example, whenever university managements have attempted to prevent employees commenting publicly on the running of the university—a topic that has frequently arisen during Enterprise Bargaining negotiations. This contestation is surprising, given that academic freedom is ostensibly "the key legitimating concept of the entire university system" (Gelber 2016b). This legitimating principle holds even when the views expressed by individual academics may seem distasteful or even offensive to some, as the high-profile case of Tim Anderson has demonstrated. Anderson had been dismissed from the University of Sydney after superimposing a swastika on an Israeli flag during a class (it was far from the first time that Anderson had rocked the political boat, but it was this action that triggered the serious misconduct proceedings that led to his dismissal). On 27 October 2022 the Federal Court found that Anderson had been unfairly dismissed as his exercise of intellectual freedom did not constitute serious misconduct. The University was found to have breached its own Enterprise Agreement in sacking him and thus also the Fair Work Act.[30]

A couple of months before Anderson was suspended in December 2018, pending misconduct proceedings, another controversy arose over a lecture by Bettina Arndt at the same University, on 12 September 2018. Some 40 protestors blocked the entrance to her talk on the supposed "myth of a rape crisis on campuses", given some six months after a group called End Rape on Campus had issued a damning report on sexual harassment and assault of female students on Australian university campuses (Funnell and Hush 2018). The University management called the riot police to protect Arndt and her audience and to allow the talk to proceed. This incident led to the commissioning by the Federal government of a report by Robert French on freedom of speech in Australian higher education providers. The report of the French review led to the adoption throughout the Australian higher education sector of charters of academic freedom (French 2019).

[30] National Tertiary Education Industry Union v University of Sydney [2022] FCA 1265 (27 October 2022). http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/1265.html. Accessed 27 June 2023.

The following year, University of Melbourne gender-critical academic Holly Lawford-Smith started to become the target of censorship, deplatforming and vilification. By 2021 she and tutors teaching on her courses had become the focus of ongoing protests and harassment, encouraged, worryingly, by the University branch of the same trade union that was at that time in the process of defending Tim Anderson's right to academic freedom in Sydney. Worse, the National Tertiary Education Union adopted, at its 2022 National Council, a resolution stating that censorsip of gender-critical views within the union did *not* constitute a breach of academic freedom. This resolution contravenes both the union's own long-held principles and university codes of academic freedom throughout the country.

In mid-2021, in a statement that appeared tacitly to target Lawford-Smith, Vice-Chancellor Duncan Maskell announced, in the context of launching the University's draft "gender affirmation" policy, that the University was considering prohibiting public events and speeches deemed "an attack on gender diversity" (Carey 2021). By 2023 the situation had become so poisonous that Lawford-Smith made a formal complaint to WorkSafe Victoria, "accus[ing] her employer of occupational health and safety breaches, of bullying her for her political views, and of undermining the university's stated commitment to academic freedom" (Le Grand 2023).

At the time of writing this submission, the campaign against Lawford-Smith has escalated into violence and vandalism, which has been condemned by Maskell, whose position seems to have altered somewhat from that taken in 2021. A report by *The Australian* on the University response cites Maskell as stating that the safety of transgender people is "a constant and deep concern for the university'' but that "resorting to this kind of violent behaviour (vandalism) is never the right answer, especially in the context of an inclusive university environment where the freedom to express ideas and speech must be fostered and not shut down … such intentional acts of damage, violence or vilification against others will not be tolerated" (cited in Neill 2023). The article in *The Australian* also reports the experience of students who have been subjected to intimidation for attending Lawford-Smith's classes, and the fact that security guards are now posted outside the classroom.

Lawford-Smith is not the only academic in Australia to be targeted for expressing gender-critical views, but the treatment to which she has been subjected is particularly egregious. Sadly, it is being reproduced in various contexts across the country.

5.2(ii) The aftermath of the Let Women Speak event in Melbourne

In March 2023, British woman Kellie-Jay Keen conducted her Let Women Speak (LWS) tour in Australia. Although Keen herself is a controversial figure, the events in capital cities around Australia were held legally and peacefully, with full knowledge and permission of the authorities and a police presence. In other words, they were legitimate public gatherings that broke no laws and were consistent with the freedoms of opinion, expression and assembly guaranteed by the ICCPR and broadly consonant with the implied constitutional freedom of political communication inferred by the High Court.

Not all gender-critical feminists align themselves with Keen, but many women concerned about the erasure of their rights and the welfare of children saw her LWS podium as a rare opportunity to speak publicly in a context where women criticising the ideology of gender identity are increasingly silenced, bullied, and marginalised. Those who spoke came from across the political spectrum. All events were attended both by a supportive crowd and by protesters, mainly gender identity activists. Some events were peaceful and took place without major incident, as was the case in Sydney, while others became fraught, polarised and even violent, as was the case in both Hobart and Melbourne.

The Melbourne event on 18 March was stormed by a Nazi group, which became the sole focus of media reporting. A number of women were also injured or by gender-identitarian protesters. One woman suffered concussion and had to be taken to hospital; at the time of writing, she is still recovering from the brain injury inflicted. Another woman was repeatedly kicked by a gender-identitarian protestor who had stormed the LWS podium, damaged the PA system and was subsequently arrested, as she tried stop a microphone falling on the protestor in question. Following the event, both the media and political leaders from all major parties characterised the women speakers and attendees at the LWS rally as "anti-trans", even though the focus of their speeches was not transgender people but women's rights and children's welfare. The women were further conflated with Nazis and were vilified via public insults levelled at them by parliamentarians on the floors of parliaments and in social media, as well as by mainstream media and (see for example Ore and Beazley 2023). One report in the *Sydney Star Observer* featured tweets that called Keen and the speakers Nazis and fascists and used the slur TERF, which is routinely lobbed against gender-critical women on social and, increasingly, in mainstream media (Thomas 2023).

One of the LWS speakers, State Liberal MLA Moira Deeming, was banned from the parliamentary party room due to this conflation of gender-critical women and Nazis, and Victorian Premier Daniel Andrews misleadingly tweeted:

> …yesterday, anti-trans activists gathered to spread hate. And on the steps of our Parliament, some of them performed a Nazi salute… They were there to say the trans community don't deserve rights, safety or dignity. That's what Nazis do. Their evil ideology is to scapegoat minorities - and it's got no place here. And those who stand with them don't, either (featured on ABC News website, 19 March).[31]

National Greens leader Adam Bandt tweeted the same day, in similar vein:

> I'm disgusted by the anti-trans rally in Melbourne yesterday, protected by their allies: saluting neo-Nazis. The banners they march under and the hate they espouse have no place here or anywhere.[32]

Although these examples of comments following the Melbourne event are extreme in associating, either directly or by implication, gender-critical women with Nazis, they are typical of the type of misrepresentation of women who speak out in support of women's sex-based rights and/or to question the medical advisability of so-called "gender-affirming" treatments for children. These women and men who stand with them have for some years now been routinely called "TERFs", "bigots", "transphobes" and so on, and now, increasingly, "Nazis" and "fascists". An event held in NSW parliament on 22 June 2023 was characterised by one prominent transactivist as a "fascist-aligned TERF event",[33] and Jackie Turner of the Trans Justice Project has claimed, in an article riddled with factual inaccuracies, that "TERFs" are aligned with the far right and "disinformation and conversion" movements.[34] Turner also reproduces the mythical characterisation of LGB Alliance, which was set up to defend the sex- and sexuality-based rights of homosexuals and bisexuals, as a "hate group".[35]

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[31] https://www.abc.net.au/news/2023-03-19/victoria-nazi-salute-peformed-parliament-government-response/102116672. Accessed 21 March 2023.

[32] https://twitter.com/AdamBandt/status/1637217403443765248/ Accessed 21 March 2023.

[33] Amy Sargeant, Twitter, 22 June 2023. https://twitter.com/amy_sargeant_/status/1671743701327167488. Accessed 25 June 2023.

[34] https://commonslibrary.org/the-anti-trans-movement/. Accessed 27 June 2023.

[35] This framing is the work of a group called the Global Project Against Hate and Extremism, set up by former members of the Southern Poverty Law Center in the US. LGB Alliance Australia is listed with mostly anti-immigrant, nationalist/racist and far-right groups, including Nazi groups.

Clearly, all citizens have freedom of expression, and the "right to (mere) slight", to draw on Ann Twomey's framing, cited above, is necessarily part of that freedom—although one could have hoped that our political leaders would exercise a little more care in spreading offensive disinformation. However, if we are to debate the desirability of "hate speech" laws being prepared in some Australian states, then we need to consider *who,* exactly, is being targeted by such "hate speech" at this point in time. The mischaracterisation of those presenting the case for women's and homosexuals' sex-based rights as "Nazi" or "fascist", or even the denigratory term TERF, surely fits the description in that it incites to hostility, violence, and discrimination—with, as we have seen above and will see further below, palpable deleterious effects for both individuals and groups. Under Australian law such misrepresentation of named individuals is also no doubt defamatory in that it is (a) untrue and (b) does reputational damage.

This is precisely why we need *very* clear definitions around the sorts of limits that can reasonably be put on freedom of expression and assembly. At this point in time, those defending the sex-based rights of women and homosexuals and the welfare of children—or even those suggesting that maybe a more reasoned and balanced debate is needed—are the ones being targeted by vilification and incitement to violence by gender-identitarian activists, and being shut down in the media (the recent sacking of journalist Julie Szego by *The Age* being a case in point[36]), not the other way around.

Even the most timidly expressed suggestions that women's sex-based rights are worthy of attention, or that conflicts between sex-based and gender-based rights claims should be discussed, or that further evidence and reflection is needed concerning the most appropriate therapeutic approach to gender-confused children, or even simple statements of demonstrable fact such as the fact that human beings are sexually dimorphic mammals or only females produce breast milk, are met with cries of "transphobia" and even "hate speech". The double standard in political attitudes here is strikingly clear: the daily vilification of women largely appears to escape the notice of media and politicians. Yet if women protest, put forward counter claims, or suggest that calmer and more constructive debate is needed, they are almost immediately accused in both social and mainstream media of "hate speech". For this, they suffer punishment workplaces, political parties (the extraordinary purges within the Greens being a case in point), the media, community groups, or any other public or semi-public forum, including social media, where bullying and hateful branding of women, including threats of violence, are rife.

5.2(iii) Attacks on women's freedom of assembly and association

The inability or unwillingness of police to hold back the Nazi group in Melbourne on 18 March, leading to the rally having to be shut down early, and reports from participants in LWS of insufficient police protection in some other cities, highlight another problem with the current state of protections of freedoms in Australia: the freedoms of assembly and association. Women's rights to associate and to assemble on women's terms to discuss and organise activities around issues of importance to them as a specific group are being eroded, if it is found that their views are at variance with those of what seems to have become a particularly powerful lobby group.

That said, whether or not the LWS events occurred in a peaceful or a violent setting largely depended on police action or inaction, and arguably, as well, on positions taken by political leaders: in Sydney and Perth, for example, the police kept the LWS group and the protest group separate, establishing a protection line that could not be crossed, and the events were relatively peaceful. In Melbourne and in Hobart, on the other hand, the police failed to keep the groups

[36] See ABC Media Watch report on this specific case, 26 June 2023. https://www.abc.net.au/mediawatch/episodes/szeg/102524030. Accessed 27 June 2023.

separate (and in Melbourne the Nazi group was not kept at bay) and women were put at risk. In Hobart the gender identitarian protestors, due to being allowed so close, were also able to surround the speakers, making so much noise that they drowned them out.

Although policing at such events is a state responsibility, and peaceful public protest at public events is *also* a legitimate activity under the principle of freedom of expression, Federal law needs to provide clear protections for freedom of expression and assembly of *all*. Participants at lawful public events—especially in a context where the topic under discussion is the subject of extreme polarisation of opinion—need both state and federal mechanisms for recourse when they are being placed at personal risk or their events are effectively shut down by others taking violent action in order to deny them the right to assembly and expression.

What happened in Melbourne and in Hobart should not come as a surprise, and police and local authorities should have anticipated some difficulties, given the emotive tone of some protests against Keen's visit long before she set foot on Australian soil. Women seeking to meet to discuss sex-based rights have in fact been targeted by such vehement and indeed violent protests and cyberbullying for some years now. For example, in March 2018, an International Women's Day (IWD) march in Brisbane was taken over by transactivists, and in March 2023, also in Brisbane, police advised the organisers of the IWD rally not to march due to the presence of transactivist protesters, as they could not guarantee to be able to protect "a moving target".[37] In November 2022, a Brisbane hotel cancelled a booking for a feminist event organised by the same women due to pressure by transactivists, and the organisers now only advertise events through trusted networks, not disclosing the venue until the last minute, due to fear of attempts to shut them down or indeed, violence against the women concerned.

As concerns freedom of association, in 2021 in Sydney, the Feminist Legal Clinic (FLC), which is one of the very rare organisations to provide free legal advice to impoverished women facing a range of difficult situations that impact on them *as women*, notably domestic violence, was evicted from its council premises due to "the Feminist Legal Clinic's affiliation with the Women's Sex Based Rights movement" (letter from Council to FLC, 24 July 2020[38]), and to publication of gender-critical material on the FLC website. In its letter of 24 July 2020, the Council directed FLC to dissociate itself from the sex-based rights movement and to purge its website of gender-critical material, under threat of receiving a "C" rating in the Council's annual assessment of NGO tenants in Council premises. FLC refused to comply with this veritable act of thought policing and censorship of views and affiliations that are not in any way illegal. Consequently, on 6 July 2021 the Council terminated FLC's tenancy on the basis of the "C" rating issued the previous month.

As concerns lesbians in particular, all over Australia, women-only lesbian events (that is, that are for female homosexuals and do not include males with a "woman" gender identity) have been driven underground, setting back lesbian rights and freedoms almost a century, and contravening anti-discrimination provisions that ostensibly include sexual orientation as a protected category. Lesbians' right to gather as *female homosexuals* is being obliterated, because lesbians are now expected to accept "women with penises" (the expression used by transgender activist Riley Dennis, see below) into their spaces, their meetings and their intimate lives. When lesbians emerge from clandestinity to attempt to organise more widely advertised lesbian events, they face prohibitions. For example, in 2022 in Tasmania a lesbian was denied an exemption under the State's Anti-discrimination Act to hold a single-sex event for lesbian women and exclude males who identified as lesbian women.

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[37] Personal communication from one of the organisers, 27 June 2023.

[38] All correspondence between FLC and Sydney City Council is available on the FLC website: https://feministlegal.org/save-feminist-legal-clinic-inc/. Accessed 27 June 2023.

The ICCPR rights that guarantee freedom of assembly and association, and anti-discrimination measures that guarantee equal access of all to those freedoms, are now denied to Australian women who present no threat to others, but simply hold views (or have a sexual preference) that may differ from those of some. Worse, women are now expected to expose themselves to physical risk (of injury or indeed sexual harassment) in the name of the rights of another group. It would seem that Martha Nussbaum's concern that women continue to be considered as a means to an end for the rights of others, rather than an end in themelves, retains its full weight.

5.2(iv) Cyberbullying and e-safety

The Australian eSafety Commissioner is "the world's first government agency dedicated to keeping people safer online" (eSafety website).[39] Set up in 2015 as the Children's eSafety Commissioner, in 2022 the role was expanded, although the Commission retains a particular focus on harms to minors. It also, however, notes the high levels of online abuse experienced by women, notably although not exclusively in the context of domestic and family violence and abuse of women in the public spotlight through their work.

The statistics cited by the Commissioner are alarming:

> 75% of reports we receive about online harms come from women and girls. Globally, 85% of women have experienced online abuse.
>
> It's not just the numbers that are alarming. The nature of the online abuse women face is often sexist, racist and violent.[40]

At first glance, this would appear to be an extremely positive development, providing a means for women to challenge the abuse they are subjected to online on a daily basis. It is nonetheless still up to individual women to report individual instances of adult online abuse. They must first report the abuse to the online platform where it was published, and then if nothing is done, they can lodge a complaint with the eSafety Commissioner. The Commissioner does warn against frivolous complaints, stating that:

> For eSafety to investigate, the harmful content must meet the legal definition of 'adult cyber abuse'. This means it must target a specific Australian adult and be both:
>
> 1. intended to cause serious harm, and
>
> 2. menacing, harassing or offensive in all the circumstances.[41]

Again, we are returned to the definition of *what* constitutes "harm" or "offence", and *who* is being targeted by the "safety" concerns in question. It has come to AF4WR's attention that the eSafety Commissioner has intervened to have some Tweets about transgender persons taken down, which although occasionally expressed in intemperate language are hardly likely, by any reasonable person standard, to either cause serious harm or be menacing or harassing in all circumstances to other than the extremely thin-skinned. Meanwhile, gender-critical feminists are targeted by stalking, trolling and abuse all over social media, and our political leaders are giving credence and sometimes overt support to this vitriol, as we saw above in the case of the "Nazi" accusation.

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39 https://www.esafety.gov.au/about-us/who-we-are. Accessed 27 June 2023.
40 https://www.esafety.gov.au/women/women-in-the-spotlight/about. Accessed 27 June 2023.
41 https://www.esafety.gov.au/key-issues/adult-cyber-abuse. Accessed 27 June 2023.

5.3 Erosion of the freedoms of opinion, expression, association and assembly of women

It is all the more urgent to introduce robust protections and balances in the areas of freedom of opinion, expression, assembly and association in that women are overall disproportionately affected by lack of freedom of speech and assembly rights. As Irene Khan, UN Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression stated to the 76th session of the UN General Assembly in October 2021, in the "first ever ever report by this mandate on the subject of gender justice and freedom of expression and opinion":

> Sexual and gender-based violence, hate speech and disinformation are used extensively online and offline to chill or kill women's expression. In many cases, online threats escalate to physical violence and even murder. Women journalists, politicians, human rights defenders and feminist activists are targets of vicious, coordinated online attacks. The objective is to intimidate, silence and drive them off the platforms and out of public life. The effect is to undermine human rights and set back media diversity and inclusive democracy.

Khan made five recommendations in that report, the first of which was to "make the digital space safe for women" and "ensure the safety of women journalists" and the second of which was that "there can be no trade-off between women's right to be free from violence and the right to freedom of opinion and expression. Both rights must be equally upheld by States" (Khan 2022).

In May 2023, Reem Alsalem, UN Special Rapporteur on Violence Against Women and Girls, expressed her concern "at the escalation of intimidation and threats against women and girls for expressing their opinions and beliefs regarding their needs and rights based on their sex and/or sexual orientation". She stressed that

> the rights to free expression and peaceful assembly are crucial to ensuring that societies can develop their priorities and policies democratically and balance the rights of diverse groups in a pluralistic society. Attempts to silence women based on the views they hold regarding the scope of gender identity and sex in law and in practice and the rights associated with these, severely affects their participation in society in dignity and in safety, as well as their country's prosperity and development (Alsalem 2023).

The new FHRA must thus provide for far more robust freedoms of expression and assembly, such as provided for in the ICCPR, balanced with sensible limits to those freedoms such that both diagonal accountability and full participation by all—and, as concerns the area of particular concern in this submission, by women in particular—in more than selective or tokenistic ways, are enabled.

As concerns restrictions in the interest of public order or safety, we have seen negative impacts on freedoms of expression and assembly from, among others, anti-terrorism legislation; legislation concerning treatment of asylum seekers and related censorship; anti-protest legislation; and mostly recently, the fraught public debate around COVID-related lockdowns. These last were inconsistently applied and differed, sometimes wildly, from one State to another, and had with differential impacts, as we have seen above, on male and female workers and on carers, both paid and unpaid (the overwhelming majority of whom, in both cases, are women).

The new FHRA, then, must limit the powers of governments to set aside human rights considerations, including protections of freedoms of speech, association and assembly, and attempts to do so must be vetted by a human rights oversight body that is independent of political influence. Proportionality tests must also be applied in these cases, and a clear and effective decision-making process established that balances the need to protect human rights with the need to make decisions quickly in the case of any emergency, in order to prevent authoritarian overreach of the kind that we have, sadly, seen too often in recent decades. These standards and this oversight will also help guard against the skewing of rights in favour of one protected constituency at the expense of another.

5.4 Recommendations

Recommendation 19. That the new FHRA **explicitly incorporate the freedoms of opinion, expression, assembly and association set out in the ICCPR Articles 18–22.** This includes those restrictions to these freedoms—and only those restrictions—that are necessary to protect the rights and freedoms of others and to guard against vilification or hostility that lead to, or constitute, incitement to violence or discrimination, notably against the protected rights constituencies that will be specifically mentioned in the Act.

Recommendation 20. That the new FHRA **subject any limits on freedom of speech and assembly to both the proportionality test and the reasonable person standard,** in otder to ensure the objectives of diagonal accountability and participation. Ambiguous language such as "insult" or "offend" and even the term "hate speech" must be avoided, as these terms are imprecise and leave the way open for highly subjective and even idiosyncratic interpretations by policymakers, courts and individuals or groups wishing to make complaints.

Recommendation 21. That the new FHRA **ensure that groups that are typically marginalised, whether politically, societally, culturally or economically, have access to meaningful political communication** through, for example, strict directives concerning the political independence of, and community access to, public institutions including government, human rights oversight bodies and publicly controlled media and educational institutions.

Recommendation 22. That the new FRHA include **clear definitions of cyberbullying, cyber-stalking and cyber-abuse**, which stop short of thought-policing or overfocusing on "trigger words" of the sort that social media algorithms are currently set up to censor automatically. Such policing leads to idiosyncratic and heavy-handed censorship while often, paradoxically, leaving untouched more serious forms of cyber-bullying, particularly of women and girls.

6. Ensuring compliance with the Paris Principles and International Treaty Obligations

6.1 Which jurisdiction? Which complaints mechanism(s)?

As mentioned above, two Australian states and one Territory now have Human Rights Acts. Logically, a FHRA would supersede and take precedence over these state laws, which should be consonant with Federal legislation and with Australia's international treaty obligations. At the same time, the most immediate and logical instance of complaint and recourse may be a State one—as the above example of Holly Lawford-Smith's action against her employer shows. Although university Enterprise Agreements and workplace practices fall under Federal jurisdiction, Work Health and Safety remains under State jurisdiction. Lawford-Smith has chosen to pursue her claim under this latter rubric in the first instance.

In short, as the AHRC itself notes, "[f]ederalism poses complications for uniform rights protections across Australia" (AHRC 2022a, 243), yet it appears to give a significant role to State jurisdictions in proposing

> that a federal Human Rights Act should be restricted to federal laws and federal public authorities. The Human Rights Act instruments in place in The Human Rights Act instruments in place in Victoria, Queensland and the ACT should not be affected by a federal Human Rights Act. The remaining states and the Northern Territory could be encouraged to adopt a Human Rights Act that mirrors the federal Human Rights Act.

It proposes fiscal incentives to encourage States to adopt their own human rights laws. However, given that Article 109 of the Australian Constitution provides for Federal law to override State law in the case of any inconsistencies, the question is begged as to why a FHRA would not have the effect of bringing all human rights matters under Federal jurisdiction, thus rendering state acts superfluous and indeed redundant. While we do not have the expertise of constitutional lawyers, it seems that the AHRC proposal of concurrent Federal and State laws can only multiply the risk of inconsistencies, redundancies and jurisdictional confusion, with worrying implications for effective participation and for expediting effective remedies for rights litigants.

The Commission does propose a transitional period of implementation to iron out any inconsistencies between Federal and State laws, but also suggests that any potential inconsistencies or conflcits could be dealt with "on a case-by-case basis" (AHRC 2022a, 243-44). That phrase does give some cause for concern, as even now, making any sort of complaint to a public authority about a discrimination matter can be a daunting experience. We need comprehensible and mechanisms and procedures that are as simple to follow as possible, not only for highly educated legal or political minds but also for the general populace, and that avoid multiple steps to climb on the ladder of justice.

In short, we believe that mechanisms for complaint and remedy on human rights matters should be Federal, as Australia's human rights obligations are without exception a national and not a state matter. This is currently the case for complaints pursued under the SDA, RDA, DDA and ADA, which are handled by the AHRC in the first instance, and we presume this would be the case under a FHRA. We also presume that additional resources would be supplied to advise on jurisdictional matters and if necessary, refer matters to the appropriate jurisdiction, *without* individuals or groups lodging human rights complaints being forced to shop around from one authority to another in the absence of clear information and support in making human rights claims.

The AHRC position paper recommends more or less that the existing oversight and complaints mechanisms be retained, that is, mirroring the existing discrimination complaints system. This would mean that the AHRC and conciliation and then either resolution or termination would be the first port of call, with the responsibility on complainants to then lodge a proceeding with the Federal or Federal Circuit and Family Court in the case of termination. For urgent human rights matters the AHRC proposes

> adding the following termination ground to apply to human rights complaints (in addition to the termination grounds imported from unlawful discrimination):
>
> • A termination ground based on urgency: enabling a claim to be fast tracked to the court where there is an imminent risk of irreparable harm to a person (AHRC 2022a, 281).

The AHRC's arguments for retaining the existing mechanism are that:

1. The "legal architecture" surrounding the AHRC process is well understood and it has a "consistently high satisfaction rate" (AHRC 2022a, 281).
2. Adapting the existing disciminration process to encompass human rights complaints would avoid "the need to start from scratch" and enabling a "simple, streamlined and consistent system" to result (AHRC 2022a, 282).
3. Applicants would have a single starting point for complaints, and thus "certainty about how to proceed" (AHRC 2022a, 282).
4. The AHRC has a good track record in dismissing meritorious or vexatious claims, which would "help to mitigate any concerns about the Human Rights Act leading to an increase in unwarranted litigation" (AHRC 2022a, 282).
5. A one-stop-shop for lodging human rights complaints would facilitate tracking, data collection, evaluation and indeed cross-referrals.
6. The AHRC has built up "significant institutional expertise on appropriate actions to take in response to allegations of human rights breaches. Such expertise includes an awareness of circumstances where conciliation could add significant value, and when it would not be appropriate" (AHRC 2022a, 282).
7. The AHRC has built up relationships with government departments which would help manage complaints under a future FHRA, as "respondents are generally more amendable to engaging with the Commission's concerns at the initial stage, while court processes by their nature are far more adversarial" (AHRC 2022a, 282).

We generally concur with the AHRC's position, with the addition of a provision for a body, under the auspices of the AHRC or working in consultation with it, to advise complainants on other options available and notably on the possibilities, procedures and risks of future court action. Currently, the AHRC tells complainants they have 60 days to lodge an application with the Federal or Federal Circuit and Family Court, but tells them little else about what to expect. It refers rights complainants to private legal counsel for any further advice.

However, if the AHRC is to continue to fulfil this role, presumably under a more comprehensive FHRA, both its political independence and its adequate resourcing as a public service must be ensured, legal costs to human rights claimants must be overhauled, and the structure of the Federal Courts must be reviewed.

6.2 The cost of rights justice

While it is understandable that a general advisory body cannot take on briefs for individual cases, there is currently an advice-deficit and considerable cost implication for complainants whose matters are unresolved. These problems can only be exacerbated in the case of human rights complaints, which as the AHRC itself notes, may be both more urgent and more serious than many discrimination cases. Although the Federal Court and Federal Circuit and Family Court have kept their fees relatively low for applications as a result of termination by the AHRC, the costs of a solicitor and barrister to prepare a brief and argue a case in Federal court can run to tens of thousands, even hundreds of thousands, of dollars, and legal aid services are underresourced.[42]

The material impacts of rights litigation for women, including but not limited to instances of conflicts of rights, are thus significant. In the case of Tickle versus Giggle and Grover, for example, discussed in Section 3 above, respondent Sall Grover, who is not wealthy, has had to fundraise to defend her case. Her costs were recently increased by the order to pay the applicant's costs to date in the interlocutory judgement handed down on 1 June 2023.[43]

In an important 2014 report on "Access to Justice Arrangements", the Productivity Commission estimated that around eight percent of Australians would be eligible for legal aid, according to the very low means and assets ceilings for qualifying at that time, but that legal aid services were significantly underresourced and disadvantaged groups were both ill informed about their rights or redress mechanisms and distrustful of the court system (Productivity Commission 2014). Certainly, the Commissions's report concerned a wide range of legal issues, not only discrimination or human rights matters, but the concerns raised are clearly relevant for those wishing to pursue human rights claims, and equal access to justice in *all* matters is itself a human rights issue (ICCPR, Article 14).

Things have not improved since the Productivity Commission report. In 2021 the Law Council of Australia reported that in the roughly 25 years between 1997 and 2021, the Commonwealth contribution to total legal aid funding across all jurisdictions in Australia had decreased from 55 percent to 33 percent (Law Council of Australia 2021a). Moreover, in its 2021 *Lawyer Project Report* the Council cited a Canadian study that showed the "cascading costs" of "unequal access to justice" were 2.5 times the cost of direct government spending on legal aid, impacting on other services including healthcare (Law Council of Australia 2021b, 20).

Given that the sections of the Australian population most likely to suffer human rights violations are also the most likely to be poor, the underfunding of legal aid services has clear human rights implications. According to the AHRC, those most at risk of suffering human rights violations in Australia include "Aboriginal and Torres Strait Islander people, asylum seekers, migrants from non-English speaking backgrounds, those living in poverty, people with a disability", while the Commission notes that 80 percent of people over 65 rely on the full or part age pension.[44] According to the Australian Council of Social Services, one in six children and one in eight adults were living in poverty in Australia in 2019–20, with people living on welfare, people renting their place of residence, and sole-parent families among the most at risk (ACOSS & UNSW 2023).

With the most likely groups to suffer rights disadvantage also among those most likely to be living in poverty, the question of rights equality and justice is not only one of legislative

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[42] For a list of fees charged by the Federal Court, see https://www.fedcourt.gov.au/forms-and-fees/court-fees/fees. Accessed 3 June 2023.

[43] https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca0553. Accessed 2 June 2023.

[44] AHRC website. https://humanrights.gov.au/our-work/education/human-rights-australia. Accessed 28 June 2023.

frameworks, institutions, or human rights education in the public sector. It is a material question. Also, given that adequate housing is a fundamental human right (Article 25 of the UDHR, Article 11 of ICESCR) and that rental stress is a significant contributor to poverty for the most disadvantaged groups, it would seem that in order to ensure rights justice, significantly increased government spending on both legal aid and social housing is necessary.

6.3 The duty of participation and engagement in Australia and beyond

The AHRC foregrounds a governmental duty of participation, which must form part of any future FHRA:

> The *participation duty* would require public authorities to ensure the participation of certain groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights. The "participation duty" addresses a fundamental problem in the development of federal policies and decisions—inadequate engagement with the very people to whom those decisions directly apply (AHRC 2022a, 21; see also AHRC 2022a, ch. 7).

AF4WR unreservedly supports this inclusion of a "participation duty", which is consistent with the ideal of a deliberative democracy: that is, a democracy "in which people come together, on the basis of equal status and mutual respect, to discuss the political issues they face and, on the basis of those discussions, decide on the policies that will then affect their lives" (Bachtiger et al 2018, 2). However, although the AHRC provides more extensive detail on the operation of this duty than the current status quo regarding consultation, it limits this this duty of participation to consultation with First Nations people, children and people with disabilities, as constituencies with specific needs and experiencing specific barriers to effective participation.

Yet, in its consideration of the specifics of how the participation duty would operate, the examples from other constituencies that it draws on—including Victoria and the UK (Gunning Principles)—suggest *a desirability of consulting any affected stakeholders regarding law and policy decisions* (AHRC 2022, 176 ff). We also argue that *all* specific protected rights constituencies should have the right to be consulted about matters directly impacting on them, whether we are speaking of the process of consultation in relation to the new FHRA and associated mechanisms and procedures, or applications of laws and policies subsequent to the passage of the Act. How those rights are to be enacted, with attention paid (a) to plurality of voices both *among* and *within* the constituencies concerned, such that one group does not claim to represent all, and (b) to the need for efficient functioning of institutions and timely application of the provisions of the FHRA, is a matter that will need careful deliberation.

AF4WR is particularly concerned that stakeholders be widely consulted with regard to any initiative that may generate a conflict of rights, that is, when the creation of rights for one constituency could result in the restriction or breach of rights for another constituency. Such consultation should be carried out fairly and equitably and in the absence of specific political agendas.

Among those groups facing personal vulnerability or structural barriers, older people immediately come to mind, Indeed, older Australians in aged care became a particular focus of human rights concerns during and after the 2021 Royal Commission into Aged Care Quality and Safety (RCACQS 2021) and subsequent revelations that came to light during the COVID

pandemic, including concerns about Public Trusteeship abuses.[45] Moreover, some two thirds of people in aged care are women (AIHW 2023), and as women, they are particularly vulnerable to abuse, notably albeit not solely sexual abuse (RACQS 2021, Volume 2).
As concerns the participation duty towards women more generally, this is, once again, an area ignored by the AHRC proposal. Article 7b of CEDAW states:

> States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:
>
> (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.

As we have seen above, many women's groups and organisations have been excluded from the development of policies that directly affect them such as Sex Self ID (Birth Death and Marriages), Conversion Therapy laws and "hate speech" laws. In legislation such as the Conversion Therapy laws, specifically about practices aimed at lesbians and gay men, it is not unreasonable to expect that autonomous lesbian and gay groups would be welcome to the table. This has not been the case. Women members of autonomous lesbian groups have not been invited *at all* as stakeholders or directly consulted about any of these laws; nor, in many instances, have women from ethno-religious minority groups.

Governments and the public service erroneously believe that inviting LGBTIQ+ peak bodies and autonomous transgender organisations to consultation on these laws and policies is sufficient. This is likely to continue to be the case if the government's participation duty towards women is not made explicit, given the AHRC's scant reference to, and apparently sketchy understanding of, what rights are or are not included, and what rights constituencies are or are not represented, by the LGBTIQ+, as indicated earlier in this submission (AHRC 2022a). In short, including a "participation duty" without concurrent inclusion of both the provisions of CEDAW and of a requirement to consult meaningfully with *all* stakeholders will not overcome the major barriers to the realisation of women's rights under Article 7.

Without the concept of sex, the participation rights articulated in CEDAW disappear. In one regional Australian roundtable on aged care, for example, an autonomous lesbian group was uninvited as a result of a transgender organisation claiming it was a transphobic group and that it would not attend if the lesbian group participated. The rights of one group were privileged over another as a result of political blackmail, and lesbians were denied their rights under Article 7. (Unfortunately, we are unable to even name the group or the part of Australia in question, as the older lesbians concerned fear retaliation by transgender lobbyists which could, among other things, result in further exclusion from consultation and from future funding opportunities, including, in their case, for subsidised housing. This experience has become commonplace and many lesbian groups and gatherings are now driven underground.) These types of scenarios are being repeated in every state. They remain unchallenged due to the costs of defending rights and the 2013 amendments to the SDA.

Yet the AHRC proposal presumes that safeguarding of meaningful participation for all will occur as a matter of course, without the necessity of articulating it clearly, or with clear reference to specific rights constituencies, in the future FHRA. While it proposes that the new participation duty would "set clear standards, fleshing out what participation means in relation to certain

[45] ABC Four Corners report, 14 March 2023. https://www.abc.net.au/news/2022-03-14/public-trustee-four-corners-investigation/100883884. Accessed 28 June 2023.

groups that are often overlooked in decision-making processes" (AHRC 2022a, 182), it also suggests that:

> Where decisions are made that affect groups of people, the decision maker need only show that there was *sufficiently fair and representative consultation,* not that participation occurred comprehensively with all relevant bodies or individuals (AHRC 2022a, 22; emphasis added).

Evidently, in a nation with a population of over 26 million people, in which one might reasonably expect that a significant number of those people may consider themselves concerned by any legislative proposal at any one time, consultation with "all relevant individuals" would be an unreasonable demand. However, investing "the decision maker" with the responsibility for deciding which groups or individuals are "representative" and what consulting them "fairly" might look like is a risky business, given that decision makers are governments and governments are controlled by political parties with particular ideological agendas and lobbied by powerful and well-resourced individuals and groups who run their own political agendas. Oversight of the duty of participation must lie with disinterested parties, who follow explicit guidelines set out by law, not with "decision makers" alone.

Even more worrying is the following comment by the AHRC:

> The participation duty would also apply as **a** *non-binding duty for proponents of legislation to facilitate participation* during the law-making process and to reflect what participation measures were undertaken in Statements of Compatibility. This would also be subject to scrutiny by the PJCHR [Parliamentary Joint Committee on Human Rights]. *Failure to engage in or report on participation to Parliament would not affect the validity of the instrument in question* (AHRC 2022a, 22; emphais added).

The new FHRA must thus embed provisions *obliging* lawmakers to consult with rights constituencies, especially those most socioeconomically and culturally marginalised or disadvantaged, such that these constituencies obtain fair and equitable access to participation during the process of lawmaking that directly impacts on their human rights. It must, further, ensure that consultation is subjected to the oversight of a politically neutral body, whether we are talking about an expanded role for the AHRC, a specific role of the PJCHR, the creation of a new oversight body or some combination of all three. At the moment, information provision and consultation in some areas is being hampered by the privileging of certain political agendas. Any Federal human rights body tasked with overseeing implementation of the new FHRA and appropriate consultation with stakeholders must rise above these agendas.

Further to the right to participate and to be consulted, the *right to speak* must be guaranteed. In the case of both the Public Trustee, mentioned above, and that of adult survivors of abuse whose cases went through the Family Court when they were children, those directly concerned are legally prevented from speaking out, and must undertake costly legal proceedings in order to obtain the court's permission to speak publicly (Nelson 2022). The role of so-called "expert witnesses" has also been criticised as working against the interests of children in situations of abuse (Miller 2023). These costly and procedurally complex legal barriers have a retraumatising impact on people who are already traumatised or otherwise vulnerable. The gagging of these people is an effective breach of their human rights.

More generally as concerns the Family Court, two further issues arise. In 2021, the Federal legislation that brought the Family Court under the jurisdiction of the Federal Circuit Court was greeted with dismay by judges, legal support services and women's and children's rights advocates alike (Lipson 2021). Concerns included exacerbation of vulnerability of women and

children due to increased workload and lack of expertise in the Federal Circuit Court. Prior to the passage of the law, the Family Court's first Chief Justice, Elizabeth Evatt, expressed concern at undesirable outcomes for children and families, commenting that

> The Family Court was designed purposely as a world-leading, specialist, standalone court to deal only with family law matters, with the support of a dedicated multi-disciplinary team of counsellors and mediators …Its standalone nature is one its greatest attributes, providing protections for vulnerable people in need of family law assistance (cited in Snape 2020).

More recently, new concerns have emerged as the Family Court becomes the arbiter of whether or not "gender-affirming" medical procedures should be approved for minors, in a political landscape where such procedures are stridently defended and even mandated in some State legislatures but the evidence base for them is lacking. Both the decision to allow the procedures and conflicts between parents over them now are increasingly ending up in the Family, or rather, Federal Circuit, Court, before judges who have little grasp on the science or the developmental ramifications for the children concerned, but are operating in a context of fierce lobbying and legislative support for these procedures, as well, again, as in a context where "expert witnesses" are running a specific political agenda (Lane 2023).

These various issues with the Family Court point, first, to the need to restore the independence of the Court and increase its funding under a new Federal human rights regime, and second, to provide for a serious, non-partisan inquiry into the rights and best interests of the child in the face of so-called gender medicine, such that the Family Court is provided with the informational and analytical resources to enable it to deliberate constructively in these matters.

We cannot close this submission without a brief mention of Australia's international human rights engagement and obligations, which *also involve a participation duty* towards those finding themselves on Ausralian territory and seeking the protection of the Australian state.

Apart from Australia's moral obligation, as a wealthy nation (G20 member), to provide human rights leadership and material aid in our region and beyond, we have concrete treaty obligations under the Refugee Convention and Protocol as well as the CAT.

Australia must, as a matter of urgency, put an end to the arbitrarily punitive treatment of asylum seekers, which has been extensively documented and criticised over the last two decades as breaching Australia's treaty obligations, including by barrister and refugee advocate Julian Burnside; Challis Chair of International Law at the University of Sydney Ben Saul; and Australia's former President of the Human Rights Commissioner, Gillian Triggs (Burnside 2007; Saul 2012, 2013; AHRC 2014). These criticisms have also been widely publicised through testimony by asylum seekers themelves, among them the collection of letters *From Nothing to Zero* (2003) and, most famously, the recent memoir by Behrouz Boochani, *No Friend but the Mountains* (2019), which was sent in instalments on WhatsApp from Manus Island and translated from Farsi to English by Omid Tofighian. Ironically, that memoir won several Australian literary awards yet Boochani himself still did not obtain asylum in Australia, but in New Zealand.

The AHRC has recently expressed concern at the ongoing violations of the human rights of asylum seekers in Australia:

> Australia has one of the strictest immigration detention regimes in the world. It is mandatory, is not time-limited and people are not able to challenge their detention in court. For many years, the Commission has called for an end to this system as it leads to breaches of Australia's human rights obligations (AHRC 2023c).

Here, also, even if unaccompanied males (presumed heterosexual) are the majority of asylum seekers, it is women and homosexuals fleeing (hetero)sexist persecution who are the most at risk of various forms of violence, including sexual violence and including from other asylum seekers within camps overseas and detention centres within Australia or offshore. They face these risk *because of their sex and/or because of their actual or presumed sexual orientation—especially if they do not conform to heteronormative precsriptions concerning appearance and behaviour.* Here, too, Australia has human rights obligations.

6.4 Recommendations

Recommendation 23. That the new FHRA reflect the fact that **Australia has human rights obligations as one national state and needs one set of mechanisms for complaint and remedy being handled at Federal level, initially by the AHRC.** Where jurisdictional questions arise, the complaints-handling body should be empowered to expedite referral to the appropriate State or Federal authority through, among other things, the provision of clear guidance to complainants concerning next steps if a conciliation process is terminated.

Recommendation 24. That the new FHRA **provide for human rights information and education to be delivered** not only to public service actors but also to the private sector and to individuals and groups seeking redress. This information and education should be available in accessible format for all.

Recommendation 25. That the new FHRA **centre the AHRC as the body administering human rights research, advocacy and mediation in consultation with the community.** The FHRA should provide for periodic reviews of the powers, funding and structure of the AHRC, such that it continues to be fit for purpose as the key human rights agency in a continually evolving sociopolitical context. An evidence-based approach must be taken to ensure the people administering programs to promote and protect human rights in Australia are representative of the Australian community.

Recommendation 26. That the new FHRA contain a **formal government commitment to meaningful international human rights engagement**, including appropriate resourcing of international or regional human rights commitments.

Recommendation 27. That **the previous level of Commonwealth funding for legal aid services be restored**, and that overall funding be increased, such that the theoretical equality of access to rights be given material weight for those that are currently most disenfranchised, **including those deprived of liberty within the prison or other detention system, and including asylum seekers.**

Recommendation 28. That **the independence of the Family Court be restored** and its funding increased, and its regulations and procedures reviewed such that both vulnerable women and children have full access to the protection of their rights, notably the right to live free from violence and abuse.

Recommendation 29. That the new FHRA **explicitly include provisions for the protection of the human rights of asylum seekers** incorporating the provisions of the ICCPR as well as the Refugee Convention, and that **a comprehensive review of the current** regime in relation to asylum seekers be undertaken as a matter of urgency.

Glossary of acronyms and abbreviations

ABS	Australian Bureau of Statistics
ACON	AIDS Council of New South Wales
AHRC	Australian Human Rights Commission
AHRCA	Australian Human Rights Commission Act
AIFS	Australian Institute of Family Studies
AIS	Australian Institute of Sport
AIHW	Australian Institute of Health and Welfare
ALC	Arts Law Centre
CAT	Convention Against Torture and other cruel, inhuman or degrading treatment or punishment
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DEVAW	Declaration on the Elimination of Violence Against Women
DSD	Disorders of Sexual Development
FHRA	Federal Human Rights Act
FLC	Feminist Legal Clinic
FWA	Fair Work Act
GAM	Gender Affirming Medicine
GIDS	Gender Identity Development Service
HRC(s)	Human Rights Commission(s) or Human Rights Committee/Council
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
LGB Alliance	Lesbian, Gay and Bisexual Alliance
LGBTIQA+	Lesbian, Gay, Bisexual, Transgender, Intersex, Queer/Questioning, Asexual/Allies, Plus any other diverse sexual or gender self-identification
LWS	Let Women Speak
MEAA	Media Entertainment and Arts Alliance
NHRI	National Human Rights Institutions
PP	Paris Principles
ROGD	Rapid Onset Gender Dysphoria
RDA	Racial Discrimination Act
SDA	Sex Discrimination Act
SOGI	Sexual Orientation and Gender Identity
TERF	Trans Exclusionary Radical Feminist
UDHR	Universal Declaration of Human Rights
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
WEF	World Economic Forum
WHO	World Health Organisation
YP	Yogyakarta Principles 2007
YP+10	Yogyakarta Principles 2017 version

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