AUSTRALIAN FEMINISTS FOR WOMEN'S RIGHTS

Feedback to the Australian Government on its draft of the Ninth periodic report for submission under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women 26 September 2024

Australian Feminists for Women's Rights (AF4WR) welcomes the opportunity to provide feedback on this draft report. AF4WR is an incorporated association of left-wing feminists who campaign for the sex-based rights of women and girls, within the broader struggle for a more just and equal society. Women and girls must have full and equal recognition and participation in society — politically, economically and culturally. We advocate for evidence-based protections in law, policy and all social interactions, to enable and acknowledge our rights and needs specific to our sex.

In providing this feedback we are cognisant of the purpose for which CEDAW was originally drafted and signed: to create an obligation on signatory states to protect women as a sex from discrimination, to combat attitudes and behaviours to women that are based on patriarchal sex-role stereotypes. We note in particular Article 5(a), which requires States Parties "to take all appropriate measures":

> To modify the social and cultural patterns of conduct of men and women, with a view to achieving 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.

We further note the position paper published in April 2024 by Ms Reem Alsalem, UN Special Rapporteur on violence against women and girls (UNSR on VAWG), on the definition of "woman" in UN treaties and in particular in CEDAW.

We would like to acknowledge the progress Australia has made in statutory protections of women's rights in general and protections against discrimination and violence in particular since its eighth report submitted in 2016. We nonetheless consider this progress to be insufficient in several areas, sometimes because the laws are not adequately enforced within the various institutions charged with doing so, and sometimes because they are simply too weak in protecting women, or include other categories of individuals in legal protections for women, thus setting up conflicts of rights claims which have of late been resolved to women's detriment. We would thus like to see far stronger commitments by the Australian government in the following areas:

1. A firm commitment to removing the reservation to Article 11(2) of CEDAW

We note the government is "reviewing" its reservation to Article 11(2) of CEDAW "with a view to withdrawing it", and note the progress made in the area of paid parental leave (PPL), including measures to increase its duration in coming years. These measures will certainly help lift Australia from continuing to be one of the worst performers in the OECD in this area. However, we highlight that pregnancy-related employment discrimination remains a persistent issue for women, and that sometimes despite industrial entitlements being introduced, the political will to enforce them, even in public sector employment, is lacking.

We would welcome an unambiguous commitment in this Report to the withdrawal of this reservation, which has no reason to continue to exist in the third decade of the 21st century.

2. A commitment to working towards a federal human rights act

We further note, from Paragraph 42 of the draft Report, that the Parliamentary Joint Committee on Human Rights (PJCHR), following its 2023 consultation (to which AF4WR made a 70-page submission with multiple recommendations: submission 211 on the Inquiry website), has recommended that the parliament:

i. enact a federal Human Rights Act;
ii. commit to national human rights education;
iii. enhance human rights parliamentary scrutiny; and
iv. review all existing legislation for compatibility with human rights.

We support these recommendations and stress that it is necessary for the government to make a firmer commitment in its CEDAW report to taking more proactive steps than simply "considering" the report. Australia is now the *only* Western democracy to lack either a constitutional bill of rights or a federal human rights act. The Australian government should commit *now* to commencing a process to introduce a federal human rights act, including but not necessarily limited to:

a) Wide-ranging and in-depth public consultation with appropriate individuals and stakeholders concerning specific aspects of the act;
b) A consideration of how existing specific discrimination acts will be brought under a holistic human rights law, including particular attention to the interaction and often compounding of different forms of discrimination (e.g. against older women, or Indigenous women);
c) Establishing transparent and impartial guidelines and processes for addressing conflicts of rights claims;

d) Strengthening the impartiality of the Australian Human Rights Commission (AHRC), which has in recent times exhibited significant bias against women in areas where the rights of women as a sex enter into conflict with the rights claims of males with a "woman" gender identity.

A federal human rights act, if carefully thought through and constructed in genuine and impartial consultation with a range of stakeholders, would go a considerable way to addressing existing conflicts, gaps and ambiguities in Australia's human rights framework, notably, for what concerns us here, with regard to the rights of women and girls.

We would thus ask that in this Report a commitment is made by our government to presenting a bill to parliament to apply recommendation (i) of the PJCHR report as set out above.

3. A commitment to strengthening the Sex Discrimination Act to better protect women

A federal human rights act would, if elaborated, have the potential to strengthen protections for women, which are insufficient in the Sex Discrimination Act (SDA). At the time of its adoption in 1984, the SDA offered protections on the basis of sex without distinguishing between men and women as to the need for such protections, even though certain protections clearly concerned women in particular. The SDA was thus inadequate from the outset as an enactment of CEDAW which is specifically about protecting *women* from discrimination.

Men do not suffer sex-based discrimination as understood in the terms of CEDAW or indeed according to the original intent of the SDA. Where men are excluded from women's spaces, activities and so on, this is specifically in order to address discrimination and violence against women, as is noted, for example, in paragraph 91 of the draft Report on provision of support services for women having suffered male violence.

The draft Report foregrounds amendments to the SDA, all of which the government sees as positive. While we concur on the positive import of the inclusion of discriminations on the basis of sexual orientation or breastfeeding or the Respect@Work amendments, we do not concur that all amendments have represented progress for women.

We stress in particular that the SDA is not an ever-expanding receptacle into which can be placed various other minority groups with grievances about discrimination or claims to affirmative action. The SDA was intended to be the Australian application of CEDAW and needs to be brought closer to that purpose. One of the advantages of a federal human rights act would be in fact to decouple other rights claims from those of women. While sexual orientation of lesbians, for example, is indeed a sex-based issue, because lesbians suffer specific sex-based forms of discrimination, sexual orientation more broadly also concerns men. The placement of sexual orientation more generally, aside from how it impacts on women

who are same-sex attracted, within the SDA is thus inappropriate. Likewise gender identity and "intersex" status.

The use of the term "Intersex status" is no longer commonly accepted as properly reflecting what are now referred to as DSD (differences or disorders of sexual development). All so-called intersex persons are biologically either male or female, even if their sex characteristics present unusually. It is thus inaccurate to suggest that people with a DSD are somehow in between male and female.

We are increasingly seeing particular issues arise as concerns the rights of persons with a DSD and potential conflicts of rights. The debates over males with a DSD in women's international sporting competitions, for example, have caused significant distress to both women athletes and no doubt to many of the DSD males competing in their events. The case of persons with a DSD not already covered in disability legislation (such as females with Turner syndrome or both males and females with Down syndrome) thus need to be handled sensitively in both legislation and policy. They are not, however, in and of themselves issues of *sex discrimination against women* for the purposes of the SDA.

We now turn to gender identity. As we argued in our abovementioned submission on the Human Rights Framework, the 2013 amendments to the SDA considerably weakened it by removing definitions of male and female; providing no definition of either sex or gender; and providing only a circular definition of gender identity based on the feelings and appearance of an individual concerning the individual's gender. As gender is included as a protected attribute but not defined, we are none the wiser about what protections are afforded by the SDA, and discrimination claims are thus wide open to interpretation according to the political mood of the day.

In particular, the SDA offers zero guidance as to steps to be taken in the case of perceived or actual conflicts of rights, which, once again, means that considerable licence is given for biased interpretations of the law to occur, as has indeed happened in recent months.
Two court cases this year have highlighted the conflict in rights claims between women and males with a gender identity, as well as bias from the AHRC.

The first, Tickle vs Giggle, has become the subject of international news and debate. The AHRC intervened in the case on behalf of Tickle. The Federal Court decision of 23 August found indirect discrimination against transgender person Roxanne Tickle and ordered damages and costs against the respondent, Sall Grover. The judge in his remarks claimed that "sex" is a movable category. It may have become so in law in some state jurisdictions, but it does not become so in human biology. Nor does it become so when it comes to sex-based discriminations and violence, and (hetero)sexist attitudes, against women. It is not yet confirmed whether the decision will go to appeal but the broad potential ramifications of the

finding on the ability for the SDA in its current form to protect women and girls must not be ignored by the Australian government.

The second court case, Lesbian Action Group's appeal against the Australian Human Rights Commission's refusal to grant an exemption under the SDA to hold women-only public events (that is, events for female adults), was heard some ten days after the above Federal Court decision, at the Administrative Appeals Tribunal in Melbourne. The decision is pending. Following the hearing, the AHRC attempted to have an intervention by Reem Alsalem, UNSR on VAWG, excluded from the proceedings; it also requested that certain provisions of international treaties to which Australia is a signatory be discounted in their relevance. The decision on these matters is also pending.

These two cases highlight the problems arising from the absence of definitions of sex, gender and gender identity in the SDA and the ensuing confusion and opening of opportunities to weaponise the law for political reasons, notably against women. The AHRC is supposed to be an impartial body; the Sex Discrimination Commissioner's *parti pris* in these two cases is thus disturbing. (We also note in passing a comparable apparent *parti pris* by the E-Safety Commissioner, discussed in our June, 2024 Submission to the Statutory Review of the Online Safety Act.)

As Reem Alsalem's abovementioned position paper makes abundantly clear, the word "woman" in CEDAW, as in other international human rights treaties and associated UN documents, refers to people of female biological sex. Where the word "gender" is used (such as in the Rome Statute of the International Criminal Court), it is also made clear that the reference is to people of male and female sex. Ms Alsalem notes that:

> While CEDAW did not define "gender", the Committee in charge of monitoring its implementation (hereafter, the "CEDAW Committee") has defined the term "gender" in its general recommendations …In General Recommendation No. 28, the CEDAW Committee defined "gender" as "socially constructed identities, attributes and roles for women and men and society's social and cultural meaning *for these biological differences* resulting in hierarchical relationships between women and men [emphasis added].

We further note that the term "gender-based violence", long used by the UN and indeed many member States, including Australia, is understood to refer above all to male violence against women, even if this reference is not explicit in the denotative meaning of the term. The Australian government's own presentation of "gender-based violence" as Priority Number One in its "Working for Women" strategy makes this reference crystal clear:

> Rates of violence against women in Australia have remained alarmingly high over recent decades, in spite of increased efforts across the country.
> Equality cannot be achieved when so many women are experiencing violence at the hands of men – often from men they know. This violence can be deadly. The threat of violence alone affects women's lives and the choices they make.
> Gender-based violence – including sexual violence and harassment, and domestic and family violence – is complex, intricately linked to women's position in society and is a product of power imbalances between men and women. This is exacerbated by systems that fail to hold perpetrators to account, enable violence to continue or put the onus for change on the women it has affected (Australian government gender equality website, consulted 24 September 2024).

Yet the same website, in discussing "gender attitudes and stereotypes", refers to "gender diverse people" and a gender expression that sits "outside the traditional gender binary".

We are thus confronted with two different understandings of "gender" in Australian federal, and by extension state, law and policy. The first relates to discriminations and violence against women *as a sex*, within a clear understanding that there are people of male sex who perpetrate, and/or benefit from, discriminations and violence against people of female sex. However, the second concerns some sort of personal identity perceived by individuals of either sex that is deemed to somehow sit outside this power relationship between the sexes but still apparently has something to do with the government "Working for Women" strategy.

"Women" is not an identity category. It is a social category, denoting a class of people that suffer discrimination and violence *because they are biologically female*, and on many levels the government demonstrates a clear understanding of this fact. On another level, however, there is this new amorphous, non-defined, individualised "gender identity" category that sits outside the power relationship between the sexes but is nonetheless shoehorned into the "women" category for the purpose of the SDA. This is not a coherent basis for making law and policy to address discriminations against women. Importantly, it is certainly not up to Australian women to make accommodations for people of male sex who fall into (or rather, identify into) this "gender diverse" category. Expecting them to do so fundamentally undermines the integrity of the SDA and its intent.

The 2013 Amendments to the SDA thus take it further from CEDAW, not closer to CEDAW. People with a gender identity, like all humans, have rights, and some no doubt suffer some forms of discrimination. But the SDA is the wrong instrument to address this. The SDA was initially enacted as the translation of CEDAW into Australian law, and must be returned to that focus. Protections for other social categories in need of them should be the focus of other laws.

The Report should thus include a commitment from the Australian government to decoupling sex from gender identity as protected categories—as we have seen above that they are currently entering into conflict in legal cases, at women's expense—and to returning the SDA to its original purpose, based on unambiguous workable definitions of terms.

4. Amendments to the Family Law Act

We welcome the changes to the Family Law Act, notably:

- the central focus on the welfare of the child, with specialised legal support for children over 5 in custody cases;
- the removal of the requirement for "shared parenting" without due regard for either the specifics of the family situation or the welfare or wishes of the child;
- the explicit inclusion of a requirement to look at the family history in considering child safety;
- improved compliance and enforcement provisions for child-related orders;
- new powers for the Courts to prevent harmful litigation, including the power to make harmful proceedings orders.

These changes represent a major conceptual shift and hold out the promise of a much fairer system and a far less detrimental one to women and children. We are also heartened by the government's responsiveness to input from feminist lawyers with considerable experience in supporting women and children through the previous Family Law process.

However, both lawyers and women having been through the Family Court system with whom we have consulted have expressed ongoing concerns, which highlight, once again, that laws are only as good as the mechanisms provided for their effective application and the political will to enforce them.

First, adequate legal aid funding needs to be provided for parents in need of such support (usually albeit not always the mothers). One of the major issues faced by women in dealing with the Family Court is the lack of funds, resulting in them having to self-represent, and they often lose out in the process.

Second, the provision for harmful proceedings orders, designed to prevent systems abuse of family violence survivors through harmful litigation, could work against women as easily as it could work for them, particularly given the abovementioned problem of having to self-represent. For example, as some submissions concerning the 2023 exposure draft pointed out, property proceedings are frequently weaponised by perpetrators against women.

Third, all professionals working in the Family Court structure must be properly trained to undertake their function as the legislation intends. The roles of Independent Children's Lawyer (ICL), Family Report writers and, particularly, new judges, need to be properly trained in the

application of the new laws. The sexist mindset enabled by the previous legislative framework, including that which sees women's word as untrustworthy and which has too often informed proceedings to date, risks carrying over into the new framework if proper attention is not paid to ensure that *legal professionals as well as parents comply with the new regime.* Restoring the independence of the Family Court rather than keeping it under the aegis of the Federal Circuit Court is critical in working towards this goal.

Fourth, the Family Courts have long been a battleground where a double and self-contradictory logic operates of adversariality on the one hand and a requirement to negotiate and compromise on the other hand. The juxtaposition of these two mutually exclusive mindsets is frequently manipulated by perpetrators and their lawyers and works, once again, to the detriment of women and of children. The proper functioning of the roles of the Family Report writers and ICL will certainly help, but a more conciliatory approach to dispute settlement in the Family court, bringing in a range of experts, would further help reduce the toxicity of the Court process as an adversarial and often punitive one for women.

Fifth, we note with dismay the removal of the space dedicated to the Women's Court Support Service in Sydney, ostensibly to accommodate legal professionals and other Court staff. However, we have since been given to understand that this space is now used for supporting *men* in Family Court proceedings. If this is the case, it is indeed distressing news and an indicator that the system is still working against women rather than for women.

We thus wish to see the government add to its Report a commitment to an investigation or at least consideration of the following matters:

a) restoration of the independence of the Family Court by reversing the 2021 merger of the Court with the Federal Circuit Court;
b) provision of increased legal aid funding to support the new initiatives and contribute to levelling the legal playing field for women;
c) provision of rigorous training for new and continuing Family Court judges in application of the new legislation, which represent
d) dedicated space and resourcing of Women's Court Support Services, for women attending court proceedings in the Family Court, to provide for their support, assistance and security.

5. Male violence against women

We note the many measures introduced by the government, with significant funding attached, to address violence against women, both in the home and in the workplace. Yet male violence against women (MVAW) appears to continue unabated and has even increased in recent times, whether we are talking beating, rape, sexual harassment or murder. As feminists we have witnessed decades of various government measures to address MVAW, with patchy or paltry

results. All those programs do not seem to have got us very far. This is not only frustrating, it is deadly for women.

The problem is huge: it is societal and all-encompassing. It has at its core the masculinist presumption that women count as less fully human, as less valuable humans, than men; that women exist for the use of men rather than as humans in our own right; that women's interests and welfare are expendable when men have specific wants or needs that they require to be addressed. Again, we cite the case of gender identity, but it is far from the only case. As long as male entitlement remains more important—culturally, politically, legally, financially—than women's rights and safety, we are not going to solve the problem.

The first step, in our opinion, is something that the inaugural Domestic, Family and Sexual Violence Commissioner, Micaela Cronin, has also foregrounded. In her 22 August address to the National Press Club in Canberra, Cronin observed that the National Plan to End Violence Against Women and Children uses the word "men" 129 times and, in contrast, the word "women" 543 times: over four times more. Ironically, her National Press Club audience was composed almost entirely of women, which is further indicative of the problem.

MVAW is not a "women's problem". It is a men's problem. Certainly, programs need to focus on women: refuges, medical, psychological and legal support, workplace support and so on. But they also need to call men to account in much more concrete ways. The Respect@Work initiative does create a positive duty on employers with some significant penalties for non-compliance. But this is in the public sphere, and just as in the private sphere, it is still up to the women to report abuses, commonly within a male power-based response structure.

Initiatives to include education about respectful relationships in school programs are laudable, but until every single government initiative clearly foregrounds male violence against women as a *male* problem, and addresses the considerable resistance to such messaging, we are unlikely to see cultural change. The challenge is significant, but a change in mindset from focusing on the victims who are framed as incarnating the problem, to focusing on the perpetrators who have created the problem, and on men as a group who need to take collective responsibility for it, is crucial to success.

One aspect of MVAW that needs more attention is its institutional enablement —in the courts, by police, in the workplace—and resulting re-traumatisation of women who seek to assert their rights.

First, the police and the courts. Cases such as that of "Chloe" in Western Australia earlier in September 2024 simply should never happened. Chloe had to submit to a cross-examination for five hours by her alleged DV perpetrator in a contested Restraining Order case: WA law allows this. Molly Ticehurst should never have died earlier this year in NSW: her alleged murderer was out on bail after being arrested for raping and stalking her. The list of such cases

is long. *They simply should not happen*. Federal law needs to override inadequate state laws: women need to be taken seriously by the police and by the courts and are entitled to their protection.

Second, the workplace. One of the workplaces in which sexual harassment is rife is the hospitality industry. The workforce is overwhelmingly young, female, casualised and under-unionised, and these women work in a sector where being attractive and servile to male clientele is part of the cultural landscape, to the extent of often being an unstated job requirement. Sexual Harassment Australia goes so far as to state that "sexual harassment is so common within the hospitality industry that it's just seen as part of employee's job".

However, this is not only a "pink collar" problem. At the opposite end of the workplace spectrum, women in high paid, well-educated industries also routinely suffer sexual harassment. The individual experiences of women in medicine, for example, provide a stark reminder that this notoriously male dominated sector creates a dynamic in both training and employment in which women balance their right to be free of sexual harassment or discrimination against their career progression and aspirations, and decide to stay silent to protect their career.

Women are unlikely to report cases of harassment due to all of these factors and more. Respect@Work is not going to help them because they do not have sufficient voice to report the issue, to the AHRC or anywhere else. And they see how others suffer when they speak out under inherently sexist employer structures.

We thus urge the government to include in its Report, in addition to documentation of all the very important and very welcome progress that it has made in this area, a commitment to

a) engaging with state governments with a view to conducting an overhaul of legal and police procedures and structures in those states and appropriate training of legal and enforcement officers, and
b) proposing a federal inquiry into discrimination, sexual harassment and hypersexualisation of women in the workplace.

We thank the government for this opportunity to provide feedback and look forward to further progress in the above-discussed areas.

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