AUSTRALIAN FEMINISTS FOR WOMEN'S RIGHTS

SUBMISSION

TO THE INDEPENDENT STRATEGIC REVIEW ON:

Queensland Human Rights Commission and Queensland's Anti-Discrimination Protections and The Human Rights Statutory Framework

Submitted by:

Australian Feminists for Women's Rights (AF4WR)

30 October 2026

To:

The Hon. Peter Flanagan KC, Strategic Reviewer

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Via

the Queensland Government Department of Justice

About this submission

Australian Feminists for Women's Rights (AF4WR) is a feminist organisation focused on the sex-based health, safety and legal rights of women and girls, including Australia's compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). AF4WR has members in Queensland.

AF4WR answers the questions in the Discussion Paper (30 September 2026) that relate to the sex-based human rights of women and girls. All are within the Terms of Reference, including Part B(a)(iv) (rights under CEDAW) and Part C(b) (any reform to the Anti-Discrimination Act 1991). Our concerns relate to how gender identity, and the definition of "sex" adopted to accommodate it, now operate against women's sex-based protections.

Summary of AF4WR's answers

The Anti-Discrimination Act 1991 (ADA) protects women by reference to "sex" but never defines the word, and the QHRC reads it as including the sex a person identifies with. After Giggle for Girls Pty Ltd v Tickle [2026] FCAFC 64, the same reading of the federal Act has left women-only services and special measures open to challenge. AF4WR asks the Review to fix that foundation first (section 1), then test each uncommenced provision against it.

Question	AF4WR's answer
Part C(b), [498]	Define "sex", "man" and "woman" by the male and female sex; make the single-sex exceptions answer gender identity claims (section 1)
A1	QHRC advice to state the legal status of each source, treat only treaties as obligations, and assess the effect on each attribute, including sex
A9 and A10	Take part only with leave, as intervener or amicus; address each group's interests and Australia's obligations under CEDAW
A12	Train on women's sex-based rights; independent legal review and publication of training materials
A13 to A15	If involved earlier, publish the advice and its sources when the Bill is introduced
A16 to A17	Publish a complete list of engagement partners and external support; include women's sex-based rights organisations
B2	Add a right to equality between women and men, with protection for measures for women, and a right of women and girls to live free from violence
B10	Retain s 48, with a note that it cannot override the Act's purpose; a definition of sex settles the question
B16	Yes, make the definition exhaustive
C1	Replace "equitable outcomes" with "substantive equality between women and men"
C2	Retain, once "sex" is defined; omit s 120(1)(b)(v)

Question	AF4WR's answer
C3	Retain, once "sex" is defined
C7	Agree with the preliminary view not to commence
C9	Yes. The new definition removes sex from sexual orientation
C10	Commence only after section 1 reforms
C11	Yes, but only after the section 1 reforms
C12	Yes. Agree with the preliminary view to delay
C13	No, for two reasons; any enforcement body should be separate from the QHRC
C18 and C19	Publish for consultation, state the exceptions for women's services and be consistent with a definition of sex
C20	Sex must be a ground, once defined
C21	Do not support while "sex" is undefined and s 124C remains
C23	Commence s 124C only if sex is defined and good faith statements about sex are protected

1. The meaning of sex (Part C(b) and Discussion Paper [498])

Although Queensland was the second-last Australian state to allow women to vote in state elections (1905), it led the nation in protecting women when it enacted the 1991 ADA. The QHRC records that the Act contained the most comprehensive sexual harassment protections of its day and Queensland was the first State to prohibit discrimination on the ground of breastfeeding (Building Belonging (July 2022), p 44).

The Act's preamble still names CEDAW, and its examples still describe accommodation for women escaping domestic violence (s 104) and the employment of women to search women (s 25). Every one of these protections depends on the word "sex" and implements CEDAW.

In 2022 the Commission nonetheless advised that "sex" includes the sex with which a person identifies (Building Belonging, pp 279 to 281, Recommendation 22.3), and this year the Full Federal Court has shown where that reading leads under the federal Act. (Giggle for Girls Pty Ltd v Tickle [2026] FCAFC 64, [277] to [283], [298] to [301])

The Discussion Paper notes that the Respect at Work Act 2024 adds sex as a ground of vilification without defining it ([498]). The same gap runs through the whole ADA. Sex and gender identity are separate attributes (s 7(a) and (m)), and gender identity is defined as a person's "internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth", but sex is never defined. (Anti-Discrimination Act 1991 (Qld), s 7 and Schedule 1)

The current definition was inserted by the Births, Deaths and Marriages Registration Act 2023 and commenced on 29 April 2024 ([375]). The Explanatory Notes to the proclamation commencing it state that the new definition "implements recommendation 22.1" of Building Belonging, which recommended that the definition of gender identity "be based on the definition in the Yogyakarta Principles". The wording closely matches the Yogyakarta Principles' definition, a "deeply felt internal and individual experience of gender" (Yogyakarta Principles, Preamble). Building Belonging also recommended redefining gender identity "consistently with the Yogyakarta Principles plus 10", the 2017 supplement, although its footnote cites the 2007 Principles (p 272, n 89).

The QHRC's reading. In Building Belonging (July 2022) the QHRC advised that "sex" encompasses "the sex with which a person identifies" and recommended that the Act say so (Recommendation 22.3). It counted as a consequence to be avoided that a charity's women's crisis accommodation could lawfully refuse a male person who identifies as a woman (s 91). It reached a matching conclusion on sexual orientation, finding that replacing "sex" with "gender" in that definition would "not compromise existing protections" (p 285; see C9). However, in each case, the protections that would be lost were women's.

The federal Commission gave a similar assurance in 2013, stating that the new federal grounds "do not affect the existing grounds" (AHRC, June 2013). A 2010 submission to its consultation on discrimination on a ground of gender identity had warned that women "cannot be fully protected in institutions such as women's refuges" if male persons are admitted (Erinyes submission, 2010). In 2026 the Full Federal Court held that a women-only service could not rely on the special measures provision to answer a gender identity claim (Giggle for Girls Pty Ltd v Tickle [2026] FCAFC 64, [301]).

In Building Belonging (July 2022) the QHRC described the Yogyakarta Principles as an "authoritative exposition of international human rights law" (p 275). It did not assess the effect on women under CEDAW's sex-based definition of women's human rights, which the ADA's preamble names. (pp 275 to 281)

The status of that source. The Yogyakarta Principles are a statement by a private group of experts; no State is a party to them. In 2013 the Commonwealth Attorney-General's Department told the Senate they "have no legal force either internationally or within Australia" (Senate Legal and Constitutional Affairs Legislation Committee, Report on the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, June 2013, [3.40] to [3.41]). As far as we can ascertain, neither the Yogyakarta Principles nor the QHRC has assessed the impact of the gender identity ground on women's rights under CEDAW. The Human Rights Committee's only decision on an individual complaint involving gender identity, G v Australia (2017), proceeded on Australia's submission that "other status" in the ICCPR includes it, without reasoning or authority (paras 4.14 and 7.12).

The consequence. In Giggle for Girls Pty Ltd v Tickle [2026] FCAFC 64 the Full Federal Court held that "woman" in the Sex Discrimination Act 1984 (Cth) (SDA) includes a male person

who identifies as a woman, and that a special measure for women is no defence to a gender identity claim ([277] to [283], [298] to [301]). The High Court refused special leave on 10 September 2026. (Full Court; special leave) On the QHRC's reading, the ADA's single-sex provisions are exposed in the same way.

The Full Court acknowledged that the observations it relied on in Secretary, Department of Social Security v SRA (1993) 43 FCR 299 were "strictly obiter" ([204], [277]). Those observations trace back to cases that treated a person as the opposite sex only so that a particular law could apply, on indecency between males, a wife's pension or marriage, and each of those laws has since been reformed (R v Harris and McGuiness (1988) 17 NSWLR 158). They were statutory workarounds for outdated laws and so did not change the ordinary meaning of "woman".

Queensland women's services already face this. In Re: Sera's Women's Shelter Incorporated [2024] QIRC 199 a shelter for women and children escaping domestic violence sought an exemption to employ only women. The QHRC opposed it and submitted that any exemption covering gender identity should allow the employment of "females, trans women, and persons who identify and express themselves as female" ([61] to [63]). The QIRC refused the exemption as unnecessary, finding that the existing exceptions in ss 25, 104 and 108 already allow the shelter to employ only female staff ([131], [159] to [161]). That protection rests on one tribunal member's reading of exceptions that never mention gender identity. The QHRC's annual report describes the case only as an exemption refused for being "too broad" (Annual Report 2024–25, p 56).

ADA provision	What it permits	Answers a gender identity claim?
s 25	Only women for body searches of women (example 3)	Uncertain while "women" is undefined
s 30	Separate sleeping accommodation for each sex	No (sex only)
s 41 and s 89	Single sex schools and student accommodation	Uncertain while "sex" is undefined
s 91	Charitable accommodation according to its purposes	No (sex, relationship status or age only)
s 98	Club benefits for males and females separately	No (sex only)
s 104 and s 105	Welfare and equal opportunity measures, including accommodation for women escaping domestic violence	Uncertain after Tickle
s 111	Competitive sport for males or females	Yes, expressly (s 111(3))

In her 2025 report to the Human Rights Council, the UN Special Rapporteur on violence against women and girls recommended that States "clarify and reaffirm the definition of sex

according to its ordinary meaning". She also recommended that laws expanding sex to include "certified" or "legal" sex, or conflating sex with gender identity, be rescinded, because they undermine equality between women and men. (A/HRC/59/47, 16 June 2025, para 64)

Draft provisions. The Terms of Reference invite draft provisions (p 4). AF4WR offers the following draft provisions for testing by Parliamentary Counsel.

1. Insert in Schedule 1 "**sex**, of a person, means the person's sex as male or female"; "**man** means a male person of any age"; "**woman** means a female person of any age".
2. "For this Act, a person's gender identity, or a change to the sex recorded for the person in a register of births, does not change the person's sex."
3. "An act that is not unlawful under section 25, 30, 41, 89, 91, 98, 104 or 105 because it is done in relation to persons of one sex is not unlawful discrimination on the basis of gender identity."

The Review may wish to consider the interaction with ss 10 and 11 of the SDA, which preserve State laws capable of operating concurrently with it, including State laws that further the objects of a relevant international instrument such as CEDAW.

2. Part A: the QHRC

A1: Should there be any changes to the drafting of the QHRC's functions or powers?

Yes. On sex and gender identity the QHRC treated a non-binding text, the Yogyakarta Principles, as international law and did not weigh the binding treaty, CEDAW, that protects women (section 1).

The Yogyakarta Principles are not an instrument to which any State can be a party. Under Australia's treaty-making process, a proposed treaty is tabled in both Houses of Parliament and reviewed by the Joint Standing Committee on Treaties before the Federal Executive Council approves binding treaty action, and any legislation needed to implement it must pass both Houses. The Yogyakarta Principles have been through none of these steps. In 2013 the Attorney-General's Department told the Senate committee examining the Bill that the Principles "have no legal force either internationally or within Australia" and "were developed by a group of human rights experts, rather than being an agreement between States".

The Paris Principles ask that national human rights institutions promote harmonisation with "the international human rights instruments to which the State is a party" (Paris Principles, GA Res 48/134 (1993), para 3(b)).

AF4WR recommends that, when the QHRC advises on a law or reports on law reform, it must state the legal status of every international source it relies on, describe as obligations only those arising under treaties Australia has ratified through the federal treaty-making process, and assess the effect on each attribute affected, including on women and girls as a

sex. Building Belonging's conclusion that defining sexual orientation by gender would compromise no existing protections (section 1) shows why. Our answer to C9 sets out the protection lesbians would lose.

A9 and A10: Should the QHRC take part in court and tribunal proceedings, and on what conditions?

Yes, but only on conditions that stop the QHRC presenting advocacy documents to courts as international law. Consistent with A1, its submissions in any proceeding should identify the legal status of every international source relied on, distinguishing treaties Australia has ratified, such as CEDAW, from documents produced by advocacy groups, and should state who authored and funded those documents.

The federal record shows why. In Re Alex (2004) the Australian Human Rights Commission intervened to argue that a 12-year-old girl had a "right to live with a transgender identity" under international human rights law. Its submissions did not refer to CEDAW and did not address evidence raising the possibility that the child was a same-sex attracted girl ([102] to [107], [222]). The Commission's later work became the route by which the 2007 Yogyakarta Principles entered Australian case law and the basis of the 2013 SDA amendment without an assessment of impact of gender identity as a new ground on existing women's rights under CEDAW that Australia is obliged to uphold (Re Alex [2009] FamCA 1292, [183]).

Under HRA s 51(1), the QHRC may intervene and be joined as a party without leave ([70]), and it ordinarily supports the individual party ([69]). Where a proceeding turns on competing attributes, such as a claim against a women-only service, two protected groups have opposing interests. AF4WR recommends that the QHRC take part in any proceeding, whether as intervener or amicus curiae, only with the leave of the court or tribunal, as the AHRC does ([73]). Its submissions should address the interests of each group and Australia's obligations under CEDAW, which the ADA's preamble names.

A12: What is your experience of the QHRC's education services and are any improvements required?

In 2024–25 the QHRC delivered 174 training sessions and received over 20,000 new online enrolments. Its course list includes "Gender identity and discrimination" but no course on women's sex-based rights (Annual Report 2024–25, pp 44 to 46). Employers, schools and service providers act on this training, so its content shapes how women's protections operate in practice.

AF4WR recommends that the QHRC take three steps.

1. Deliver training on the sex-based rights of women and girls under the ADA and CEDAW, covering the single-sex exceptions and measures in ss 25, 30, 41, 89, 91, 98, 104, 105 and 111, and the protections for pregnancy and breastfeeding.
2. Have its training materials on sex and gender identity reviewed for legal accuracy by a person independent of the QHRC, including how they treat the meaning of "sex"

in the ADA, which is unsettled, and the QHRC's view in Building Belonging (Recommendation 22.3), which is not the law.

3. Publish what it teaches on these topics, so the community can see the content of training that shapes how women's protections operate.

A13 to A15: The QHRC's role and timing in policy and legislation

The federal record shows the risk of advice the public cannot see. The Explanatory Memorandum for the 2013 SDA amendment relied on the Australian Human Rights Commission's 2011 consultation report as its principal evidence, without naming the Yogyakarta Principles. The report, which was never tabled in the federal Parliament, records that the Asia Pacific Forum of National Human Rights Institutions contributed to funding it "as part of its program to promote the implementation of the Yogyakarta Principles" (Consultation Report, May 2011, p 1). If the QHRC is involved earlier, AF4WR recommends that its advice on a Bill be published when the Bill is introduced, with its sources and their legal status. Transparency protects both Parliament and the QHRC's independence.

A16 and A17: What is your experience of the QHRC's engagement activities, and what improvements are needed?

Engagement should reach every group the ADA protects, including women's organisations concerned with sex-based rights. The QHRC took part in more than 30 events in 2023 to 2024 and works through partnerships with community legal centres and other stakeholder forums ([90] to [91]).

The Paris Principles, the international benchmark for human rights institutions, call for the pluralist representation of the social forces involved in protecting human rights (para B.1) and for funding free of financial control that might affect independence (para B.2). GANHRI's General Observations add that external funds should not be tied to donor-defined priorities (GO 1.10). Engagement partnerships and sponsored events can create the same risk.

AF4WR recommends that the QHRC's annual report includes a complete list of its engagement partners and any external funding or in-kind support for its engagement and education work, with the purpose of each. The current report names some partners as examples. A complete list would let the public see the whole picture. Its engagement should also include organisations representing women's sex-based rights. These are safeguards, and they protect both the QHRC's independence and public confidence in it.

3. Part B: the Human Rights Act 2019 (HRA)

B2: Should any additional human rights be recognised in the HRA?

Yes. The HRA draws most of its rights from the ICCPR, but it omits article 3, by which States undertake to ensure the equal right of men and women to enjoy all civil and political rights. The words "women" and "sex" appear nowhere in its statement of rights. (Human Rights Act 2019 (Qld), Part 2; ICCPR, art 3).

CEDAW explains why that omission matters. Its preamble notes that the States Parties to the International Covenants on Human Rights are obliged to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights. It then records that the States were "Concerned, however, that despite these various instruments extensive discrimination against women continues to exist". (CEDAW, Preamble) CEDAW was adopted because general equality guarantees had not protected women. The HRA contains neither the general guarantee in article 3 nor any of the specific protections CEDAW added. Section 96(4)(a)(iv) requires the Review to consider rights under CEDAW.

AF4WR recommends a new section after s 15, along the following lines.

1. "Women and men have an equal right to enjoy their human rights."
2. "Measures taken to accelerate equality in fact between women and men, including measures for women only, do not constitute discrimination." (CEDAW art 4(1))
3. "In this section, woman and man have the same meanings as in the Anti-Discrimination Act 1991."

Subsection 2 is needed because s 15(5) protects measures for disadvantaged groups without naming women, and after Tickle a measure for women needs express protection.

AF4WR also supports a right of women and girls to live free from violence, framed as the CEDAW Committee frames it, as violence directed against a woman because she is a woman, or that affects women disproportionately (General Recommendation No 35 (2017), para 1, quoting General Recommendation No 19).

B10: Should the interpretation provision be retained or amended?

The QHRC used s 48 to give "sex" a meaning that defeats the Act's purpose. Section 48(1) requires statutory provisions to be interpreted compatibly with human rights only "to the extent possible that is consistent with their purpose". The ADA's purpose is set by its preamble, which names CEDAW, a treaty about discrimination against women as a sex. The QHRC nonetheless relied on s 48 to read "sex" as including the sex with which a person identifies (Building Belonging, p 279). That reading reverses the Act's purpose instead of serving it.

Section 48(3) permits international law to be considered. CEDAW is international law. The Yogyakarta Principles, on which the QHRC based its approach, are not.

AF4WR recommends that s 48 be retained, with a note that it cannot be used to give an undefined term a meaning inconsistent with the purpose of the Act in which it appears. A definition of sex in the ADA (section 1) would settle the question for that Act.

B16: Should the definition of "discrimination" be made exhaustive?

Yes. An exhaustive definition gives certainty ([277]) and confines discrimination under the HRA to the attributes Parliament has agreed in the ADA.

4. Part C: the Respect at Work Act amendments

C1: Does the phrase "equality of opportunity" require any amendment?

Yes. AF4WR agrees that "equitable outcomes" is uncertain ([317] to [318]). The better phrase is "substantive equality between women and men" as the Respect@Work Report recommended for the SDA ([314(a)]). It ties the concept to CEDAW arts 3 and 4(1) and aligns Queensland with the federal object in SDA s 3(e).

C2: Unintended consequences of a prohibition on harassment on the basis of sex?

Yes, while "sex" is undefined. Once sex is defined, the prohibition would give women the protection CEDAW requires. AF4WR respectfully differs from the Review's preliminary view ([330]) and supports the prohibition as long as "sex" is defined as recommended in section 1.

Building Belonging opposed the prohibition because "extending protection against harassment only on the attribute of sex and/or gender may serve to embed inequality" in the Act (p 138). The phrase "sex and/or gender" treats sex and gender as interchangeable. Women are harassed because of their sex, including their bodies, pregnancy and reproductive capacity. If "sex" is read as gender, the protection moves away from the women it is meant to protect.

1. **CEDAW requires it.** CEDAW was adopted because general equality guarantees had not ended discrimination against women (Preamble). The CEDAW Committee treats harassment of women at work as discrimination against women (General Recommendation No 19 (1992), paras 17 and 18).
2. **The evidence supports it.** The Department of Justice and Attorney-General told the Parliamentary Committee that the Respect@Work evidence "shows that sex-based contraventions remain rampant in workplaces" ([322]). Building Belonging's view that sex-based harassment is no more prevalent than other harassment ([329(b)]) does not engage with that evidence.

   These reports are now out of date as there has been a rapid escalation in misogyny towards girls and women in 2026 as demonstrated in numerous recent news articles and documentaries about the impacts of online algorithms being fed to boys and young men who started out just playing pokemon and Minecraft at 7 years old.
3. **It matches federal law.** The SDA already contains the prohibition ([328]), and matching provisions help employers bound by both Acts.
4. **Proposed s 120(1)(b)(v) should be omitted.** It covers "a sex the other person has been, even if the person is not that sex at the time of the conduct", and so assumes that sex can change.

C3: Unintended consequences of a prohibition on a work environment hostile on the basis of sex?

The prohibition protects women from workplace cultures that demean them as a sex, and it works only if "sex" is defined. AF4WR supports it once "sex" is defined, for the reasons given at C2.

Defined in that way, the prohibition would protect women from workplace conduct that treats their sex as irrelevant. It would cover requiring women to share changing rooms or toilets with male colleagues, replacing "women" with terms such as "people with a cervix" in materials on women's health, and treating a woman's statement that sex is real as misconduct. Each of these is offensive, humiliating or intimidating to women on the basis of "a characteristic that a person of the second person's sex generally has" (proposed s 124E(2)(c)(ii)).

On the QHRC's reading of sex, the same provision could work in reverse. The test is framed around "a person of the second person's sex" (s 124E(2)(c)). Women discussing single-sex facilities, or a women's staff network, could be said to create an environment hostile on the basis of sex to a male person who identifies as a woman. The definition recommended in section 1 decides which way the provision operates.

Building Belonging's concern about bystanders ([334]) does not reflect the drafting. Liability attaches only to a person who engages in conduct, judged by what a reasonable person would anticipate, having regard to the person's role, influence and authority (proposed ss 124E(2) and 124F(c)). The AHRC regarded a sexually hostile environment as already unlawful under the SDA and recommended an express prohibition to set clear boundaries ([333]).

C7: Unintended consequences of the attribute "a combination of two or more attributes"?

Yes. A free-standing combined attribute would undo the section 1 reforms, because a claim on the combination would answer to none of the exceptions that protect women. AF4WR agrees with the preliminary view that an undefined attribute, shaped by the facts of each case, would be problematic ([382]).

Proposed s 8(2) already protects people who face discrimination on two or more attributes, including their combined effect ([378]). It treats that discrimination as discrimination on each attribute concerned, so the Act's exceptions continue to apply to each. AF4WR supports s 8(2), which protects women who face discrimination because of sex combined with race, age or impairment.

Proposed s 7(r) goes further. It would make "a combination of 2 or more of any of the above attributes" a separate attribute (Respect at Work Act, s 7(4)). The single-sex exceptions are drafted around sex. Section 30 permits separate accommodation for each sex, s 91 permits charitable accommodation "on the basis of sex", and s 98 permits separate access for males and females. Even with sex defined and those exceptions secured against gender identity claims, a claim on sex and gender identity together would be a claim on attribute (r), which

none of them answers. The Review calls the attribute an uncertain "catch all" ([381]). Women would bear the brunt of that uncertainty in women's services and other single-sex spaces.

C9: Unintended consequences of the other new or amended attributes?

Yes as replacing "sex" with "gender" would remove existing protections. Building Belonging concluded that replacing "sex" with "gender" in the definition of sexual orientation would "not compromise existing protections" (p 285) but that was wrong because for lesbians it would remove existing protections. A lesbian's attraction to women as a sex would no longer be protected.

The current ADA defines sexuality as "heterosexuality, homosexuality or bisexuality" but does not define those three terms (Schedule 1). In their ordinary meaning, they refer to attraction to persons of the other sex, the same sex, or both.

The proposed new definition asserts protection of attraction to persons "of a different gender or the same gender or more than one gender" (proposed Schedule 1). That wording comes from the Yogyakarta Principles, which define sexual orientation as attraction to "individuals of a different gender or the same gender or more than one gender" (Preamble). Building Belonging called the Yogyakarta approach "best practice" and recommended the gender-based definition (Recommendation 23.1). The new definition would remove sex from sexual orientation. Same-sex attraction would become attraction to a gender, and the QHRC reads even "sex" as including the sex with which a person identifies (section 1). A woman's sexual orientation towards other women as a sex would then have no protection of its own. The UN Human Rights Committee anchored sexual orientation in sex in Toonen v Australia (1994), holding that the reference to "sex" in articles 2(1) and 26 of the ICCPR includes sexual orientation (para 8.7). The Commonwealth responded with the Human Rights (Sexual Conduct) Act 1994 (Cth).

A lesbian is a woman attracted to women as a sex. Under the new definition, a male person who is heterosexual and identifies as a woman would share a lesbian's "sexual orientation". A lesbian group that admits only females could then face a sexual orientation claim from that person. The federal Lesbian Action Group litigation shows that this risk is real (Lesbian Action Group Inc v Australian Human Rights Commission [2026] FCA 432). The UN Special Rapporteur on violence against women and girls cited the group's case as an example of the erosion of protections for lesbians, describing a ruling that its events could not be confined to lesbians born female (A/HRC/59/47, para 34). The Federal Court has since allowed the group's appeal, but the case shows what follows when sexual orientation is detached from sex.

C10: Unintended consequences of the new definitions of direct and indirect discrimination?

Yes as unless "sex" is defined separately to the idea of 'gender stereotypes', the new tests would leave every women-only service, group or space with a case to answer in a gender identity claim.

The direct test asks only whether treatment is "unfavourable" because of an attribute, and the attribute need be only one of the reasons ([404] to [406]). There is no comparator, so excluding a male person who identifies as a woman from a women's service would meet the test without any comparison with how men are treated.

The indirect test treats "creating an environment" as imposing a condition ([410]), so a women-only space would be the condition. AF4WR recommends that both tests commence only after the section 1 reforms that would define "sex" and secure the single-sex exceptions against gender identity claims.

C11: Should the burden of proof shift?

Yes, but only after the section 1 reforms that would define "sex" and secure the single-sex exceptions against gender identity claims.

Under proposed s 204, once a complainant shows facts from which a contravention could be found, the respondent is taken to have contravened the Act unless it proves otherwise ([413]). While "sex" is undefined, a women-only group, often small and run by volunteers, would be presumed to have discriminated in a gender identity claim before it could rely on any exception.

With "sex" defined and the exceptions secured, the shifting burden would assist women bringing complaints of sex discrimination and sexual harassment. This will be important as young men are entering the workforce who have been formed by the 'manosphere' creating an increasingly hostile environment for girls and women.

C12: Unintended consequences of the positive duty?

Yes, as while "sex" is undefined, the positive duty would impose the QHRC's contested reading of sex on every employer and service provider without Parliament ever having decided it. It would also set them two duties they cannot meet at the same time.

A law that cannot be complied with offers no protection. Historically, when duty holders are forced to choose, the protections for women are the ones that give way. AF4WR agrees with the view that the duty be delayed ([450]).

Proposed s 131I(3) would require duty holders to take "reasonable and proportionate measures" to eliminate discrimination and harassment "as far as possible" before any complaint is made. The duty covers every attribute. On the QHRC's reading of sex, eliminating gender identity discrimination would require opening women's changing rooms, services and groups to male persons who identify as women. The same duty would also

require eliminating sex discrimination and sex-based harassment of women which those measures would cause. A duty holder could comply with one obligation only by breaching the other. The definition of sex in section 1 would resolve the conflict, and the duty should not commence before it is made.

C13: Should the QHRC have a regulatory and enforcement function?

No, the QHRC should not have a regulatory and enforcement function for two reasons. While "sex" is undefined the QHRC would enforce a contested reading it has already published. Whatever the law says, combining conciliation and enforcement in one body would compromise both.

The QHRC's published view in Building Belonging is the reading it would bring to enforcement and that view remains its institutional position until withdrawn. In that report, it listed a charity's lawful refusal to admit a male person who identifies as a woman to women's crisis accommodation as a consequence to be avoided (section 1). A women's service facing enforcement would be judged by a body that has already said its single-sex provision should not be lawful. Women's protections should not depend on who holds office at the Commission, and only a definition of sex in the Act can secure them.

The structural concern applies to every attribute. The Review asks whether an enforcement role would conflict with the QHRC's impartiality as a conciliator ([453]). Parties who are asked to conciliate in good faith before a body that may later investigate and penalise them have reason to be guarded. The QHRC would also become advocate, conciliator and enforcer on the same questions. Each role weakens confidence in the their capacity to uphold their other roles, and duty holders would have no neutral body to turn to.

If Parliament later decides that the positive duty needs an enforcement mechanism, it should sit with a body separate from the QHRC with any enforcement guidelines being the product of a deliberative process arising from feedback from publishing the draft guidelines for public consultation first.

C18 and C19: Guidelines

Any guidelines drafted should be based on a deliberative process of feedback from public consultation, published, state the exceptions available to women's sex-based services, and be consistent with a definition of sex in the Act. Without those conditions, guidelines that tribunals can rely on would turn the QHRC's contested reading of sex into practice (see C13).

C20: Unintended consequences of vilification on the grounds of sex and the updated sexual orientation definition?

Yes. While "sex" is undefined both grounds could be used against the women including lesbians they are meant to protect.

Sex must be a ground of vilification. Women are targeted with public hatred because they are women, and the UN Special Rapporteur on violence against women and girls has reported that women who speak about sex face online vilification, threats and smear

campaigns designed to silence them (A/HRC/59/47, para 36). The rise of the current manosphere is relevant women because of their sex and without section 1 reforms that would define "sex" Queensland cannot begin to address its impacts as vilification.

Without a definition, the same ground would protect males who say that have a woman identity. A woman who says publicly that sex is real could face a vilification complaint from such males (see C23). The protection women need would become a means of silencing them.

The proposed updated definition of sexual orientation would carry the problem identified at C9 into vilification law. Same-sex attraction would no longer be protected as such. The Special Rapporteur has also found that removing sex from the definition of lesbians leaves them more exposed to harassment and abuse (A/HRC/59/47, para 33). A lesbian who says publicly that she is attracted only to females could face a complaint of vilifying on the ground of sexual orientation. Both grounds need the definition of sex in section 1.

C21: Unintended consequences of the updated definition of "public act"?

Yes. Together with s 124C, the new definition would expose women to vilification complaints in workplaces and schools, where they most need to speak about sex. AF4WR does not support the extension while "sex" is undefined and s 124C remains.

Proposed s 124B(2) provides that conduct may be a public act even in a place not ordinarily accessed by the general public and gives "a place of work" and "an educational facility" as examples. These are the settings where questions of sex arise in practice, such as shared changing rooms and toilets, workplace policies, girls' sport and sex education. A woman who says at a staff meeting that she will not share a changing room with a male colleague or a teacher who explains in class that sex cannot change could face a complaint under s 124C (see C23). The good faith exemption would not prevent the complaint, the process or its cost.

C23: Unintended consequences of the "harm-based" prohibition in s 124C?

Yes as, while "sex" is undefined, s 124C could make it vilification for women to advocate for the sex-based rights that CEDAW requires Australia to protect. AF4WR does not support s 124C unless two safeguards are adopted.

It would penalise what CEDAW protects. CEDAW requires Australia to eliminate discrimination against women by any person or organisation (art 2(e)), to permit special measures for women (art 4(1)) and to secure women's participation in organisations concerned with public life (art 7(c)). Women cannot exercise those rights without naming their sex and arguing for protections that respond to it. The UN Special Rapporteur on violence against women and girls has warned that some gender identity hate speech provisions are being read so that "any interrogation of the scope of rights based on gender identity" is hate speech (Statement, 22 May 2023). She has recommended that women and their organisations be free to speak on sex "without suffering reprisals or restrictions on freedom of speech" (A/HRC/59/47, para 62(f)).

The test decides the answer in advance. When the reasonable person is defined as a member of the group on one side of the question, the definition largely decides the answer. Under proposed s 124C(2), conduct is judged by a reasonable person "who has the same ... gender identity ... as the other person or members of the group". A statement that sex cannot change, or a call for single-sex provision, would be judged through the eyes of a person who shares the gender identity of those it concerns, and could be found "seriously contemptuous" of them (s 124C(1)).

The safeguards in the Act would come too late. The good faith exemption (s 124C(3)(c); [493]) would apply only after a complaint is made, accepted and answered. For small women's organisations, the process is the penalty. The HRA seeks to protect freedom of thought, belief and expression (ss 20 and 21), and a law that deters women from speaking up in public debate limits both.

The same test could protect women. The harm-based test applies to sex as well. Misogynist vilification of women would be judged by a reasonable woman, a protection that women have long sought, and one consistent with AF4WR's support for sex as a ground of vilification (C20).

AF4WR recommends that s 124C commence only if both of the following safeguards are adopted.

1. "Sex" is defined as recommended in section 1.
2. The vilification provisions state that a good faith statement of a person's sex, a belief that sex is unchangeable, or advocacy for women's sex-based rights is not vilification.

With those safeguards, the harm-based test would protect women from misogynist vilification without exposing their advocacy to complaint.

Conclusion

CEDAW defines discrimination against women as discrimination "made on the basis of sex" (art 1), and that text has not changed since Australia ratified it in 1983. Advocacy documents and interpretive statements cannot amend a treaty, which only its States Parties can do (CEDAW art 26; Vienna Convention on the Law of Treaties, art 39).

The Respect at Work provisions were paused because of the risk of unintended consequences. For women and girls, the greatest risk comes from the ADA's failure to define "sex".

AF4WR asks the Review to recommend a definition of sex and an express provision protecting the single-sex exceptions from gender identity claims. Only then should the provisions that depend on them commence. Those steps would restore women's sex-based rights under CEDAW, the treaty named in the ADA's preamble.

Principal sources

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- R v Harris and McGuiness (1988) 17 NSWLR 158; Secretary, Department of Social Security v SRA (1993) 43 FCR 299
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