

SUBMISSIONS OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN AND GIRLS

Introduction

1. I understand that on 12 October 2023, the Australian Human Rights Commission (**AHRC**) determined not to grant the five-year exemption sought by Jean Taylor on behalf of the members of the Lesbian Action Group (the **LAG**) pursuant to s 44(1) of the *Sex Discrimination Act 1984* (Cth) (**SDA**) to allow LAG to hold regular lesbian born female only events (the **Decision**).
2. I understand that the present proceeding relates to an application by the LAG to review the Decision.
3. I make the submissions in support of my application to be made a party to this proceeding, pursuant to s 30(1)(d) of the *Administrative Appeals Tribunal Act 1975* (the **Alsalem Application**).
4. The extent of involvement in this proceeding sought in the Alsalem Application is that these submissions be accepted and considered by the Tribunal in this proceeding. I do not seek to otherwise engage in the proceeding, for example by making oral submissions or cross-examining witnesses.

Mandate of Special Rapporteur on Violence Against Women and Girls

5. I hold the position of Special Rapporteur on Violence Against Women and Girls (**Special Rapporteur**). I have held this role since August 2021.
6. The United Nations Commission on Human Rights first appointed a Special Rapporteur on violence against women, including its causes and consequences, on 4 March 1994 (resolution [1994/45](#)). Since March 2006, the Special Rapporteur reports to the Human Rights Council, as per Human Rights Council's decision 1/102. The mandate was most recently renewed in 2022 by resolution [50/7](#).
7. My mandate as Special Rapporteur includes recommending measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences.¹

¹ See item 7(b) of resolution 2003/45.

8. To fulfill my mandate, I undertake work including the following:
 - a. writing letters to State and non-State actors relating to their international and regional human rights responsibilities as to ending violence against women and girls;
 - b. assisting and protecting survivors of such violence;
 - c. providing feedback to States on changes to legislation or new legislation relating to violence against women;
 - d. providing expert opinion through amicus briefs on emblematic cases in front of State courts;
 - e. preparing and presenting two thematic reports per year on subjects of my choosing to the UN Human Rights Council and the UN General Assembly; and
 - f. carrying out two State visits every year, in which I comprehensively assess the situation of women and girls and their freedom from discrimination and violence in that State, and subsequently making recommendations to the concerned State on how their prevention and response policies could be improved.
9. My work as Special Rapporteur is performed having regard to, and within the framework of, United Nations instruments and international and regional human rights law that a State is bound by, including the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**).

The Alsalem Application ought to be allowed by the Tribunal

10. I understand that the Tribunal will grant the Alsalem Application if it is satisfied of the following three matters:
 - a. that the Alsalem Application has been made to the Tribunal in writing;
 - b. that the Alsalem Application is made by 'a person'; and
 - c. that my interests as Special Rapporteur are affected by the Decision.
11. The first two of these matters are clearly satisfied – the Alsalem Application is made in writing and I am a 'person'.² Accordingly I make no substantive comment on them.
12. As to the third of the matters that the Tribunal will consider, my interests as Special Rapporteur are affected by the Decision for the following reasons.
13. The Decision involves consideration of the term 'sex' and 'sexual orientation' as legal concepts in SDA.³ In the Decision, the AHRC concludes that the term 'sex' is not defined in the SDA.⁴ In the explanatory note of the SDA Bill 2013, it is explained that "sex is not a binary concept."⁵
14. Australia is a signatory to the CEDAW. The SD Act is required to be interpreted in accordance with the objects of the SD Act – one of which is to give effect to certain provisions of CEDAW⁶ and other binding international treaties on Australia that address discrimination against women

² I note s 2C of the *Acts Interpretation Act 1901* (Cth) notes that a reference to a 'person' includes an individual.

³ Paragraphs 4.2 and 4.3 of the Decision.

⁴ Paragraph 4.2 of the Decision.

⁵ Para 15 of the Explanatory Note of the SDA Amendment Bill of 2013.

⁶ Paragraph 8.12 of the Decision.

such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights.

15. As set out above, my mandate as Special Rapporteur includes recommending measures, ways and means (including at the national level) to eliminate violence against women and its causes, and to remedy its consequences. This aspect of my mandate includes providing opinion on how national practices of signatory nations are able to comply with international human rights laws and regulations that affect women and girls, including CEDAW.
16. The interpretation of the term 'sex' and related terms international human rights law, including in CEDAW, and the use of such terms by signatory State parties in their State laws, are relevant to my mandate as Special Rapporteur because such interpretation informs not only the scope of my mandate but also how and the degree to which violence against women and its causes can be eliminated and its consequences remedied. Equally, the determination of whether differential treatment of women on intersecting grounds amounts to discrimination is equally important for the execution of my tasks as mandate holder and forms a core part of my mandate's activities.
17. It is worth noting that even though the SDA does not define "sex", the SDA continues to differentiate between the concepts of sex and gender identity, thereby suggesting that the law acknowledges the existence of a stand-alone category of "sex". Unfortunately, by severing the term "sex" in the SDA from its ordinary meaning of "biological sex" (at least since the amendment to the SDA was introduced in 2013), that distinction no longer stands in practice. Moreover, it operates on a built-in and erroneous assumption that every person has a gender identity irrespective of whether it matches the sex observed at birth or not.
18. Para 46 of the SDA Amendment Bill of 2013 allows for substantive measures to achieve substantive equality which would not constitute unlawful discrimination. Stated differently, the SDA contains provisions that would potentially justify the maintenance of single sex spaces for Lesbian women or the reasonableness of distinguishing on the basis of biological sex.
19. In my submission, international law allows for women and girls to retain spaces for biological females including for those biological females attracted to biological females, without such a differentiation constituting discrimination, since the criteria for such differentiation are reasonable and objective and aims is to achieve a purpose which is legitimate under ICCPR . As indicated in a March 2024 [position paper issued upon the request of the Australian Human Rights Commission \(attached to this submission\)](#), "where tension may arise between the right to non-discrimination based on sex and non-discrimination based on gender or gender identity, international human rights law does not endorse an interpretation that allows either for derogations from the obligation to ensure non-discrimination based on sex or the subordination of this obligation not to discriminate based on sex to other rights."

20. In addition, CEDAW (to which Australia is a signatory), foresees specific considerations and protection for different women on different grounds, including lesbian women, understood by CEDAW as women who engage in "same sex sexual activity".⁷

The exemption sought by the LAG ought to be granted

21. In addition to the comments I have made on how the terms 'sex' and 'women' should be interpreted that are set out in the Alsalem Position Paper – and the conclusion in the Alsalem Position Paper that international human rights law does not permit any derogation to the prohibition of discrimination against women based on sex, including to accommodate other rights – I make the following additional observations as to the state of international human rights law as it pertains to protections afforded to lesbian born females.
22. On an international level, State practice should support the rights of women not to be discriminated against based on their sex. This requirement is included in at least six international human rights treaties and four regional human rights treaties.⁸ With the exception of some regional treaties, none of the international human rights treaties expressly refer to gender. Even where the term "gender" is used in international treaties and resolution, there is no general agreement amongst States as to whether the concept of "gender" includes "gender identity". Irrespective of whether the understanding of gender extends to include the concept of "gender identity", there is no substantive State practice at international level that recognises that where rights based on gender identity clash with rights of rights based on sex, or freedom of belief or expression, the latter should be subjugated to those based on gender identity. International human rights law recognizes that there are times when differentiation in treatment is legitimate and would not be considered discrimination, if the criteria for such differentiation are reasonable, objective and if the aim is to achieve a purpose which is legitimate.⁹ I submit that the objective of ensuring that biologically female women that are attracted to other biologically female women are able to meet as between themselves is such a legitimate purpose that justifies differentiation in treatment to those that are not biologically female and are not same sex attracted.
23. When it comes to lesbian born females, the jurisprudence is more precise. The Committee on the Elimination of Discrimination against Women (the **CEDAW Committee**) has consistently emphasised the importance of protecting the human rights of lesbian women.¹⁰ The CEDAW

⁷ See communication 134/2018 of 24 March 2022

⁸ See the European Convention on Human Rights (ECHR) – 1950, European Social Charter - 1961 (revised in 1996), American Convention on Human Rights (ACHR) – 1969, the African Charter on Human and Peoples' Rights (ACHPR) – 1981, the Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") – 1988, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol") – 2003, and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (1994).

⁹ Human Rights Committee General Comment No. 18 (1989), para. 13.

¹⁰ In its Communication No. 45/2012 (L.C. v. Peru), involving a young girl who was a victim of rape and who was denied a legal abortion. While the primary focus was on reproductive rights, the CEDAW Committee's decision noted the compounded discrimination faced by women in marginalized groups, including lesbian women. In its decision, the CEDAW Committee underscored that States should take all appropriate

Committee interprets the CEDAW as covering all women, including those that are lesbian and states that prohibited discrimination against women includes discrimination based on sexual orientation.¹¹ Article 1 of the CEDAW defines discrimination against women as ‘any distinction, exclusion, or restriction made on the basis of sex’ that impairs or nullifies the recognition, enjoyment, or exercise of human rights and fundamental freedoms in various fields. The broad definition of discrimination includes any form of discrimination against women, including on the basis of sexual orientation and covers lesbian women. For example, in its decisions, the CEDAW Committee has expressed concern about the violence and discrimination that lesbian women often face, including corrective rape and harassment.¹²

24. International Human Rights Treaty bodies have called on States to take measures to protect lesbian women from such violence and ensure their access to justice.¹³ The CEDAW Committee has also urged States to review and amend laws, policies, and practices that discriminate against lesbian women and that may put their lives in danger as well as expose them to inhumane and degrading treatment.¹⁴
25. The CEDAW Committee has also highlighted the importance of considering the intersectionality of discrimination. Lesbian women may face multiple forms of discrimination based on their gender, sexual orientation, race, ethnicity, disability, or other factors. The CEDAW Committee has called for measures to address these intersecting forms of discrimination. For example, the CEDAW Committee’s General Recommendation No. 28 on the core obligations of States parties under Article 2 of the CEDAW explicitly mentions that States should ensure that all women, including those facing discrimination on the basis of sexual orientation, enjoy their rights under the CEDAW.
26. General Recommendation No. 33 on women’s access to justice also highlights the need to protect lesbian women from discrimination within the legal system. The CEDAW Committee has

measures to eliminate discrimination against women, particularly those facing multiple forms of discrimination, including on the grounds of sexual orientation.

¹¹ In its Communication No. 60/2013 (*Karen Tayag Vertido v. The Philippines*), the CEDAW Committee addressed a case concerning rape and the failure of the the Philippine judiciary to address gender biases, it also touched on issues of discrimination against women in marginalized groups, including lesbian women. In its decision, the Committee recognized that marginalized women, including those belonging to sexual minorities, face compounded forms of discrimination. The decision emphasized the need for judicial systems to be sensitive to the specific needs and vulnerabilities of women from marginalized communities, including lesbians.

¹² Communication No. 47/2012 (*E.S. & S.C. v. Tanzania*). This case involved two Tanzanian women who were attacked and threatened with death due to their perceived sexual orientation. They alleged that the state had failed to protect them from gender-based violence and discrimination. The Committee found that Tanzania had violated the women’s rights under CEDAW. It highlighted the State’s obligation to protect women from violence and discrimination, including those targeted based on their sexual orientation. The Committee also recommended that the State take measures to protect women from such violence and ensure that lesbian women could enjoy their rights without fear of discrimination or violence.

¹³ See for example the CEDAW Committee’s General Recommendation No. 35 (2017) on Gender-Based Violence against Women

¹⁴ For example, in the *M.I versus Sweden*, a woman was raped, beaten and forced to marry because she is a lesbian. The Human Rights Committee found that Sweden would violate Article 7 of the International Covenant on Civil and Political Rights prohibiting torture or cruel, inhuman or degrading treatment if it deported her to Bangladesh. (HRC Communication 2149/2012, paras 2.4-2.9) More importantly, the Committee noted that impunity and existing laws that criminalized homosexuality increased the stigma associated with homosexuality.

also considered that the rights enshrined in the CEDAW belong to all women, including lesbian women, and that Article 16 of the CEDAW applies to non-heterosexual relations.¹⁵

27. If the Decision is upheld, it would not only be inconsistent with the interpretation of 'sex' in international law, but further discriminate against lesbian that are biologically females because they will be denied the opportunity to meet exclusively amongst themselves in public spaces; and will likely face criticism intimidation and coercion to desist from being same sex attracted. Such an outcome would be contrary to CEDAW because it is recognized that it would affect the enjoyment of lesbian born females of their fundamental human rights, including their right to privacy, safety, security, right to a family, as well as their right to freedom of expression, assembly, freedom of belief, equality before the law – amongst others. It would also mean that the State failed in fulfilling its responsibility towards Lesbian born females who would experience discrimination and violence based on their sexual orientation. By expecting Lesbian born females to widen their sexual attraction to include biological males, they are being effectively forced to cease to be lesbian and it wrongly suggests that lesbian women that are biologically female can control or alter who they are sexually attracted to. It would be subjecting lesbians to false stereotypes. Article 5(a) of the Convention places an obligation on State parties to eliminate prejudicial stereotypes. More importantly would result in de facto prohibition of same sexual relations that is outlawed by the CEDAW. This can be deduced from the CEDAW committee's ruling on its decision on (RFC v Sri Lanka) of 2022, which was the CEDAW Committee's first landmark decision on the criminalisation of Same Sex Conduct Between Women (for more details see here: <https://www.ohchr.org/en/press-releases/2022/03/sri-lanka-criminalisation-same-sex-sexual-activity-breached-rights-lgbti>). It established that through such criminalization, Sri Lanka had violated article 16 of the CEDAW which relates to marriage, family relation, autonomy and choice.

Evidence of Professor Paula Gerber

28. For the purpose of preparing this statement, I have reviewed the report prepared by Professor Paula Gerber and dated 12 August 2024 (**Gerber Report**).
29. At paragraph 53 – 56 of the Gerber Report, Professor Gerber has made certain comments about the Alsalem Position Paper and my work more broadly. I make the following responsive comments in relation to these paragraphs.
30. Ms. Gerber takes issues with me citing the first edition of a resource. However the second edition does not contradict the assertion I was making. Sex is understood as a biological category in the main international human rights treaties and that this was not challenged in any of the jurisprudence by international human rights treaty bodies. In fact, until today, no human rights treaty body has stated that the term "sex" includes "gender identity".
31. CEDAW has recognized that women could be discriminated against based on a number of grounds that included their sexual orientation and gender identity. While not binding on Staes,

¹⁵ CEDAW decision Case: C. v. Denmark of 134/2018.

the CEDAW Committee did extend in its jurisprudence the protections of the CEDAW Convention to include transgender women and women that are transgender. This could be interpreted to include also trans men, since a transgender man is still a woman that falls under the protection of the CEDAW Convention based on sex. In practice, the Committee has considered the case of a woman that was born female at birth but that does not identify as a woman (C. v. Denmark 2018). The complainant in question argued successfully that Denmark's decision to deport the complainant to the complainant's country of origin would violate C's rights under CEDAW, as the complainant would face a real risk of gender-based violence and discrimination in the complainant's home country due to the complainant's gender identity. The Committee found that Denmark had not adequately considered the risks of gender-based violence that the complainant would face if deported.

32. While I acknowledge that major treaty bodies do recognize that discrimination and violence against persons can happen on the ground of their gender identity and not only their sex, none of the treaty bodies mentioned by Professor Gerber considered a situation where there was tension between right to non-discrimination of women (biologically female) based on their female sex and right to non-discrimination of persons born male but who identify as women, nor have any of these bodies stated how to resolve that tension when it happens (which is the situation we have at hand here).

Joinder for limited purpose sought

33. I note, for completeness, that given the limited degree of involvement I seek in this proceeding (see paragraph 4 above), the Alsalem Application will not cause delay to the proceedings nor unreasonable additional costs to be incurred by either of the current parties.

Reem Alsalem

Reem Alsalem

29 AUGUST 2024