Consultation
Current and emerging threats to TGD human rights
Australian Human Rights Commission

Submission from the
Affiliation of Australian
Women's Action Alliances
(AAWAA)

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Protecting the human rights of trans and gender diverse-identifying people in the context of medical interventions including puberty blockers and cross-sex hormones

AAWAA is a civil society organisation with affiliate groups in five states and the ACT. Our members include healthcare professionals, lawyers, policy makers, academics, and researchers.

We have a demonstrated track record advocating for the human rights of people who identify as trans and gender diverse (TGD) including with the World Health Organisation, the United Nations, and in Australian parliamentary and governmental inquiries.

A. HUMAN RIGHTS OBLIGATIONS AND RESPONSIBILITIES

We welcome the AHRC's interest in the human rights of people who identify as TGD, and note the AHRC's mandate to investigate actions or practices that could be inconsistent with or that threaten or violate human rights. We urge the Commission to fulfil this mandate and investigate the practice of gender medicine in Australia and recommend remedies to address inconsistencies.

Legal obligations

International law obliges Australia to ensure the right of all people to

- The highest attainable standard of healthcare (ICCPR, ICESCR, CRC, CPRD, UDHR
- Be free from cruel, inhuman, and degrading treatment and from torture (CRC, CAT) and from medical experimentation without consent properly informed and freely given (article 7, ICCPR)

Victoria, Queensland, and the ACT have incorporated these obligations in their respective human rights acts, including the prohibition on medical experimentation without informed consent freely given.

Rights of the Child

The UN Committee on the Rights of the Child further calls on States to ensure

- Treatments and medicines are based on the best available evidence (CRC/C/GC/15/116)
- Health data that is reliable, transparent, and consistent (CRC/C/GC/15/117)
- National accountability mechanisms include both routine and periodic evaluations of the evidence; and that evidence from these evaluations is used to evaluate what is working and to remedy and reform what is not (CGR/C/GC/15/118)

The Committee also warns against

- Over-medicalising children and urges States to undertake an approach based on public health and psychosocial support to address mental ill-health among children and adolescents (CRC/C/GC/15/38)
- Making definitive and irreversible decisions: “To do this [decision-makers] should not only assess the physical, emotional, educational and other needs at the specific moment of the decision but should also consider the possible scenarios of the child's development and analyse them in the short and long term.” (CRC/C/GC/14/84)

In advocating the right of the child to have their best interests taken as a primary consideration, the Committee notes

- If there is more than one possible treatment for a health condition or if the outcome of a treatment is uncertain, the advantages of all possible treatments must be weighed against all possible risks and side effects, and the views of the child must also be given due weight based on [their] age and maturity. (CRC/C/GC/14/77)

Regarding psycho-social elements of health and wellbeing, the Committee notes

- The need for increased attention for behavioural and social issues that undermine children’s mental health, psychosocial wellbeing, and emotional development (CRC/C/GC/15/38)
- Concern regarding “the increase in mental ill-health among adolescents, including developmental and behavioural disorders; depression; eating disorders; anxiety; psychological trauma resulting from abuse, neglect, violence or exploitation; alcohol, tobacco and drug use; obsessive behaviour, such as excessive use of and addiction to the Internet and other technologies; and self-harm and suicide.” (CRC/C/GC/15/38)

The World Health Organisation and UN High Commissioner for Human Rights have similarly emphasised the importance of evidence-based healthcare as well as accountability and monitoring at the national level to ensure States uphold their legal obligations.

Through the Special Rapporteur on the right to health, the UN has further emphasised States' responsibilities to guarantee informed consent in healthcare, especially in relation to vulnerable groups including TGD-identifying people.

The Rapporteur has underscored the importance of completeness in communication, and notes that informed consent includes

- Adequate information regarding potential risks as well as anticipated benefits (A/64/272/35)

In the context of research, informed consent must "be continuous, inclusive of new adverse developments."

- Concerns that results will be consequently undermined cannot justify withholding of information (A/64/272/35)

Moreover,

- "[A] rights-based approach to medical research means that special protections must be in place to ensure that the autonomy of potential participants, particularly those from vulnerable groups, is not compromised as a result of power imbalances …" (A/64/272/36)

B. PROTECTING TGD HEALTH RIGHTS IN AUSTRALIA

A human rights approach to protecting people who identity as TGD in the context of medical interventions requires Australia to recognise these responsibilities, and in turn ensure interventions are truly evidence-based, uphold genuine informed consent, avoid over-medicalising children and making irreversible decisions without adequate consideration of their long-term consequences. Unfortunately, Australian practice falls short.

Constitutional responsibilities

The Commonwealth was formally advised in 2019, and informally aware before then, that the evidence base for the efficacy and safety of puberty blockers and cross-sex hormones for the treatment of gender dysphoria/incongruence, particularly in children, was limited. This advice came from a range of sources, including a coalition of respected academics and, in response to the Commonwealth asking, the Royal Australian College of Physicians (RACP). The former suggested a public inquiry, the latter did not but emphasised the need for the Commonwealth to collaborate closely with the states and territories to strengthen the evidence base for treatments, including via a national framework for service delivery and data collection.

The Commonwealth has not, however, sought closer collaboration with states and territories, nor they with it, as evidenced by National Health Ministers' Meeting records. Without considering its broader human rights obligations, the Commonwealth has simply maintained it cannot assume an oversight role in treatment options and practices for young people with gender dysphoria, on the basis that these matters are the responsibility of state and territory governments.

Inaction on the collection of accurate health data

Government inaction has left Australia without the reliable, transparent, and consistent health data essential to ensuring treatments are based on the best available evidence, in line with our human rights responsibilities.

States and territories do not publish data and FOI/GIPA inquiries confirm that some fail to ensure clinics in their jurisdictions retain accessible data regarding number, age and sex of children presenting for or undergoing treatment for gender dysphoria/ incongruence (Inquiries available on request). Some states have reported they provide some data to the Australian Institute of Health and Welfare but it is unclear what this data covers nor if/when the institute will make it available.

The Commonwealth collects no data on the use of puberty blockers for gender dysphoria on the basis that these drugs have not been approved for this purpose. Nor does it collect data on private practitioners' prescription of cross-sex hormones to children.

Data that researchers have obtained through FOI applications to individual clinics do, however, indicate a sharp, possibly exponential, rise from around 2016 in children and young people presenting at gender clinics for puberty blockade and cross-sex

hormones. (Experience overseas is that girls dominate presentations.) Available Australian data suggests that Australia's per capita rate of young people seeking treatments is higher than the UK's before the National Health Service (NHS) reviewed these treatments.

At the same time, data the Commonwealth has received about adult gender dysphoria/ incongruence confirm rapid increases in Australia. In the context of an application by the Australian Society of Plastic Surgeons for MBS coverage of adult gender affirmation surgery – including mastectomy, penectomy, orchiectomy, vaginoplasty, phalloplasty, and facial surgery to "treat or prevent" gender dysphoria – the Commonwealth was advised that, if approved, 47,087 such surgeries would be accessed annually.

Even accounting for cosmetic motivations, or one individual accessing multiple surgeries, these numbers underscore the imperative of better data collection of all demographic cohorts, in line with our human rights obligations. These numbers also belie the suggestion – which the RACP made to the Minister in 2020 – that a low prevalence of gender dysphoria reduced the need to apply Australia's National Health and Medical Research (NHMRC) standards (discussed below) to the development of Australian clinical guidelines.

Inadequacies in reliance on 'clinician consensus' and 'standards of care' (SOC)
Bureaucratic inaction has also left Australian governments without the up-to-date and relevant information necessary to "evaluate what is working and to remedy what is not" in gender medicine, further compromising Australia's capacity to uphold our human rights obligations.

In eschewing a public inquiry into the practice of gender medicine, the Commonwealth (along with states and territories) has asserted confidence in the Standards of Care and Treatment Guidelines for Trans and Gender Diverse Children and Adolescents and those provided by the World Professional Association of Transgender Health (WPATH) These standards support the 'affirmative model of care' in accordance with which the clinician affirms (rather than explores) a child's gender identity; they also note the limitations of the evidence base for the model emphasising instead reliance on 'clinician consensus.'

FOI inquiries, however, confirm that the Department of Health and Aged Care (DOHAC) has made little effort to inform ministers that the 'clinician consensus' for the affirmative model of care that these standards endorse, no longer exists in Europe and is being

questioned elsewhere, and in Australia. As of mid-2023, DOHAC appears not to have advised ministers that having reviewed the evidence for the safety and efficacy of hormonal interventions for minors and found it wanting, Finland, Sweden, and Denmark had restricted their use and advocated alternatives to the affirmative model of care.

DOHAC noted in late 2022 that the CASS Review was underway in the UK but not the parallel finding by the UK National Institute for Health and Care Excellence (NICE) that the evidence for both puberty blockers and cross-sex hormones was of "very low certainty." DOHAC also failed to report concerns the Interim Cass Report raised about the risks of puberty suppression, including that it might in fact *prevent* children resolving their gender dysphoria.

At the time of writing, the Commonwealth, states, and territories are yet to provide considered responses to the final Cass Report – or even undertake that they will. Their responses will be critical to ensuring TGD-identifying people receive the "highest standards of attainable healthcare" in view of the CASS Review finding that Australia's Standards of Care were unreliable on a range of key measures. These measures include rigor of development, applicability, and editorial independence. The independent researchers who conducted this review used the same methodological tool (AGREE II) that Australia's own National Health and Medical Research Council recommends and sometimes instances mandates for developing and appraising clinical practice guidelines.

The final CASS Report also confirmed a number of other salient shortcomings in the Australian Standards of Care, including that they fail to recommend assessment processes to address neurodiversity, same-sex attraction, physical health conditions, and body image issues. (These failures, especially regarding same-sex attraction and neurodiversity, would appear to constitute possible indirect discrimination under Australian law.)

Shortcomings in informed consent

The Australian Standards of Care raise a number of other human rights concerns, including by their failure to recommend that clinicians explain the limitations of the evidence base for their treatments – even though treatments that rely on a limited evidence base are by nature experimental and engage heightened human rights responsibilities. The RACP alluded to this when it advised the Minister in 2020 that "to facilitate a high level of informed consent, patients and families must be provided with information about the limitations of available evidence regarding gender dysphoria" as well as "the burdens and benefits of treatment options."

The Standards also fail to provide advice on alternatives to gender affirming care, even though providing advice on *all* possible treatments is key to informed consent and arguably a requirement of Australian law. They also make little effort to keep clinicians up-to-date, itself a core requirement of Australian clinical guidelines. The 2023 version of the Standards retained the exact same references as the 2018 version, despite the intervening years witnessing an explosion of new evidence and studies. (The updated Standards added only two paragraphs, addressing hormone provision by GPs outside of multidisciplinary hospital-based teams. Medical indemnity providers have since limited coverage for these circumstances because of the risk of claims by people who later regret decisions they made at a young age.)

The Standards also fail to consider the complexity of the psycho-social aspects of TGD health, including the widely recognised possibility that social factors influence the development of gender dysphoria/incongruence. They also neglect the risks of premature social transition.

An independent review of Australia's Standards of Care

Upholding Australia's human rights obligation to ensure the highest attainable standard of healthcare for TGD-identifying children and adolescents requires that guidelines supporting their treatment also conform to the highest attainable standards.

It is accordingly imperative that Australian authorities – the Commonwealth, ideally in close collaboration with states and territories – commission an independent review of these treatment guidelines, to be conducted by experts free from conflicts of interest and skilled in evidence-based standards such as AGREE II (for guidelines) and GRADE (for evidence). We recommend the AHRC consult the NHMRC and the Australian Commission on Safety and Quality in Health Care for insights into best practice.

One-sided advice: the LGBTQIA+ Health Advisory Group

AAWAA is concerned that the Commonwealth's LGBTIQA+ Health and Wellbeing 10-year National Action Plan Expert Advisory Group is without any identifiable advocate for psychological treatments for gender dysphoria/incongruence and lacks representation from key cohorts, including detransitioners. We urge the AHRC to recommend DOHAC review the group's composition to achieve the diversity of viewpoints necessary to ensure the highest attainable standard of healthcare.

C. RECOMMENDATIONS

1. The AHRC develop and publish a framework for protecting the human rights of people who identify as TGD in the context of medical interventions, addressing,
    - the principle of medical necessity
    - the precautionary principle
    - a child's right to an open future
    - the elements of consent freely given, and
    - the proportionality principles engaged when derogating from fundamental rights including to health, to physical and mental integrity, to found a family, and the obligation on States to eliminate harmful practices that perpetuate gender stereotypes.

    The Commission's 2021 report on the human rights of people born with variations in sex characteristics should serve as a reference.

2. National Health Ministers develop a national regulatory framework to ensure accurate and consistent data collection and ongoing outcomes monitoring, in line with Australia's human rights obligations.

3. The Commonwealth commission an independent review of Australia's treatment guidelines by experts utilising evidence-based standards such as AGREE II and GRADE.

4. The Commonwealth review the composition of the LGBTQIA+ Health Expert Advisory Group to ensure a diversity of views, including clinicians who advocate alternative approaches to the affirmation model of TGD healthcare, as well as TGD detransitioners.