MONASH University | CASTAN CENTRE FOR HUMAN RIGHTS LAW

Consultation into Current and Emerging Threats to Trans and Gender Diverse Peoples' Human Rights

Submission to the Australian Human Rights Commission

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Part 1: Background

1.1 About the Castan Centre for Human Rights Law

The Castan Centre for Human Rights Law (**Castan Centre**), based in the Faculty of Law at Monash University in Melbourne, Victoria is a research, education and policy centre which aims to create a more just world where human rights are respected, protected and fulfilled, allowing all people to flourish in freedom and dignity. The Castan Centre has a long history of promoting and defending the realisation of human rights in Australia. The Castan Centre was founded in 2000 by a group of academics and human rights advocates and was named in honour of the world-renowned human rights advocate, Ron Castan AM QC.

1.2 Submission structure

This submission addresses the terms of reference of the Australian Human Rights Commission's (**AHRC**) consultation by focussing on Australia's international legal obligation to protect trans and gender diverse people (**TGD people**) under international human rights law. Principally, this submission explores protections provided by three international treaties: the *Convention on the Elimination of All Forms of Discrimination against Women* (**CEDAW**),[1] the *International Covenant on Civil and Political Rights* (**ICCPR**),[2] and the *International Covenant on Economic, Social, and Cultural Rights* (**ICESCR**).[3]

After a brief introduction to the Castan Centre, Part 2 of this submission considers CEDAW and the ways in which it protects the rights of TGD people and recognises obligations on Australia to eliminate discrimination against trans women. We specifically explore CEDAW with respect to stereotyping and cultural prejudices, employment and health. Part 3 analyses other international human rights law protections for TGD people, including, specifically, the rights to equality, non-discrimination and health in the ICCPR and ICESCR and the guidance that the Yogyakarta Principles provide in interpreting these instruments. Part 4 examines the barriers to health for TGD people in the context of sexual and reproductive health care, while Part 5 sets out our conclusions and recommendations.

This submission does not address the specific issues faced by TGD children. The submission of our colleague, Professor Claire Fenton-Glynn (and Dr Stevie Martin) "focuses on the rights of transgender children, and in particular, their right to legal recognition of their gender identity".

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1 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

2 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

3 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1866, 993 UNTS 3 (entered into force 3 January 1976).

Part 2: CEDAW and the rights of TGD people

Australia ratified CEDAW on 17 July 1980. By ratifying this convention, Australia has committed itself to ensuring it has in place policies, laws, organisations, structures and attitudes that guarantee women the same rights as men over many aspects of women's lives. In this way, CEDAW is the most comprehensive international human rights treaty in terms of protecting the rights of women. The *Sex Discrimination Act 1984* (Cth) seeks to give effect to CEDAW in Australia.

2.1 Trans women as 'women' under CEDAW

The term 'woman' is not defined in CEDAW and it appears that those drafting the convention did not turn their mind to whether it is a word that needed defining. Further, 'sex' is not defined in CEDAW and the terms 'gender', or 'gender identity' are not used in CEDAW. However, jurisprudence from the UN Committee on the Elimination of All Forms of Discrimination against Women (**CEDAW Committee**) has provided guidance on the inclusive nature of the term 'sex' in CEDAW:

> Although the Convention only refers to sex-based discrimination … the Convention covers gender-based discrimination against women. The term "sex" here refers to biological differences between men and women. The term "gender" refers to 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 and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community.[4]

That CEDAW covers gender-based discrimination 'is made clear by the definition of discrimination contained in Article 1. This definition provides that any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms is discrimination, even where discrimination was not intended.'[5]

The CEDAW Committee recently seized the opportunity to unequivocally state that 'the rights enshrined in the Convention belong to all women, including lesbian, bisexual, *transgender* and intersex women'.[6] This is not the first time the Committee has been explicit in stating that CEDAW protects the rights of trans women. In its Concluding Observations following its review of China, Hong Kong and Macau, the Committee recommended that the State party take steps to '[p]rotect the human rights of lesbian, bisexual, *transgender* and intersex women in all areas *covered by the Convention* and conduct awareness-raising campaigns to address their stigmatization in society'.[7] Similarly, in findings in an individual communication against the Russian Federation, the Committee specifically noted its concern about violence against 'lesbian, bisexual and *transwomen*' and 'urged the State Party to intensify its efforts to combat discrimination against lesbian, bisexual and *transwomen*'.[8]

The inclusive approach taken by the Committee is also evident in General Recommendation 35, where the CEDAW Committee stated,

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4 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2*, UN Doc CEDAW/C/GC/28 (16 December 2010) para 5.

5 Ibid.

6 *Rosana Flamer-Caldera v Sri Lanka* (21 February 2022) CEDAW/C/81/D/134/2018 (emphasis added).

7 Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Ninth Periodic Report of China*, UN Doc CEDAW/C/CHN/CO/9 (May 2023) para 56.

8 Committee on the Elimination of Discrimination against Women, *Views: Communication 119/2017*, UN Doc CEDAW/C/75/D/119/2017 (3 April 2020) [7.9] ('*ON & DP v Russian Federation*').

> In general recommendation No. 28 and general recommendation No. 33, the Committee confirmed that discrimination against women was inextricably linked to other factors that affected their lives. The Committee, in its jurisprudence, has highlighted the fact that such factors include women's ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital status, maternity, parental status, age, urban or rural location, health status, disability, property ownership, being lesbian, bisexual, *transgender* or intersex, illiteracy, seeking asylum, being a refugee, internally displaced or stateless, widowhood, migration status, heading households, living with HIV/AIDS, being deprived of liberty, and being in prostitution, as well as trafficking in women, situations of armed conflict, geographical remoteness and the stigmatization of women who fight for their rights, including human rights defenders. Accordingly, because women experience varying and intersecting forms of discrimination, which have an aggravating negative impact, the Committee acknowledges that gender-based violence may affect women to different degrees, or in different ways, meaning that appropriate legal and policy responses are needed.[9]

Based on the CEDAW Committee's explicit interpretation of 'women' it is impossible to assert with any credibility, that the term 'women' in CEDAW is 'a "unified" category excluding trans* individuals.[10] Rather, the term 'Woman should be defined 'as any person who is biologically, anatomically, and/or genetically female and/or who performs and/or identifies as a woman'.[11]

Given that CEDAW unequivocally protects trans women from discrimination, it is useful to consider the specific provisions of CEDAW that are particularly relevant to securing and protecting the rights of trans women, namely, stereotyping and cultural prejudices (Article 5) and access to healthcare (Article 12).

2.2 Stereotyping and cultural prejudices - Article 5(a)

Article 5(a) requires that Australia takes 'all appropriate measures' to eliminate the stereotyping and cultural practices from which discrimination against all women flows. For trans women in particular, binary and paternalistic gender stereotypes are often the cause of the discrimination they face. In this regard, the CEDAW Committee has observed that State Parties must 'modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and consequence of discrimination against women. … gender stereotypes are perpetuated through a variety of means and institutes including laws and legal systems and they can be perpetuated by State actors in all branches and levels of government and by private actors'.[12] The CEDAW committee noted the relationship between gender-based stereotypes and discrimination against trans women in its Concluding Observations on Finland in 2014, when it recommended that Finland amend its laws to 'ensure that gender recognition is carried out without requiring transgender persons to conform to stereotypical ideas of masculine or feminine appearance or behaviour'.[13]

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9 Committee on the Elimination of Discrimination against Women, *General Comment No 35: Gender-Based Violence against Women, Updating General Recommendation No 19*, UN Doc CEDAW/C/GC/35 (26 July 2017) para 12.

10 Elise Meyer, 'Designing Women: The Definition of "Woman" in the Convention on the Elimination of All Forms of Discrimination Against Women' (2016) 16(2) *Chicago Journal of International Law* 553, 590

11 Ibid.

12 Committee on the Elimination of Discrimination against Women, *Views: Communication No 99/2016*, UN DOC CEDAW/C/73/D/99/2016 (July 2019) [7.4 ('*SL v Bulgaria*')]; Committee on the Elimination of Discrimination against Women, *Views: Communication No 119/2017*, UN Doc CEDAW/C/75/D/119/2017 (3 April 2020) [7.2] ('*ON & DP v Russian Federation*').

13 Committee on the Elimination of Discrimination against Women, *Concluding Observation on the Seventh Periodic Report of Finland*, UN Doc CEDAW/C/FIN/CO/7 (10 March 2014) para 29(b).

Article 5(a) may also be used in conjunction with other rights, such as the right to health, to ensure appropriate service delivery for trans women. A common experience of trans women is their denial of access to gender-affirming medical care. Because this denial of service is often informed by discriminatory gender-based stereotypes that stem from a binary approach to gender, Article 5(a) may provide the basis for a claim of discrimination in accessing health care.

2.3 Health - Article 12

Article 12 requires Australia to ensure equal access to healthcare services by taking all appropriate measures to eliminate discrimination against women. Given CEDAW's comprehensive approach to gender-based discrimination as outlined above, it is not surprising that the CEDAW Committee has identified Article 12 as encompassing the elimination of discrimination that affects trans women's access to healthcare.[14] Given the extent to which trans women engage with the medical system, Article 12 is a significant provision protecting the rights of trans women. Part 3 below focuses particularly on trans women's access to sexual and reproductive healthcare.

Part 3: Other international law Pertaining to the rights of TGD people

3.1 ICCPR

Australia ratified the ICCPR on 13 August 1980. The ICCPR protects a suite of civil and political rights, including rights to equality before the law and non-discrimination.

Article 26 of the ICCPR provides that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex … or other status'. The UN Human Rights Committee has noted that Article 26 prohibits discrimination on the ground of gender identity.[15] In *Nepomanyashchiy v Russian Federation*, the UN Human Rights Committee determined that Article 26 extends to prohibiting discrimination on the ground of gender identity in addition to sexual identity.[16] And in *G v Australia*, a trans woman brought an individual communication against Australia alleging that her rights under the ICCPR had been violated because her application to have her gender changed on her birth certificate was denied on the basis that she was married at the time of the application. The Committee found that the law which required G to be

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[14] See, Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Fifth Periodic Report of Pakistan*, UN Doc CEDAW/C/PAK/CO/5 (10 March 2020) para 44(e).

[15] UN Human Rights Committee (UNHRC), G v Australia, Communication No. 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (28 June 2017) at [4.14], [6.6] and [7.12]; UNHRC, MZBM v Denmark, Communication No. 2593/2015, UN Doc CCPR/C/119/D/2593/2015 (12 May 2017) at [6.6]; UNHRC, Nepomnyashchiy v Russian Federation, Communication No. 2318/2013, UN Doc CCPR/C/123/D/2318/2013 (23 August 2018) at [7.3]; UNHRC, Ivanov v Russian Federation, Communication No. 2635/2015, UN Doc CCPR/C/131/D/2635/2015 (14 May 2021) at [7.12]; UNHRC, Alekseev v Russian Federation, Communication No. 2757/2016, UN Doc CCPR/C/130/D/2757/2016 (9 June 2021) at [9.14]; UNHRC, Mikhailova et al v Russian Federation, Communication No 2943/2017, UN Doc CCPR/C/134/D/2943/2017 (29 August 2022) at [9.12]; UNHRC, Savolaynen v Russian Federation, Communication No. 2830/2016, UN Doc CCPR/C/135/D/2830/2016 (23 Jan 2023) at [7.15].

[16] Human Rights Committee, *Views: Communication No 2318/2013*, UN Doc CCPR/C/123/2318/2013 (23 August 2018) [7.3] ('*Nepomanyashchiy v Russian Federation*').

unmarried in order to change her gender identity on her birth certificate (essentially requiring her to divorce) amounted to discrimination within the meaning of Article 26 'on the basis of marital status and gender identity, including transgender status', and also violated G's right to private and family life protected by Article 17 of the ICCPR.[17]

3.2 ICESCR

Australia ratified ICESCR on 10 December 1975, thereby agreeing to comply with a comprehensive range of economic, social and cultural rights.

Article 2(2) of the ICESCR provides that states parties must 'undertake to guarantee' that the rights recognised in the Covenant may be exercised 'without discrimination of any kind such as race, colour sex … or other status'. The Committee on Economic, Social and Cultural Rights has made clear that Article 2(2) extends to discrimination on the ground of gender identity.[18] For example, in its General Comment No 20, the Committee on Economic, Social and Cultural Rights unequivocally stated that "gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are Transgender …".[19]

The right to the highest attainable standard of physical and mental health recognised in Article 12 is a key right for TGD people recognised by the ICESCR. On the right to the highest attainable standard of sexual and reproductive health, the Committee on Economic, Social and Cultural rights has specifically noted that:

> Non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of persons, including lesbian, gay, bisexual, *transgender* and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status. … State parties also have an obligation to combat homophobia and transphobia, which lead to discrimination, including violation of the right to sexual and reproductive health.[20] [emphasis added].

As we explore in Part 4 below, the barriers to healthcare for TGD people raise significant human rights issues.

3.3 Yogyakarta principles

The *Yogyakarta Principle*s *on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (**Yogyakarta Principles**) are a set of principles concerning LGBTQIA+ rights. While the Yogyakarta Principles are not a legally binding international legal instrument, they do provide authoritative guidance on how international law has been, and can be, interpreted to protect

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17 Human Rights Committee, *Views: Communication No 2172/2012, 119th sess*, UN Doc CCPR/C/119/D/2172/2012 CCPR/C/119/D/2172/2012 (28 June 2017) [7.12]-[8] ('*G v Australia*').

18 Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2 Para 2)*, UN Doc E/C.12/GC/20 (2 July 2009) para 32.

19 Ibid para 32.

20 Committee on Economic, Social and Cultural Rights, *General Comment No 22: Right to Sexual and Reproductive Health (Article 12)* UN Doc E/C.12/GC/22 (2 May 2016) para 23.

against discrimination on the basis of gender identity. Since the adoption of the Yogyakarta Principles in 2007, the Yogyakarta Principles have been elaborated through the *Yogyakarta Principles Plus 10* (**Yogyakarta Principles +10**). These additional principles are to be read alongside the original Yogyakarta Principles and supplement these principles. The Yogyakarta Principles and Yogyakarta Principles +10 have been referenced in UN universal periodic review proceedings, reports of UN Special Rapporteurs and in decisions of international and domestic courts and tribunals.[21] As the former UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz noted, '[t]he intensity of this reception correlates with the fact that the process leading to the Yogyakarta Principles, and their update, followed an interdisciplinary standard identification methodology, and focused on treaty law, international custom, national practice, judicial decisions and doctrine'.[22]

Principle 2 (the rights to equality and non-discrimination) and Principle 17 (the right to the highest attainable standard of health) of the Yogyakarta Principles and Principles 31 and 32 of the Yogyakarta Principles +10 are particularly relevant to the rights of TGD people explored in this submission.

Principle 2 notes that '[e]veryone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity' and is entitled to equal protection of the law. In particular, the Yogyakarta Principles clarify that states must '[a]dopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity'.

Principle 17 deals with the right to the highest attainable standard of health and notes that, among other things, states must ensure health services respond to the health needs of TGD people, including by '[e]nsur[ing] that all sexual and reproductive health, education, prevention, care and treatment programmes and services respect the diversity of sexual orientations and gender identities and are equally available to all without discrimination'.

Principle 31 deals with the right to legal recognition 'without reference to, or requiring assignment or disclosure of sex, gender, sexual orientation, gender identity, gender expression of sex characteristics'. It also recognises the obligation on states to enable individuals to obtain official identity documents which contain accurate information in relation to their gender identity.

Principle 32 deals with the right to bodily and mental integrity, and 'autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics'. This principle explains that states must fulfil this right by, inter alia, ensuring that discrimination on the grounds of gender identity is prohibited.

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21 Victor Madrigal-Borloz, *Report of the Special Rapporteur on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc A/HRC/47/27 (2 June 2021) para 35.

22 Ibid.

Part 4: Sexual and reproductive health care for TGD people

Having considered the role that CEDAW might play in securing the right to health for trans women in Part 2, and exploring other relevant international law in Part 3, this part briefly considers the barriers to accessing sexual and reproductive health care that TGD people face in Australia. TGD poeple face particular barriers and indignities when accessing sexual and reproductive health care. For example, Assoc Professor Sifris and Professor Gerber have elsewhere noted that 'the lack of appropriate training for health care professionals' is a key barrier for TGD people accessing adequate health care, with such issues being 'exacerbated by medical record systems, which often record the patient's sex and not gender, and whose automated communications may address the patient with the wrong title and pronoun'.[23]

Sifris and Gerber have analysed what a human rights-based approach to health care might look like for TGD people, and concluded that it requires, 'a normative framework which, if implemented into law, policy, and practise through co-design with those with lived experience, has the potential to ensure that individuals within these population groups flourish in all aspects of their life'.[24] Moreover, such an approach is 'premised on respect for the fundamental dignity, autonomy and equality of all people which is given expression in, and achieved through, the realisation of their human rights'.[25]

Much more can be done to ensure that TGD people are able to fully realise their right to the highest attainable standard of sexual and reproductive health. Comprehensive data from TGD people on their sexual and reproductive health needs must be collected, and in particular, the intersectional needs of specific groups within these communities (such as First Nations peoples and older peoples) must be better understood to enable evidence-based approaches to be adopted.

Barriers to TGD people accessing health care such as a lack of appropriate training for health care professionals must also be a priority area. Anti-discrimination laws need to be amended to follow Victoria's lead to include within anti-discrimination a comprehensive duty to *eliminate* discrimination[26] and jurisdictions which have not yet enacted stand-alone human rights protections in law (including the Commonwealth) should do so, and existing human rights legislation should be amended to include the right to the highest attainable standard of health as a protected right.

Part 5: Conclusion

International human rights law has evolved and is continuing to develop to better protect the rights of TGD people. In particular, the provisions of the CEDAW are recognised as applying to trans women and the ICCPR & ICESCR have also been interpreted as protecting the rights of TGD people. Thus,

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23 Ronli Sifris and Paula Gerber, 'Sexual and Reproductive Health Care for Trans and Gender Diverse People: Imagining a Human Rights-Based Approach' (2023) 48(3) *Alternative Law Journal* 159, 160.

24 Ibid.

25 Ibid.

26 See, *Equal Opportunity Act 2010* (Vic) pt 3.

Australia is required to implement these three international instruments in a way that respects and protects the rights of TGD people. To achieve this, Australia (including all states and territories) must:

1. **Define the term "woman" to include trans women.**
2. **Protect TGD people against hate speech and vilification.**
3. **Pay particular attention to the implementation of the right to health, as recognised and interpreted by the Committee on Economic, Social and Cultural Rights. For example, Australia should undertake a review of health professionals' education in respect of TGD people and their health needs and establish comprehensive professional training to support health professionals in treating and caring for TGD people.**
4. **Ensure that all laws and policies addressing gender-based discrimination explicitly include TGD people as potential subjects of such discrimination. And all jurisdictions should enact a *positive duty to eliminate* discrimination (as Victoria has done). For example, removing barriers to obtaining identity documents that conform to a person's gender identity, such as requirements for surgery or other medical intervention, is an important step.**
5. **Fund research aimed at determining the intersectional needs of specific groups within the TGD population to enable evidence-based approaches to be adopted, including for example, Indigenous TGD persons, older TGD individuals and TGD persons with a disability.**
6. **Ensure that laws and policies adopt an intersectional approach to the issue of gender-based discrimination and to generally addressing the needs of specific groups within the TGD population.**
7. **Conduct education and awareness raising campaigns to address issues relating to cultural biases, stereotyping and stigmatisation of TGD people.**

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