

**RESPONSE SUBMISSIONS
OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN AND GIRLS**

1. On 2 September 2024, pursuant to s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) the Tribunal determined to accept submissions I sought to make in the present proceedings. Such submissions were respectively dated 29 August 2024 and 4 April 2024 (**Special Rapporteur Submissions**).
2. On 10 September 2024, the Australian Human Rights Commission (AHRC) filed submissions which responded to the Special Rapporteur Submissions (**AHRC Further Submissions**).
3. By these further submissions, which I respectfully request the Tribunal to again accept pursuant to its powers in s 33(1)(c) of the AAT Act, I respond to some of the matters in the AHRC Further Submissions.
4. For the avoidance of any doubt, to the extent I have not addressed an aspect of the AHRC Further Submissions in these submissions I should not be taken to agree with or accept the AHRC's position.

Engagement with special procedures and positive historical engagement

5. The attitude of the AHRC to the intervention by the Special Rapporteur appears to be a departure from the historical positive engagement that the AHRC has had with special procedures of the human rights council¹ in line Article 3. e) of the Paris Principles² with and the mandate of the special rapporteur on violence against women and girls.

¹ See the AHRC's page on its Engagement with the international human rights system", <https://humanrights.gov.au/about/news/engaging-international-human-rights-system>.

² Article 3 e) states : « A national institution shall inter alia, have the following responsibilities...” “To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights” « .

6. In May 2023, the AHRC invited me, the current mandate holder, to address Wiyi Yani U Thangani National Summit. The Wiyi Yani U Thangani (Women's Voices) National Summit was held over three days from 9-11 May 2023, with an additional one-day Youth Forum on 8 May, bringing together over 800 First Nations women delegates from across Australia. A copy of the speech can be found here on the website of the AHRC: https://www.youtube.com/watch?v=5a-t_TtAooE As it becomes evident from the speech, I was commenting on a Framework for Action and Institute for First Nations Gender Justice in Australia. At the time, my engagement on an Australian specific issue was not raised as an issue of concern.
7. I take this opportunity to also refer to the country visit that was carried out by my predecessor, Ms. Dubravka Simonovic to Australia from the 12-27 February 2017. As her report ([A/HRC/38/47/Add.1](#)) on her visit to Australia clearly demonstrates, she examined the national policies and legal framework to prevent and respond to violence against women and girls, making many recommendations to that effect (see section VII). Doing so is in line with resolution that asks the special rapporteur on violence against women in article 7 b) of 1994/45 to “recommend measures, ways and means, at the **national**, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences. » The former special rapporteur on violence against women and girls had met with the AHRC during her visit, and has quoted the AHRC on five other occasions in the report.
8. In light of the above, I reiterate again the fact that commenting and engaging on Australian legislation, including the *Sex Discrimination Act (SDA) Amendment Bill of 2013* falls under my mandate. Since the Special Rapporteur Submissions, I have issued a [press release](#) on the Australian Federal Court decision on the *Tickle versus Giggie* case, and expressed concern regarding the implications it has for the SDA. A copy of my press release is attached to these submissions.
9. Taken together, these elements point to the awareness that the AHRC has that the core of the work the mandate holders in the special procedures of the human rights council, including the special rapporteur on violence against women and girls is to examine legal and policy frameworks of individual countries and assess the extent to which they are in line with the country's international and regional human rights responsibilities and has always fully collaborated with special procedures with this in mind. It is regrettable that the AHRC appears to depart from this knowledge and understanding by questioning the right of the rapporteur to engage on this issue at hand due to disagreeing with my position.

On the issue of relevance of international human rights treaties to the proceedings

10. It is important to note that the term “cis woman” and “transgender woman” has not been used in any international human rights treaty, and certainly not in Convention on the Elimination of All Forms of Discrimination against Woman. While the terms “transgender woman” have been used in treaty

bodies, the term “cis woman” has not. Treaty bodies have consistently used the terms “women” and discrimination based on intersecting grounds, including sex and gender.

11. I also note that in paragraph 9 of AHRC Further Submissions, the AHRC asserts that it “maintains its position that the Special Rapporteur is not an authoritative interpreter of CEDAW” but appears not to hold back about its own ability to interpret CEDAW. The AHRC proceeded to interpret CEDAW in a way the CEDAW committee did not, when it claimed that “CEDAW is not relevant to these proceedings as it does not apply to discrimination between two groups of women (trans women and cis women)” (paragraph 6 of the AHRC Further Submissions), It should be noted that neither the CEDAW Committee has also never made this assertion.
12. As I have mentioned publically beforehand, “the CEDAW Convention recognises that there are women who are more vulnerable to discrimination as a result of the interplay between sex and other factors that affect their lives. However, treaty bodies, including CEDAW have examined the grounds on which women have faced discrimination in their own right, and not engaged in comparing the rights that groups of women hold to each other.”³
13. The AHRC references the Yogyakarta Principles in its latest submission, despite it being well known that the Yogyakarta Principles are not accepted as principles by the majority of States worldwide and are in any case not authoritative nor binding.

On the test of proportionality and derogation

14. The AHRC agrees that international law allows for differentiation in treatment without such differentiation constituting discrimination, if the criteria for such differentiation are reasonable and the objective and aim of this differentiation is legitimate. Furthermore, the differentiation must be proportional to the aim it intends to achieve. In its latest submission, the AHRC calls on the Tribunal to weigh these matters with regards to their impact of the rights of transwomen but not lesbian women (i.e. biological females sexually attracted to biological females).
15. I reiterate my position that where tension may arise between the right to non-discrimination based on sex and non-discrimination based on 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.⁴

³ <https://www.ohchr.org/en/press-releases/2024/09/special-rapporteur-decries-australias-federal-court-ruling-further-eroding>

⁴ <https://www.ohchr.org/sites/default/files/documents/issues/women/sr/statements/20240404-Statement-sr-vawg-cedaw-convention.pdf>.

Paragraph 12 of the AHRC Further Submissions

16. The AHRC has, in the AHRC Further Submissions, asserted that having read Professor Gerber's submissions, I have changed my position with regards to the CEDAW Convention's application to transgender women. This conclusion by the AHRC is inaccurate as it misrepresents the essence of what I have stated in my submissions of 29 August 2024 and 4 April 2024 (Special Rapporteur Submissions).
17. On one hand, I stated in my submission dated 4 April, which I prepared based on the AHRC's request, while CEDAW did not define the term "woman", "man" or "sex", it can be inferred based on a combination of taking the ordinary meaning to the terms of treaties in their context in light of their objectives and purpose as well as State practice that a) the term sex in international treaties must be understood in its ordinary meaning to refer to biological sex, and b) the term woman refers to a biological female. In the Special Rapporteur Submissions, I have made it clear that CEDAW made it clear that discrimination can happen on a number of factors that affect their lives including gender identity. By agreeing that the CEDAW committee extends the protection of CEDAW to transgender women, I am not departing from the position I expressed on the 4th of April that the "CEDAW Committee did not equate a person who **may identify** as a woman or a man with someone who **is** a woman or a man- the latter being defined as either biologically male or female." (emphasis added). As I have attempted to explain in the Special Rapporteur Submissions of 29th of August 2024, it is my understanding that the CEDAW Committee applies the protections of the CEDAW to *inter alia*, the following groups: 1) Women (biological females) that are just that; 2) women whose gender identity does not match their female biological sex, i.e. they do not identify as women; 3) men (biological males) who do not identify as men, but identify as women. In doing so, CEDAW does not regard all these three groups to be identical. CEDAW's approach means that it considers that discrimination against those that come under the protection of the Convention based on sex and based on gender as distinct (even if they can be related).
18. It is worth noting that the CEDAW Committee has so far not issued any decision with regards to any transgender women, while it has examined cases of women and women who do not identify as women through the individual complaint procedure established under the Optional Protocol to CEDAW, adopted in 1999. Moreover, and as mentioned in the Special Rapporteur submissions dated 4th of April, the recommendations made by the CEDAW Committee are not binding. Today, State practice globally does not overwhelmingly support such an interpretation.

Reem Alsalem

16 SEPTEMBER 2024

Reem Alsalem