

30 June 2023

Parliamentary Joint Committee on Human Rights
PO Box 6100,
Parliament House
Canberra ACT 2600

By email: human.rights@aph.gov.au

Dear Committee

Submission – Inquiry into Australia’s Human Rights Framework

1. Women’s Legal Service NSW (**WLS NSW**) thanks the Parliamentary Joint Committee on Human Rights for the opportunity to comment on Australia’s Human Rights Framework.
2. WLS NSW is a specialist accredited women-led community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women’s human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. Since 1995 WLS NSW has provided a statewide First Nations Women’s Legal Program (**FNWLP**). This program delivers a culturally safe legal service to First Nations women, including regular engagement with communities across NSW. We provide a First Nations legal advice line, casework services including a specialised family law service to assist First Nations women access the family law courts, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for First Nations women.
4. An Aboriginal Women’s Consultation Network supports and enhances the work of the FNWLP. It meets quarterly to ensure that Women’s Legal Service NSW delivers a culturally safe service. The members include regional community representatives and the FNWLP staff. There is a representative from the Aboriginal Women’s Consultation Network on the WLS NSW Board.
5. Our service brings a unique, gendered and intersectional perspective to the Inquiry, and more broadly to the question as to whether Australia should enact a federal Human Rights Act and if so, what rights should be expressly protected.
6. We believe that human rights are not sufficiently protected and promoted in Australia by our current legal framework. We note and refer to the Australian Human Rights Commission’s (**AHRC**) Position



Women’s Legal Service NSW
PO BOX 206 Lidcombe NSW 1825
Admin (02) 8745 6900
Fax (02) 9749 4433

www.wlsnsw.org.au
Women’s Legal Resources Ltd.
ACN 002 387 699
ABN 88 002 387 699



Paper, *A Human Rights Act for Australia (Position Paper)* for a detailed explanation of Australia's "patchy human rights protections".¹

7. WLS NSW believes it is vital to the protection of human rights in Australia, particularly those of women and girls, that the Australian Parliament enact a federal Human Rights Act embodying the rights within the treaties to which Australia is a signatory. We believe that these rights have not and cannot be fully realised without the passage of a Human Rights Act expressly protecting them.
8. WLS NSW broadly supports the Act proposed by the AHRC in its *Position Paper*. We seek to contribute to the inquiry by highlighting the experience of our clients and the rights and duties we believe are required for women and girls to achieve de facto and de jure equality with men. Referring to the *Convention on the Elimination of Discrimination against Women*, the General Recommendations of the Committee on the Elimination of Discrimination against Women and other international human rights jurisprudence, we have built on the work of the AHRC to expand some of its proposals, particularly the "duties" it proposes, to specifically recognise and include the voices of women and girls.
9. While WLS NSW acknowledges a federal Human Rights Act will apply to the Federal Government, its agencies and agents only, we believe it is an important model for outlier states and territories to pass their own Acts or Charters. We also believe that there are areas of the law within the federal jurisdiction, for instance, family law, discrimination and employment law, social security law, immigration law and federal criminal offences, to which a federal Human Rights Act could valuably contribute.
10. Throughout this submission we refer to the experience of women and girls. This reference is inclusive of all people who have experienced oppression as women, including cisgender, transgender, non-binary and gender diverse people. We also acknowledge the need to address the high rates of sexual, domestic and family violence and abuse perpetrated against LGBTIQ+ people more broadly and the same gendered drivers of such violence.
11. The term "gender-based violence" is intended to include sexual, domestic and family violence, sexual violence outside the domestic and family violence context, such as sexual harassment and other forms of gendered violence.

Recommendations

12. In summary we recommend:
 - 12.1 Parliament enact a federal Human Rights Act embodying the rights contained in treaties to which Australia is a signatory, including:
 - 12.1.1 The right to live free from gender-based violence;
 - 12.1.2 A duty on public authorities to comply with the human rights listed within the Act, and access to a corresponding remedy if they do not;
 - 12.1.3 A duty on public authorities to equal access to justice in criminal law matters, **as well as** civil and family law matters which involve substantial human rights issues;²

¹ Australian Human Rights Commission (2022), *Free & Equal, Position Paper: A Human Rights Act for Australia*, p46–59.

² See Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, (ECHR) Article 6(1), which states "in the determination of his

- 12.1.4 Better recognition of the rights of victim-survivors and that the rights of an accused and the rights of complainants are not mutually exclusive;
- 12.1.5 A duty on public authorities to ensure the participation of First Nations people, people with disabilities, children **and women**³ in policies and decisions that “directly or disproportionality”⁴ affect the rights of these groups.
- 12.2 Federal Parliament amends the federal anti-discrimination laws to include the status of being a victim-survivor of gender-based violence as a protected attribute.
- 12.3 While we will not detail this in these submissions, we also recommend, in line with the AHRC’s recommendations, that Parliament develop a new, modern human rights framework through the
 - 12.3.1 Continued modernisation of federal anti-discrimination laws;
 - 12.3.2 Strengthening of parliamentary scrutiny of human rights;
 - 12.3.3 Implementation of human rights education and indicators; and
- 12.4 Adequate and sustained resourcing of the AHRC and civil society, including Community Legal Centres, and other services who work with people most vulnerable to human rights breaches by the State and its agents.
- 12.5 We also recommend gender-responsive budget policy making, to ensure the consideration of women’s and girl’s human rights in legislation, policy and practice.

All human rights should be protected and promoted

13. Australia is the only remaining liberal democracy without a federal Human Rights Act or Charter⁵ yet is obliged to protect human rights under several United Nations human rights treaties. Australia is a signatory to the following treaties:

- *International Convention on Civil and Political Rights (ICCPR)*;⁶
- *International Convention on Economic, Cultural and Social Rights (ICESCR)*;⁷
- *Convention on the Elimination of all forms of Discrimination against Women (CEDAW)*;⁸

civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Article 6(1) has been interpreted by the European Court of Human Rights to, in certain circumstances, include an obligation on the State to provide legal representation in civil matters where the assistance of a lawyer is required for effective access to the court, -or the matter is sufficiently complex in procedure or substance.

³ *International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, opened for signature 18 December 1979, 1249 UNTS 14 (entered into force 3 September 1981), Article 7.

⁴ This wording is directly taken from the AHRC’s *Position Paper*. The AHRC seeks a duty specifically with respect to First Nations people, people with disabilities and children.

⁵ AHRC (n 1), p46, citing George Williams and Daniel Reynolds (2017) *A Charter of Rights for Australia* (UNSW Press, 4th Ed), p7.

⁶ *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 16 December 1966 UNTS 999 (entered into force 23 March 1976).

⁷ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁸ CEDAW (n 3).

- *International Convention on the Elimination of all forms of Racial Discrimination (CERD)*;⁹
 - *Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment (CAT)*;¹⁰
 - *Convention on the Rights of the Child (CROC)*;¹¹ and
 - *Convention on the Rights of Persons with Disabilities (CRPD)*¹².
14. Australia should meet its international obligations by ensuring that all these rights are protected in domestic law.
15. We note the work of the relevant Committees of these treaties in contextualising and modernising the rights in these treaties, particularly the Committee on the Elimination of Discrimination Against Women (**CEDAW Committee**).
16. In 1985, the international community, including Australia endorsed the United Nation's *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*¹³. The Declaration sets out the minimum standards for treatment of victims of crime, notably that "*Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.*"¹⁴ We note that some of the principles expressed in the Declaration can also be sourced from international treaties, particularly CEDAW and its Committee's General Recommendations.
17. On 3 April 2007, Australia announced its support of the United Nation's *Declaration on the Rights of Indigenous People*.¹⁵ The Declaration affirms the "*minimum standards for the survival, dignity and well-being*" of Indigenous peoples, standards which should be expressly protected in Australia. The rights that are set out in the Declaration should also be protected in Australia. We note that some of the principles expressed in the Declaration can also be sourced from international treaties, for instance the right to self-determination, contained within both ICESR and the ICCPR.

Human rights are indivisible and interdependent

18. Human rights are indivisible and interdependent. If basic economic, social and cultural rights are not protected, then it is often difficult to enjoy civil and political rights.
19. We note the CEDAW Committee's comments with respect to the interdependence and indivisibility of rights impacting women in General Recommendation 35:

Women's right to a life free from gender-based violence is indivisible from and interdependent on other human rights, including the rights to life, health, liberty and security of the person, equality and

⁹ *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

¹⁰ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 4 January 1989).

¹¹ *Convention on the Rights of the Child (CROC)*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 20 November 1989)

¹² *Convention on the Rights of Persons with Disabilities (CRPD)*, A/RES/61/106 (adopted without vote and entered into force 24 January 2007).

¹³ *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, A/RES/40/34 (adopted 29 November 1985).

¹⁴ *Ibid*, Article 4.

¹⁵ *United Nations Declaration on the Rights of Indigenous Peoples*. GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

*equal protection within the family, freedom from torture, cruel, inhumane or degrading treatment, and freedom of expression, movement, participation, assembly and association.*¹⁶

20. An example of the interdependence and indivisibility of rights in the context of gender-based violence against women and girls can be found in the case of *SF v Department of Education* [2021] QCAT 10. In this case, a decision of the Queensland Department of Education could have led to a child with disabilities being denied an appropriate education, and exposing the mother and her child to violence.

Case study – *SF v Department of Education* [2021] QCAT 10

The Department of Education rejected the Applicant's application to register her child with learning disabilities for home-schooling because she did not provide a residential address on the application. The Department argued a residential address was necessary under the governing Act. The Applicant had escaped a violent relationship with the child's father and did not provide her residential address on an application due to her serious concern that the father would gain access to this information and perpetrate further violence against them.

In substituting the decision of the Department, and granting the Applicant's application, the Tribunal interpreted the governing Act in a way that is compatible with human rights as required by the *Human Rights Act 2019* (Qld) and found that the Applicant and her child's right to be properly protected and to not have their privacy, family or home arbitrarily interfered with, and the right of the child to appropriate education, outweighed the requirement to provide her specific residential address.

The rights most important to Women's Legal Services, our clients and stakeholders

21. While WLS NSW believes that all human rights should be protected and promoted, our clients' experiences support that some rights are of particular importance to securing the safety and wellbeing of women and girls. These include:
- The right to live free from gender-based violence;¹⁷
 - The right to life;¹⁸
 - The right to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment;¹⁹
 - The right to equality before the law;²⁰
 - The right to self-determination of First Nations people;²¹

¹⁶ UN Committee on the Elimination of Discrimination against Women ('CEDAW Committee') (26 July 2017), *General Recommendation No.35 (On gender-based violence against women, updating general recommendation No. 19 (1992))*, CEDAW/C/GC/35, p6 [15]. See also CEDAW Committee, *CEDAW General Recommendation No. 19: Violence against women*, (1992).

¹⁷ Ibid, see both CEDAW Committee General Recommendation No. 35 and No. 19.

¹⁸ ICCPR (n 6), Article 6.

¹⁹ Ibid, Article 7.

²⁰ Ibid, Article 26.

²¹ *United Nations Declaration on the Rights of Indigenous Peoples* (n 15), Article 4; see also general right to self-determination in ICCPR (n 6) Article 1; ICESCR (n 7) Article 1.

- The right to live free from discrimination,²² including discrimination on the basis of being a victim-survivor of gender-based violence;²³
- The right to family and to not be subjected to arbitrary or unlawful interference with family;²⁴
- The right to housing;²⁵
- The right to health;²⁶
- The right to culture;²⁷
- The right to social security.²⁸

The right to live free from gender-based violence

22. Gender-based violence is a violation of women's human rights.
23. The CEDAW Committee explains that gender-based violence is violence directed at women because they are women or that impacts women disproportionately.²⁹ It is a form of discrimination that limits women's achievement of other human rights.³⁰ Its causes and consequences are rooted in deep-seated sexist and misogynistic societal attitudes, structures and legal systems.
24. Gender-based violence is a national problem. The prevalence of gender-based violence in Australia is demonstrated by the following data:
- 24.1 The majority of victim-survivors of domestic and family violence and abuse in Australia are women;³¹
- 24.2 One in 4 women have experienced violence from an intimate partner or family member;³²
- 24.3 One in 5 women have experienced sexual violence since the age of 15.³³
25. In General Recommendation 35, the CEDAW Committee observes,

Gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated.

...

²² ICCPR (n 6) Article 2; CEDAW (n 6) Article 2.

²³ CEDAW (n 3) Article 2. Note that the CEDAW Committee identifies gender-based violence as a form of discrimination against women in *General Recommendation No. 19: Violence against women*, [1].

²⁴ ICCPR (n 6), Articles 17 and 23; ICESCR (n 7) Article 10.

²⁵ ICESCR (n 7), Article 11.

²⁶ Ibid, Article 12.

²⁷ ICCPR (n 6), Article 27; ICESCR (n 7), Article 15; CERD (n 9) Article 5(e)(vi); CEDAW (n3), Article 13(c); CROC (n 11), Article 30 & 31; CRPD (n 12), Article 30

²⁸ ICESCR (n 7), Article 9; CEDAW (n3), Article 11(1)(e), 14(2)(c); CROC (n 11), Article 26

²⁹ CEDAW Committee, (n 16) General Recommendation No. 35 and No. 19.

³⁰ Ibid.

³¹ Australian Institute of Health and Welfare (2023), *Family, domestic and sexual violence*.

³² Australian Bureau of Statistics (2021-22), *Personal Safety, Australia*. Note that, the *Personal Safety, Australia* statistics show that as a comparison, one in 16 men experienced sexual violence since the age of 15.

³³ Ibid.

*Such violence is a critical obstacle to the achievement of substantive equality between women and men and to the enjoyment by women of their human rights and fundamental freedoms, as enshrined in the convention.*³⁴

26. The CEDAW Committee has observed that through State party practice and *opinio juris*, the prohibition on gender-based violence has “evolved” into a principle of customary international law.³⁵
27. While the right to live free from gender-based violence may be derived from other rights (for example, the right to life³⁶ and the right to liberty and security of person³⁷) we believe that this right should be expressly protected because of the pervasive nature of violence against women in Australia and the slow rate at which gendered violence is being eliminated. We believe that the inclusion of an express right to live free from gender-based violence sends a strong message that violence against women is not only a crime, but a human rights violation.
28. The CEDAW Committee notes that a State which does not take action to prevent gender-based violence in essence condones it,

*The failure of a State Party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, to prosecute and punish perpetrators and to provide reparations to victims/survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women. Such failures or omissions constitute human rights violations.*³⁸

29. We hope that an express right to be free from gender-based violence will promote cultural and systemic change by creating an obligation that public authorities adhere to this right and so interpret their functions in light of it, and that Parliament considers the impact of proposed legislation on women's and girl's safety.

Protected Attribute

30. A necessary corollary to the right to be free from gender-based violence, is a right to not be discriminated against on the basis of a person's status as a victim-survivor of gender-based violence.
31. The CEDAW Committee's General Recommendation No 19 identifies gender-based violence as a form of discrimination against women.³⁹ CEDAW places obligations on State parties to legislate to prohibit, and so eliminate, discrimination against women.⁴⁰ Including the status of being a victim-survivor of gender-based violence in Australia's federal anti-discrimination law is therefore consistent with Australia's human rights obligations.
32. While the provision of leave entitlements for domestic and family violence and abuse is a welcome step to reducing the impact of family and domestic violence on women's employment, in light of the pervasive nature of domestic and family abuse in Australia and its disproportionate impact on women,

³⁴ CEDAW Committee (n 16), General Recommendation No. 35, p4 [10].

³⁵ Ibid, p1.

³⁶ ICCPR (n 6), Article 6.

³⁷ Ibid, Article 9.

³⁸ CEDAW Committee (n 16) General Recommendation No. 35, p9, referencing CEDAW Committee, General Recommendation No. 19 p1 [1].

³⁹ CEDAW Committee, General Recommendation No. 19, p1 [1].

⁴⁰ CEDAW (n 3), Articles 1 and 2.

we believe that a review of Australia's human rights framework should result in the recognition of a person's status as a victim-survivor of gender-based violence as a "protected attribute" in federal anti-discrimination legislation in all areas of public life.

33. The need to recognise domestic and family violence and abuse as a protected attribute has been raised previously by the AHRC and by state and territory anti-discrimination commissions.⁴¹
34. We recommend the broadening of this to gendered based violence and abuse, to more explicitly include sexual violence and to be inclusive of sexual violence outside the domestic and family violence context, such as sexual harassment and other forms of gendered violence.
35. Victim-survivors who are subjected to gender-based violence can experience discrimination in areas of public life such as employment, education and housing and accommodation. For example, a woman may lose work or have their employment terminated as a result of a perpetrator harassing her at her workplace.
36. Including the status of being a victim-survivor of gender-based violence as a protected attribute would also play an important role in educating and raising awareness within the wider community about gender-based violence, and, we hope, fostering more empathetic approaches to people who are, or who have experienced it.⁴² It would also serve an important normative function, acknowledging that the harm experienced by victim-survivors can be exacerbated by negative or prejudicial attitudes and inflexible policies.⁴³
37. We believe that specific protection is required to protect women from discrimination on the basis of their experience of gender-based violence in areas of public life. Securing this right is vital to ensuring women's right to equality under Article 3 of the ICCPR, in addition to the rights protected under CEDAW.

Duty: Equal Access to Justice

38. In its *Position Paper*, the AHRC has proposed an equal access to justice duty for public authorities, derived from various treaties to which Australia is signatory, which applies in the context of criminal proceedings only.
39. The AHRC has explained the duty as embedded within "access to justice principles", creating an obligation on public authorities "to meet minimum requirements associated with the right to a fair hearing, overlaid by non-discrimination principles that require the provision of certain key supports and services within the justice system to protect equality before the law."⁴⁴
40. In brief, the duty as proposed by the Commission would involve:
 - 40.1 Access to legal representation in criminal matters where a defendant cannot afford a lawyer; and

⁴¹ Australian Council of Human Rights Agencies (December 2012), *Australia's Universal Periodic Review: Progress Report prepared by the Australian Human Rights Commission on behalf of the Australian Council of Human Rights Agencies*, [30].

⁴² Andrea Durbach (5 December 2011), *Domestic Violence discrimination and the consolidation of Commonwealth anti-discrimination laws*, Safe at Home, Safe at Work Conference.

⁴³ Tashina Orchiston and Bella Smith (March 2012), 'Empowering Victims of Family Violence: Could Anti-Discrimination Laws Play a Role', *Australian Review of Public Affairs*.

⁴⁴ AHRC (n 1), p215.

- 40.2 Non-discrimination in relation to accessing legal services and courts, for instance the provision of interpreters, accessible court facilities and administrative processes, provision of specialist children's lawyers and advocates, and culturally safe legal services.⁴⁵

Equal Access to Justice in civil and family law matters

41. WLS NSW believes that the proposed duty should extend to civil and family law matters that involve substantial human rights issues. An inability to access legal assistance (referring broadly to free legal advice, advocacy and/or representation) in civil and family law matters, or appropriately participate in the court process due to procedural deficiencies, can have serious human rights implications for women and children, impacting the right to be free from gender-based violence, the right to civil redress for gender-based violence, the right to life, the right to family and the right to shelter, among others.
42. We acknowledge that funding for criminal law is important because of the loss of liberty consequences. However, we submit that the lack of funding for women who have experienced gender-based violence in family law, immigration law, discrimination and employment law, social security and other areas of civil law, (as well as in state/territory based issues such as protection orders and tenancy) has similar human rights implications. As discussed throughout this submission, such violence is a violation of the rights to life, to equality, to liberty and security of person, to the highest standard attainable of physical and mental health, to just and favourable conditions of work and not to be subjected to torture and other cruel, inhuman, or degrading treatment or punishment. For example, parenting orders which provide for care arrangements that do not recognise the risks posed by a violent father, can have serious and sometimes fatal consequences, directly impinging on a mother and her children's right to life and to live free from violence.
43. The AHRC explains that it has not extended this duty to civil and family law matters as it is of the view that a right to legal aid in these areas is not guaranteed under the relevant treaties. However, we would strongly urge the Committee to consider the inclusion and extension of this duty to civil and family law matters. We note Professor Simon Rice's comment, also referenced in the *Position Paper*, that,

It is simply not possible to say, as a general rule, that a person who loses their liberty loses 'more' or 'less' than a person who loses their home, their livelihood, their children, their reputation, their earning capacity, their freedom of expression, their right to vote and so on. Nevertheless the 'incarceration is more serious' argument persists and is commonly treated as a relevant factor in deciding whether a right to legal aid arises. Under cover of 'the interests of justice' the perceived seriousness of outcome is a defensible basis on which states can allocate limit resources to making legal aid available.⁴⁶

44. It is our experience that our clients and their children suffer when they do not have access to early and adequate legal assistance. We have clients who have felt forced by the police and judicial officers to agree to parenting plans with violent partners on the day of a final hearing for a protection order, and have been told those plans have the effect of parenting orders, without having access to family law

⁴⁵ AHRC (n 1), p217.

⁴⁶ Simon Rice (2017), 'Reasoning a Human Right to Legal Aid', in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing) 202, quoted in AHRC (n 1), p219.

advice about the effect of the plan, its appropriateness and most importantly whether it is in the best interests of the children and safe for the children and adult victim-survivor.

45. The European Convention on Human Rights (**ECHR**) includes a right under Article 6(1) to a fair trial in the determination of a person's civil rights and obligations, in addition to the right to a fair trial in criminal law matters.⁴⁷ As noted by the AHRC,⁴⁸ Article 6 of the ECHR has been interpreted by the European Court of Human Rights to, in certain circumstances, include an obligation on the State to provide legal representation in civil matters where the assistance of a lawyer is required for effective access to the court, or the matter is sufficiently complex in procedure or substance.⁴⁹
46. Below we have provided examples of how a duty to ensure access to legal representation in civil and family law may improve outcomes for women and children:
 - 46.1 *Family law*: Some of our clients report feeling pressured by Family Dispute Resolution Practitioners and Judicial Registrars in voluntary and Court Ordered Mediation processes, to communicate directly with violent fathers and to reach an agreement, even where they have continuing concerns about their children's and their own safety. Our clients have also reported a limited understanding of, and provision for cultural safety in these processes, particularly in court-ordered processes. Access to gender-based violence informed, trauma informed and culturally safe legal advice and representation and processes, including court ordered and voluntary Family Dispute Resolution, may ensure that the mother's safety concerns are voiced and heard, and ensure that she does not feel compelled to reach an agreement that does not prioritise the children's and her own, safety.
 - 46.2 *Care and Protection*: access to legal advice when a primary caregiver may not be able to care for their child but there is another family member who is appropriate and available could mean a matter is diverted to the family law courts rather than waiting for the matter to escalate to the Children's Court and the removal of a child from their family. The benefit in these circumstances is there is an increased likelihood that the child will stay with family members instead of going into "care" and the family unit is preserved while safety is also ensured. This limits the trauma otherwise involved for everyone in the removal of a child from their family – the child, parents, extended family and child protection workers. Further, in the case of First Nations children, culturally and linguistically diverse children and people from other cultures, including people with disability and LGBTIQ+ communities, it can help to ensure connection to culture and community.
47. This duty cannot be fulfilled without sufficient funding for services which provide free legal assistance to their communities, such as Community Legal Centres, including specialist Women's Legal Services, Family Violence Prevention Legal Services, Aboriginal and Torres Strait Islander Legal Services and Legal Aid.
48. As noted in the CEDAW Committee's General Recommendation No 28 a core obligation of States is to "*financially support independent women's legal resource associations and centres in their work to*

⁴⁷ See note 2 above which extracts Article 6(1) of the ECHR.

⁴⁸ AHRC (n 1), p219.

⁴⁹ *Airley v Ireland* [1979] ECHR 3. See Council of Europe/European Court of Human Rights (2022), 'Guide on Article 6 – Right to a fair trial (civil limb)'.

educate women about their rights to equality and to assist them in pursuing remedies for discrimination".⁵⁰

49. Specialist Women's Legal Services understand the dynamic of gender-based violence and why such violence is primarily perpetrated against women and children. They provide safe, trauma-informed spaces for women to disclose violence, sometimes for the first time, and to receive appropriate, nuanced support and advice. Moreover, these services are important for empowering women who are victim-survivors of gender-based violence.
50. Furthermore, we note that women facing intersectional discrimination frequently face challenges in obtaining access to justice, specifically legal services, that are appropriate for their needs, including First Nations women, women with disabilities, Culturally and Linguistically Diverse women, LGBTIQ+ people and girls and women across their lifespan.
51. We believe it is vital to ensuring access to justice for women and girls that these services receive adequate and sustainable funding from State/Territory and Federal Governments that is not reliant on one-off grants.

Duty of Equal Access to justice - rights of victim-survivors

The human rights framework for victim-survivors

52. The AHRC explains that the duty of equal access to justice supports the overarching right of an accused to a fair trial. We acknowledge the fundamental importance of this right and its need to be explicitly protected.
53. We believe the rights of victim-survivors of violence are equally important and should be recognised in any proposed federal Human Rights Act. We believe the right of victim-survivors to be treated with dignity and compassion in the legal process, need to be explicitly recognised and protected and can be done so by extending to them the duty of equal access. We note that there is currently no federal victims' rights charter.
54. The rights of victim-survivors are recognised by the international community. The *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* declares that victim-survivors should be "*treated with compassion and respect for their dignity*"⁵¹. These principles have formed the basis of the Charters of Victim's Rights across Australia. A consistent theme throughout the international instruments concerning women and victim-survivors is the need for the policing and judicial systems to take gender-sensitive approaches to their roles and to avoid re-victimisation.
55. The CEDAW Committee's General Recommendation 33 makes several recommendations for the realisation of women's access to justice. The Committee notes the influence of gender stereotypes in criminal proceedings involving gender-based violence, particularly regarding the questioning of victim-survivors and evidence.

⁵⁰ CEDAW Committee (16 December 2010), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, [34].

⁵¹ *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (n 12), Article 4.

*Use a confidential and gender-sensitive approach to avoid stigmatization, including secondary victimization in cases of violence, during all legal proceedings, including during questioning, evidence collection and other procedures relating to the investigation.*⁵²

The Committee also recommends that States,

*Review rules of evidence and their implementation, especially in cases of violence against women, and adopt measures with due regard to the fair trial rights of victims and defendants in criminal proceedings, to ensure that evidentiary requirements are not overly restrictive, inflexible or influenced by gender stereotypes.*⁵³

56. Balancing the rights of the accused, the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* make several recommendations for how States can ensure victim-survivors obtain access to justice. Among other recommendations, Guideline 7 provides that States should provide access to:

56.1 advice and assistance throughout the criminal legal process, provided in a manner which prevents re-victimisation;

56.2 legal advice about their involvement in the criminal legal process;

56.3 prompt information from police and other front-line responders about the matter, their entitlement to legal aid, assistance and protection, and how to access these rights;

56.4 mechanisms that allow for the presentation and consideration of victim-survivors views and concerns, where their personal interests are affected or where it is in the interests of justice, at appropriate stages in the criminal legal process.⁵⁴

57. The rights of victim-survivors and of accused people are not in conflict. Both can be realised if access to justice is afforded to both. This is consistent with the recommendation by the Royal Commission into Institutional Responses to Child Sexual Abuse that “*the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused*”.⁵⁵

58. Further, providing gender-based violence informed, trauma informed, culturally safe and disability aware processes will assist victim-survivors to provide their best evidence, which in turn, is in the interests of justice.

59. Former Commissioner for Victims Rights in South Australia, Michael O’Connell advocates for a broader understanding of a “fair trial” which incorporates the rights and voices of victim-survivors, stating:

It is important to have an inclusive understanding of the principle of a fair trial that has regard to the position of not only the defendant but also the positions of victims and witnesses. As Wolhuter and others aptly said, – victim empowerment and the reduction of secondary victimisation require procedural rights during both the pre-trial and trial stages. Victim studies and my experiences

⁵² CEDAW Committee, [General Recommendation No. 33 on women’s access to justice](#), CEDAW/C/GC/33 (3 August 2015), p19 [51].

⁵³ Ibid.

⁵⁴ United Nations General Assembly, [United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#), 67th Sess, A/RES/67/187 (28 March 2013), Guideline 7, p18 [48].

⁵⁵ Royal Commission into Institutional Responses to Child Sexual Abuse (2017), [Criminal Justice Report](#), Recommendation 1.

*convince me that there is nothing less empowering for a victim (who wants to be involved in decision-making) than being unable to influence any decision that affects him or her.*⁵⁶

How a Human Rights Act may assist

60. We believe that a duty of equal access should be included in a federal Human Rights Act and should recognise the rights of victim-survivors, affording them similar procedural rights to those of the accused, including guaranteeing
 - 60.1 access to interpreters at all stages of the police and judicial process;
 - 60.2 access to legal representation to understand their rights; and
 - 60.3 access to gender-based violence and trauma informed, culturally safe support services.
61. A duty of equal access for victim-survivors should also include allowing the participation of victim-survivors in the criminal legal process where decisions are being made that directly impact them, for instance bail decisions. This can occur through legal representatives or through the direct participation of the victim-survivor. Consulting with and listening to the concerns and wishes of victim-survivors in the legal process acknowledges that they have expertise in the issues that impact them, including the safety of their children and themselves.
62. Victim-survivor participation in the criminal legal process is not novel. As noted by former Commissioner for Victims Rights, SA, Michael O'Connell, United States' Federal Courts can appoint legal representation for a victim-survivor.⁵⁷ We note that the Charter of Victims Rights in NSW provides that victim-survivors should be consulted about the charges laid against the accused, or the reason for not laying charges, as well as decisions by the prosecution to modify charges or not proceed with them, and more generally about the progress of criminal proceedings.⁵⁸ However, the experience of our clients is that they are very rarely consulted and often have very limited knowledge of the progress of criminal proceedings to which they are the primary witness.
63. A failure to provide a victim-survivor with appropriate supports when reporting violence and during the criminal legal process can have a profound impact on the rights of victim-survivors including their right to life, right to family, and the right to not be subjected to cruel, inhuman or degrading treatment. For example, we hear from several of our clients that they are told by police not to attend court events in protection order proceedings, unless specifically required. In practice, this means applications can be made to reduce protections under a protection order, and agreements and pleas can be reached by the defendant and police without a victim-survivor being heard on issues that directly impact them and their children's safety. Some victim-survivors may also seek to vary a protection order, but their views are not put before the court. Victim-survivors should have standing and a right to be heard during proceedings that affect their safety with the judicial officer then making their decision.
64. Further, if victim-survivors are not provided with appropriate gender-based violence informed, trauma-informed, culturally safe, disability aware services, or translation services or communication supports during the initial stages of an investigation, this can compromise their reporting of the violence. In our experience, this can lead to negative police, judicial and community perceptions of

⁵⁶ Michael O'Connell, 'Integrating victims rights in criminal proceedings' (2017/2018) *Australian Institute of Judicial Administration* 10.

⁵⁷ *Ibid*, 5. See also United States Code, Title 18, § 3771.

⁵⁸ *Victims Rights and Support Act 2013* (NSW), s 6.5.

their credibility if their stories contain inconsistencies by virtue of their experience of trauma or due to lack of specialist translation services or lack of support to help them effectively communicate.

65. A Human Rights Act which embeds a duty to equal access for victim-survivors in the criminal legal process, in addition to the duty towards defendants, sends a clear message that the voices and experiences of victim-survivors are important. It recognises that a legal system which respects victim-survivors and their right to dignity, life and family, is a system which provides them with the tools to understand and participate where appropriate in legal processes which directly impact them, their safety, and their children.

Duty of Participation

66. We support the duty of participation with respect to First Nations people, people with disabilities and children as proposed by the AHRC in its *Position Paper*. We strongly recommend that women and girls must also be expressly included as a group that requires consultation when policies or decisions are proposed that directly or disproportionality impact them.

67. The inclusion of women and girls in this duty is supported by Article 7 of CEDAW which stipulates that,

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

68. Women and girls should be able to participate in the formulation of decisions and policies that directly or disproportionately impact them. This participation is important to the realisation of women's equality. Women and girls with lived experience of gendered violence make valuable contributions to decisions and policies that concern gender-based violence and they should therefore be consulted by government.

If you would like to discuss any aspect of this submission, please contact Anna Blacket, Solicitor or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

Philippa Davis
Principal Solicitor