AFFILIATION OF AUSTRALIAN WOMEN'S ADVOCACY ALLIANCES

Draft General Comment No. 38
Article 22 ICCPR (Freedom of Association)

INTRODUCTION

AAWAA is a peak body and represents women's rights organisations from all Australian states and territories. We are not affiliated with any political party or religion and advocate on the basis of evidence for the protection and advancement of women and girls where we are vulnerable because of our sex.

We welcome the Committee's draft elaboration of General Comment No. 38 on Article 22 (Freedom of Association) of the International Covenant on Civil and Political Rights and its articulation of the interdependence between freedom of association and other Covenant rights, the detailed four-part test for restrictions, and States parties' positive obligations; however, the draft does not yet clearly affirm that women have the right to form and maintain female-only associations on the basis of our biological sex, and it contains language that could, in practice, be used to restrict or delegitimise such associations.

Recent decisions of the Federal Court of Australia, including *Lesbian Action Group Inc v Australian Human Rights Commission FCA 432* and *Giggle for Girls Pty Ltd v Tickle FCAFC 64*, show that, without such clarity, national frameworks can in practice make female-only organising legally precarious or impossible.

Our submission therefore proposes specific clarifications to the draft General Comment to

- Recognise explicitly women's right to associate on the basis of biological sex
- Require that restrictions on female-only associations be treated and tested as Article 22(2) restrictions, and
- Ensure that language on 'non-discrimination' and 'hostile discourse' is not used to delegitimise sex-based advocacy by women's organisations.

COMMENTS ON PARAGRAPH 9. FREEDOM OF ASSOCIATION FOR WOMEN

Paragraph 9 lists persons and groups for whom restrictions on freedom of association may have a differentiated and heightened impact, including women and LGBTQI+ persons as separate categories.

Comment

We welcome the explicit recognition that women as a class face structural and intersecting barriers to exercising freedom of association, alongside other groups. This reflects the reality that women's associations are often targeted in law and practice, including when women organise to defend our sex-based protections and rights.

However, later paragraphs (especially para 51) risk collapsing women's sex-based advocacy into 'hostile discourse' against LGBTQI+ persons, thereby undermining the protection for women recognised here. To avoid this, it is essential that the Committee clarify that:

- Women's organisations are entitled to organise specifically on the basis of biological sex, and
- The mere fact that a women's association holds and expresses views about the relationship between sex and gender identity — for example, that sex is binary and relevant for law and policy — does not in itself constitute 'hostile discourse'.

Suggested addition after paragraph 9

> 9 bis. In applying the Covenant's guarantees of equality and non-discrimination, States parties must ensure that women's organisations are able to associate on the basis of biological sex where this is integral to their purposes. The fact that such associations advocate for the recognition of sex as a relevant legal and social category, or for the maintenance of sex-based protections and rights, does not, in itself, constitute discriminatory or hostile discourse against other protected groups.

COMMENTS ON PARAGRAPH 15. THE RIGHT TO DEFINE MEMBERSHIP ON THE BASIS OF BIOLOGICAL SEX.

Paragraph 15 affirms that associations have the right to freely determine their membership, "provided they respect the right to non-discrimination", as well as their purposes, programmes and actions, subject to article 22(2).

Comment

This paragraph is central for women's associations. We strongly support the recognition of independence, autonomy and self-governance, and the explicit statement that associations have the right to determine their membership.

At the same time, the clause "provided they respect the right to non-discrimination" is very open-textured. Without clarification, there is a serious risk that any sex-based membership criterion — such as an association for women — could be characterised as 'discriminatory' in domestic law and thereby treated as incompatible with Article 22, regardless of purpose or proportionality.

In Australia, for example, the Lesbian Action Group (LAG) sought an exemption under national anti-discrimination law to hold public events for 'lesbians born female' only. The Australian Human Rights Commission refused the exemption. A review tribunal affirmed the refusal on the basis that the exemption power was not intended to permit "overt" discrimination, even where the association's purposes were clearly tied to the shared experience of being female and lesbian. The Federal Court ultimately held that this interpretation was legally erroneous, and that the exemption power did exist to permit conduct that would otherwise constitute discrimination, subject to proper consideration of human rights. This litigation illustrates the real risk that associations' autonomy in determining membership can be hollowed out in practice.

Suggested amendment to paragraph 15

We respectfully urge the Committee to retain the core of paragraph 15, but to add a clarifying sentence recognising that

- Sex-based membership criteria may be legitimate where they are genuinely connected to the association's purposes, and
- Assessment of compatibility with the Covenant must apply the full Article 22(2) test, rather than relying on an abstract notion of 'non-discrimination' detached from context.

For example,

> 15. … Associations have the right to freely determine their membership, provided they respect the right to non-discrimination and any limitations are assessed in light of article 22(2). In this regard, membership criteria that are intrinsically linked to the association's purposes, such as criteria based on biological sex for women's organisations, may be compatible with the Covenant where they pursue a legitimate aim and meet the requirements of necessity and proportionality.

This wording would protect the core autonomy interest while ensuring that truly exclusionary or abusive practices remain subject to scrutiny.

COMMENTS ON PARAGRAPHS 28–35. STATES PARTIES' NEGATIVE AND POSITIVE OBLIGATIONS

These paragraphs set out States parties' obligations to respect and ensure Covenant rights, and to create an enabling environment for associations across their life cycle. They emphasise that cumulative and indirect measures can infringe freedom of association; that States must address hostile discourses and narratives against associations; and that particular attention is needed where associations focus on controversial issues, such as gender issues.

Comment

We strongly support this section. It provides a robust framework for assessing whether States have created a genuine enabling environment, and recognises that a hostile climate, including hostile discourse, can chill associational activity.

Organisations that defend sex-based protections and rights increasingly face hostile narratives that portray them as 'extremist' or 'anti-equality'. The Australian LAG case is again instructive: the Federal Court held that the reviewing tribunal had failed to apply its statutory duty to act with regard to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights, treating those obligations as merely aspirational. This omission directly affected the LAG's ability to obtain legal protection to hold female-only events.

Suggested addition after paragraph 35
We suggest adding an explicit reference to women's organisations and to associations defending sex-based protections and rights, as an illustration of the hostile narratives the Committee already mentions:

> 35 bis. The obligation to address hostile actions, discourses and narratives applies in particular where women's organisations, including those defending sex-based protections and rights, are portrayed as 'extremist' or 'anti-equality' for advocating the continued recognition of biological sex as a relevant legal and social category. States parties should ensure that such associations are able to operate without undue interference or stigmatisation, and that public authorities do not themselves contribute to a hostile environment against them.

COMMENTS ON PARAGRAPHS 41–50 — RESTRICTIONS AND THE FOUR-PART TEST
The clarification in paragraphs 41–50 that restrictions must meet the cumulative requirements of legality, legitimate aim, necessity and proportionality is crucial. In relation to women's organisations, it is imperative that the Committee state explicitly that broad invocations of public order, morals or security cannot justify measures that, in effect, impede women's autonomous organising or advocacy for gender equality, particularly in light of Article 5(1).

Comment
We welcome this clear, strict articulation of the restriction regime. It is consistent with general comment No. 34 on article 19 (freedom of expression) and general comment No. 37 on article 21 (right of peaceful assembly), and it sets a high bar for any restriction, including dissolution, deregistration or criminalisation of associational activity.

The Committee should make clear in General Comment No. 38 that States parties have a positive responsibility to ensure that anti-discrimination and equality legislation is drafted, interpreted and applied in a way that is clear, accessible and compatible with Article 22. In particular, such legislation must not, in law or in practice, operate as a de facto blanket prohibition on associations maintaining membership criteria that are integral to their purposes, such as female-only associations, Indigenous associations, or other groups defined by a protected characteristic.

Where legal frameworks make it effectively impossible for such associations to exist or operate except by obtaining burdensome, uncertain or discretionary exemptions, those frameworks amount to restrictions on freedom of association within the meaning of Article 22(2). In such circumstances, the restriction must satisfy the cumulative requirements of legality, legitimate aim, necessity and strict proportionality, and must not be treated as justified merely because it is expressed through anti-discrimination law.

The recent Australian jurisprudence mentioned above illustrates this risk. In *Lesbian Action Group v Australian Human Rights Commission*, an association seeking to hold public events for 'lesbians born female' only was refused an exemption under national anti-discrimination law, and the reviewing tribunal treated the exemption power as unavailable for what it characterised as 'overt' discrimination. On appeal, the Federal Court held that approach was

legally erroneous and confirmed that the exemption power exists precisely to permit conduct that would otherwise constitute discrimination, subject to proper consideration of human rights.

The same structural problem is visible in *Giggle for Girls Pty Ltd v Tickle* FCAFC 64. The Full Federal Court held that the operator of a women-only digital platform had engaged unlawful discrimination on the ground of gender identity by excluding a transgender woman. In contemporary practice, such platforms are one of the main ways women form and sustain communities, share information and organise collectively, and therefore function as spaces for the exercise of freedom of association in the digital environment.

In *Giggle,* the Court noted that the *Sex Discrimination Act* contains only narrow, specific exemptions and stressed that the Court was confined to applying the Act as enacted, making clear that any reconsideration of the balance between sex-based and gender-identity protections is a matter for the legislature. The decision is now the subject of an application for special leave to appeal to the High Court of Australia, underscoring that the adequacy of the statutory framework in reconciling sex-based associational rights with gender-identity protections is a live and contested issue in domestic law.

Suggested addition after paragraph 42

> 42 bis. The strict requirements of article 22(2) apply equally where States parties impose, through anti-discrimination or other legislation, obligations on associations that effectively prevent them from maintaining membership criteria integral to their purposes, such as associations of women, Indigenous peoples or other groups defined by a protected characteristic. Blanket legal obligations that render impossible, or practically unworkable, the operation of female-only associations or similar organisations must be justified under article 22(2) as restrictions on freedom of association, and must meet the requirements of legality, legitimate aim, necessity and strict proportionality. In practice, blanket legal obligations that render female-only associations impossible to operate lawfully should be regarded as incompatible with Article 22, given the central role such associations play in enabling women's participation and equality.

COMMENTS ON PARAGRAPH 51. ABUSE OF RIGHTS AND ‘HOSTILE DISCOURSE’

Paragraph 51 states that individuals and groups cannot claim protection of article 22 if they pursue violent and anti-democratic activities or promote war propaganda or advocacy of hatred under article 20. It then adds that “associations cannot be used for hate speech or discriminatory or hostile discourse and actions concerning others, such as migrants, ethnic minorities, women and LGBTQ+ persons,” and refers to addressing participation in such associations in conformity with articles 22, 19 and 21.

Comment

We agree that Article 22 does not protect violent or anti-democratic activities, and that associations cannot be used as vehicles for advocacy of hatred that constitutes incitement to discrimination, hostility or violence within the meaning of article 20.

However, the current wording of paragraph 51 goes significantly beyond article 20(2). It introduces an undefined category of “discriminatory or hostile discourse and actions concerning others” and lists “women and LGBTQ+ persons” together as examples. Without clear anchoring in article 20 and without definitions, this formulation risks being interpreted by States parties in a way that treats legitimate sex-based advocacy by women’s organisations as ‘hostile discourse’ against LGBTQ+ persons, and thus outside the scope of Article 22.

Women’s organisations that argue, for example, that biological sex is relevant for the definition of ‘woman’ in law, or that female-only spaces and associations are necessary for our safety and for our effective participation in public and political life, are already being characterised as ‘hateful’ or ‘hostile’ towards transgender people in public and legal discourse. The LAG case illustrates this dynamic: the association’s lesbian feminist critique, and its insistence on female-only events, were treated as fundamentally incompatible with gender identity-based protections, leading to the refusal of an exemption and requiring Federal Court intervention to correct legal errors in the decision-making process.

If paragraph 51 remains in its present form, it will provide an interpretive hook for States to characterise sex-based advocacy as ‘hostile’, and thereby to deny women’s organisations the protection of Article 22. This would undermine the protection that paragraph 9 seeks to extend to women as a group facing structural barriers.

Suggested revision to paragraph 51

We therefore urge the Committee to revise this paragraph to :

- Retain its reference to article 20(1) and (2) and the prohibition on violent and anti-democratic activities, and
- Narrow the reference to ‘hostile discourse’ so that it is clearly tied to article 20(2), and
- Add an explicit clarification that critical or dissenting views about law and policy, including on sex and gender identity, do not amount to ‘hostile discourse’ merely because they are controversial.

For example,

> 51. Article 5(1) of the Covenant prohibits the abuse of rights protected by the Covenant. Therefore, individuals and groups cannot claim the protection of article 22 if they pursue violent and anti-democratic activities or promote war propaganda (article 20(1)) or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (article 20(2)). Associations cannot be used as vehicles for such advocacy or for discriminatory violence or harassment against others, such as migrants, ethnic minorities, women and LGBTQ+ persons. As far as possible, action should be taken in such cases against the individual perpetrators, rather than against the organisation as a whole. Criticism of laws, policies or social practices, including those relating to sex, gender identity, religion or other protected characteristics, does not in itself amount to advocacy of hatred within the meaning of article 20(2), nor to ‘hostile discourse’, merely because it is controversial or offensive to some. Participation in associations whose dominant message falls within the

> scope of article 20 must be addressed in conformity with the requirements for restrictions set out in article 22 and, when relevant, articles 19 and 21 of the Covenant.

This would preserve necessary protections against genuine hate advocacy, while reducing the risk that women's sex-based advocacy is excluded from Article 22 protection.

CONCLUSION

The draft General Comment provides a strong foundation for the protection of freedom of association. With the clarifications suggested above, particularly in relation to paragraph 15 (autonomy and membership), paragraph 42 (application of the restriction regime to female-only associations), and paragraph 51 (abuse of rights and 'hostile discourse'), it can also ensure that women's organisations — including those defending sex-based protections and rights — are clearly recognised as legitimate associations entitled to the full protection of Article 22.

We thank the Committee for considering these comments.