

Briefing note on Australia's sex and gender
framework and women's sex-based human rights

Prepared for the President and Commissioners of
the Australian Human Rights Commission

TAB 1

A. Executive summary

B. Analysis of the
regulatory and
institutional framework

C. A framework for clarity

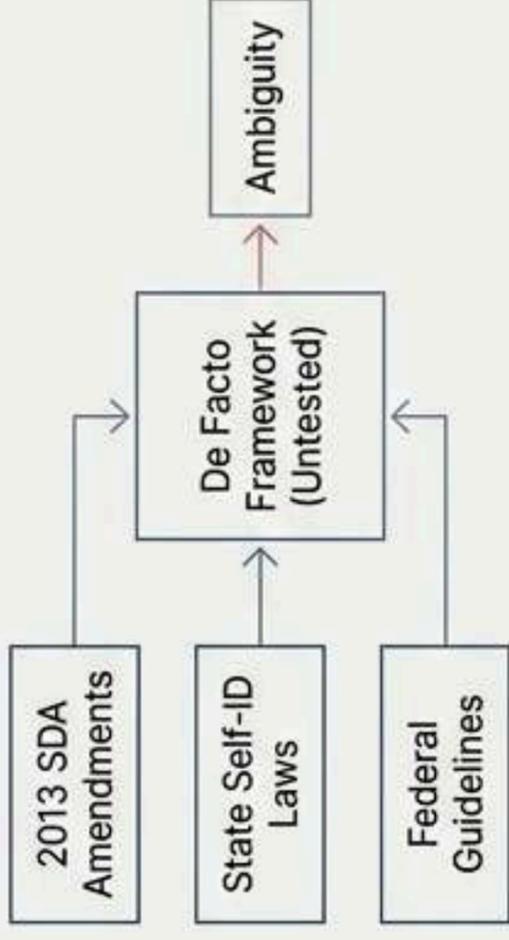
Executive Summary



The legal landscape regarding sex and gender has evolved piecemeal over a decade. It now operates as a single, untested framework that creates significant ambiguity for women and girls.

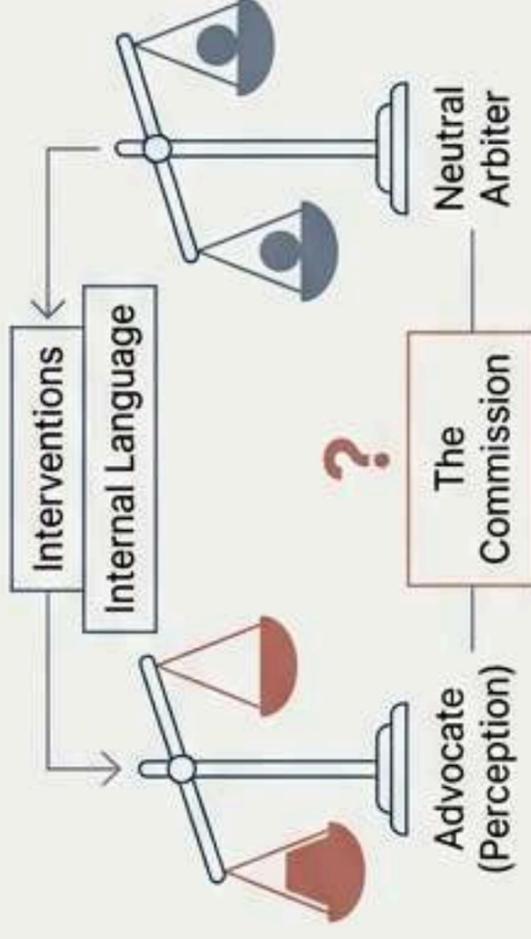
1. Statutory Interaction

The cumulative effect of 2013 SDA amendments, state self-ID laws, and federal guidelines has created a “de facto framework” that has never been examined as a whole.



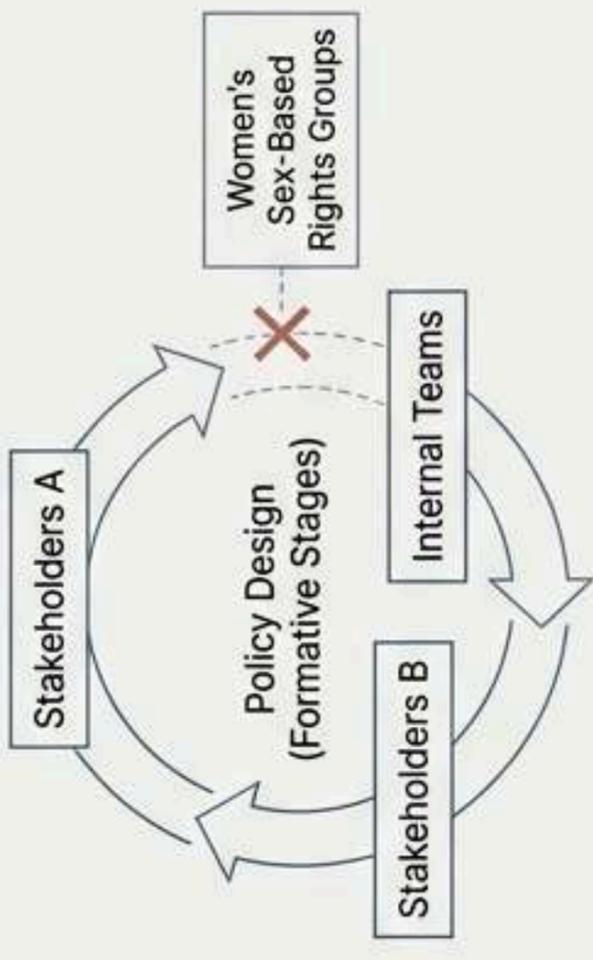
2. Institutional Neutrality

Recent interventions (e.g., Tickle v Giggle) and internal language have created a perception that the Commission acts as an advocate for a specific model rather than a neutral arbiter.

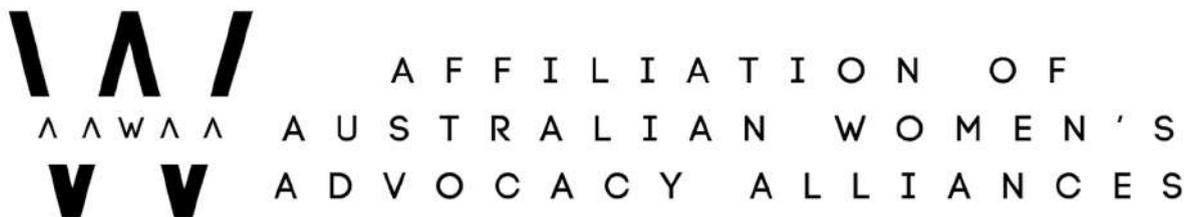


3. Consultation

There is a structural imbalance in engagement, with women’s sex-based rights groups excluded from the formative stages of policy design.



The Proposed Remedy: We invite the Commission to use Section 11 of the AHRC Act to conduct a structural review.



Analysis of the regulatory and institutional framework for sex and gender in Australia

EXECUTIVE SUMMARY

This briefing document synthesises current concerns regarding the legal and regulatory landscape of sex and gender in Australia, particularly as they relate to the rights and protections of women and girls as a sex class. The analysis identifies three main areas of systemic friction:

- **Systemic legal ambiguity:** Over the past decade, piecemeal legislative and policy changes have created a de facto framework lacking internal coherence. This has produced significant uncertainty regarding the legality of female-only spaces, services, and sports categories.
- **Institutional neutrality concerns:** There is a growing perception that the Australian Human Rights Commission (AHRC) has shifted from a neutral human rights arbiter to an institutional advocate for a specific model of gender identity, as reflected in its amicus curiae interventions and internal communications.
- **Consultation deficits:** A structural disparity exists in stakeholder engagement. LGBTQIA+ organisations are frequently involved across government areas in policy design, while women's organisations focused on sex-based protections are often excluded or consulted only at late, non-formative stages.

The document proposes a structured examination of this framework under Section 11 of the *Australian Human Rights Commission Act* to provide legal clarity and ensure Australia's compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

1. THE FRAGMENTED STATUTORY AND REGULATORY LANDSCAPE

The current framework governing sex and gender has developed incrementally since 2009 without a holistic review of its cumulative impact on women and girls.

1.1 Key elements of the piecemeal framework

The following instruments and decisions interact to form the current regulatory environment:

- **2013 Sex Discrimination Act (SDA) amendments:** Introduced protections for “gender identity” and “intersex status” while removing clear biological definitions of “woman” and “man.”
- **Federal guidelines (2013 onwards):** The *Australian Government Guidelines on the Recognition of Sex and Gender* expect public and publicly funded services to align with a self-identification model.
- **State and territory laws:** Implementation of sex self-identification laws (e.g. QLD, NSW, WA) allows legal sex markers to be changed, often without consistent consideration of how these changes interact with sex-based exemptions.

- **National sport guidance:** Developed by the AHRC and AIS, this emphasises inclusion of male-bodied participants in women's sports, with limited engagement with established sex-based protections for female-only sport.
- **Judicial and administrative decisions:** Cases such as the *Lesbian Action Group* (LAG) exemption refusal and *Tickle v Giggle* have created conflicting interpretations of the interaction between women's sex-based rights and gender identity.

1.2 Impact on women and girls

The interaction of these discrete policies has generated "system-level ambiguity." Key concerns include:

- **Legal uncertainty:** Service providers and women's organisations are unsure when female-only spaces and services are lawful under SDA provisions such as Sections 7D (special measures), 30, and 42.
- **International law discrepancies:** Conflicting readings of CEDAW exist. While the Federal Court in *Tickle v Giggle* rejected CEDAW-based gender-identity protections, the AHRC has advanced a broader interpretation collapsing sex into gender identity.
- **Administrative displacement:** Women's sex-based rights risk being displaced through administrative redefinition rather than transparent legislative balancing.

2. INSTITUTIONAL ROLE AND NEUTRALITY OF THE AHRC

A recurring theme is the perceived erosion of the AHRC's independence and neutrality. Evidence suggests the Commission may be functioning as an institutional advocate for gender-identity models over women's sex-based protections.

2.1 The Tickle v Giggle amicus intervention

- **Stated role:** The Sex Discrimination Commissioner claimed to appear as *amicus curiae* only to assist on questions of law.
- **Actual submissions:** The AHRC recharacterised the case as a gender-identity claim and argued that female-only policies could be unlawful even if intended as "special measures."
- **Internal sentiment:** FOI-disclosed emails revealed staff describing the judgment as a "win," language more characteristic of activism than neutrality.

2.2 Engagement with international mechanisms

FOI materials indicate internal discussions about using influence with the Global Alliance of National Human Rights Institutions (GANHRI) to challenge UN Special Rapporteur Reem Alsalem after she emphasised women's sex-based protections diverging from the Commission's position.

2.3 Patterns in guidance and decisions

- **Sport and LAG decisions:** Both adopt a model where gender identity is determinative, treating women's sex-based boundaries as presumptively discriminatory.
- **Lack of balancing:** Despite statutory duties to uphold universality and indivisibility of rights, little evidence shows the AHRC balancing women's rights as a sex class against other attributes.

3. STRUCTURAL GAPS IN MEANINGFUL CONSULTATION

Stakeholder engagement appears imbalanced, privileging gender-identity advocates over sex-based women's organisations.

3.1 The consultation disparity

FOI releases and stakeholder lists show a recurring pattern:

- **LGBTQIA+ stakeholders:** Granted early access at project design stages (e.g. *Sex Files* project, ABS sex/gender standards, state self-ID reforms).
- **Women's sex-based rights groups:** Often excluded from formative stages or invited only at the public consultation stage after key policy directions were determined.

3.2 Compliance with international standards

CEDAW Article 7 and General Recommendation 23 require states to ensure that women participate meaningfully and on equal terms with men in the formulation and implementation of government policy, not just in token consultations. The current ad hoc consultation model falls short. Organisations such as the Coalition of Activist Lesbians (CoAL) and Feminist Legal Clinic (FLC), which hold ECOSOC status, have not been treated as standing domestic stakeholders by government or its agencies.

4. STATUTORY FRAMEWORK FOR REFORM

Provision	Function
Section 10A	Requires the Commission to perform functions with regard to the universality and indivisibility of human rights.
Section 11(1)(e)	Empowers the Commission to examine enactments for inconsistency with human rights and report findings to the Minister.
Section 11(1)(f)	Allows inquiries into acts or practices potentially inconsistent with human rights.
Section 13	Grants power to do all things necessary for the performance of its functions (basis for court interventions).
Section 15	Authorises collaboration and consultation with appropriate non-governmental organisations.

The Australian Human Rights Commission Act provides tools for addressing these issues without pre-empting parliamentary decisions.

5. RECOMMENDATIONS AND PROPOSED ACTIONS

To restore institutional credibility and legal clarity, the following actions are proposed:

- **Conduct a Section 11 inquiry:** Use statutory powers to map the full sex and gender framework, identifying where clarification is needed to protect women as a sex class under CEDAW.
- **Establish a public amicus policy:** Specify how the Commission distinguishes between assisting the court and advocating for outcomes, ensuring neutrality where policy positions exist.
- **Formalise stakeholder recognition:** Recognise women's sex-based rights organisations (e.g. AAWAA, CoAL, FLC, WRNA) as distinct stakeholders to be consulted at the design stage of relevant projects.
- **Provide transparent reporting:** If the Commission declines review, it should explain how its Section 11 functions apply to this contested area.

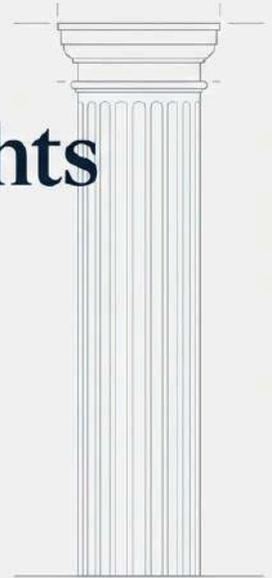
Principle of legality

Under the common law 'principle of legality', Parliament is presumed not to abrogate fundamental rights or depart from settled legal concepts unless it does so clearly and expressly. From women's organisations' perspective, the way sex has effectively been re-engineered through case law, guidance and administrative practice, without Parliament ever squarely confronting the question of how women's sex-based protections and rights should be balanced against gender identity, sits uncomfortably with that principle. A structured inquiry under section 11 could help to surface where current practice may be out of step with what Parliament has actually decided, and where clearer legislative choices are needed.

By adopting a structured, inclusive approach, the Commission can provide Parliament with the consolidated human-rights analysis necessary to ensure that sex-based protections are not quietly displaced by administrative redefinition.

A Framework for Clarity: Sex, Gender and Human Rights

A proposal for a statutory review and enhanced consultation posture

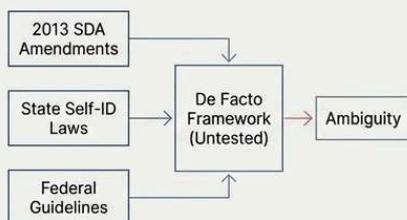


Executive Summary

The legal landscape regarding sex and gender has evolved piecemeal over a decade. It now operates as a single, untested framework that creates significant ambiguity for women and girls.

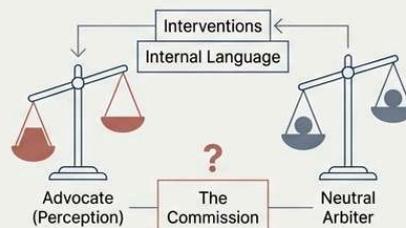
1. Statutory Interaction

The cumulative effect of 2013 SDA amendments, state self-ID laws, and federal guidelines has created a “de facto framework” that has never been examined as a whole.



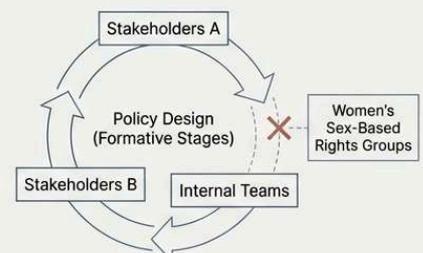
2. Institutional Neutrality

Recent interventions (e.g., Tickle v Giggle) and internal language have created a perception that the Commission acts as an advocate for a specific model rather than a neutral arbiter.



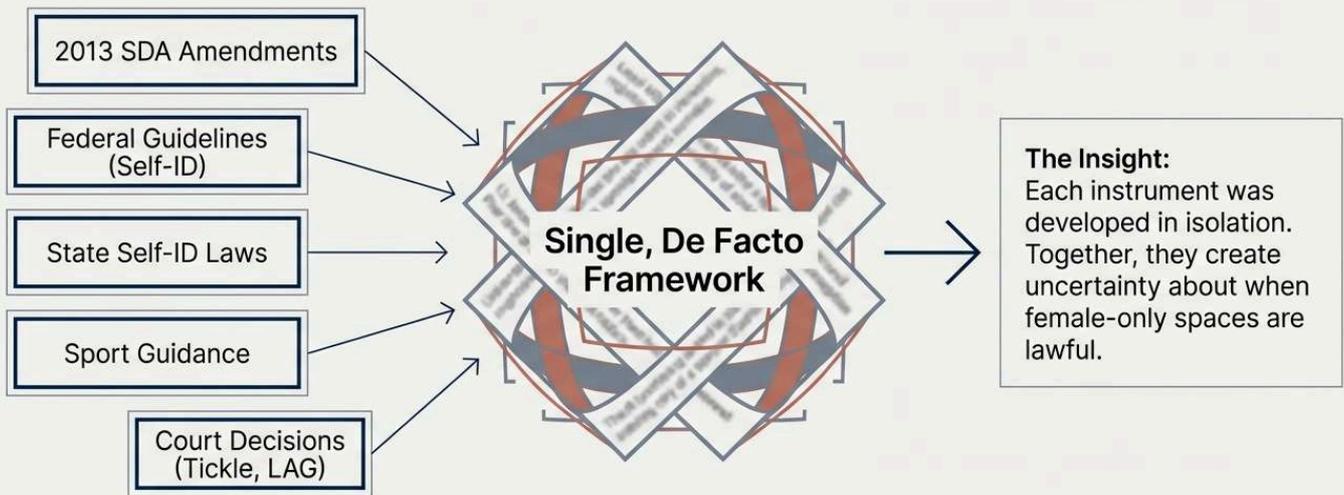
3. Consultation

There is a structural imbalance in engagement, with women’s sex-based rights groups excluded from the formative stages of policy design.



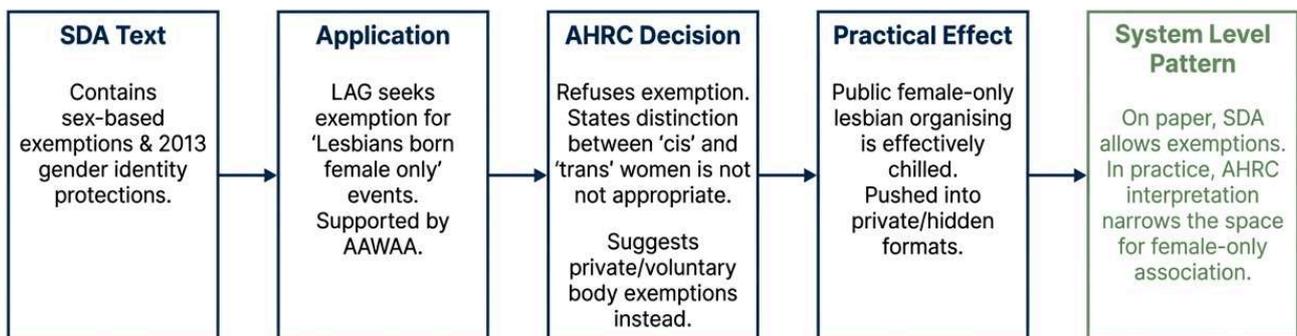
The Proposed Remedy: We invite the Commission to use Section 11 of the AHRC Act to conduct a structural review.

The Core Issue is Cumulative Ambiguity

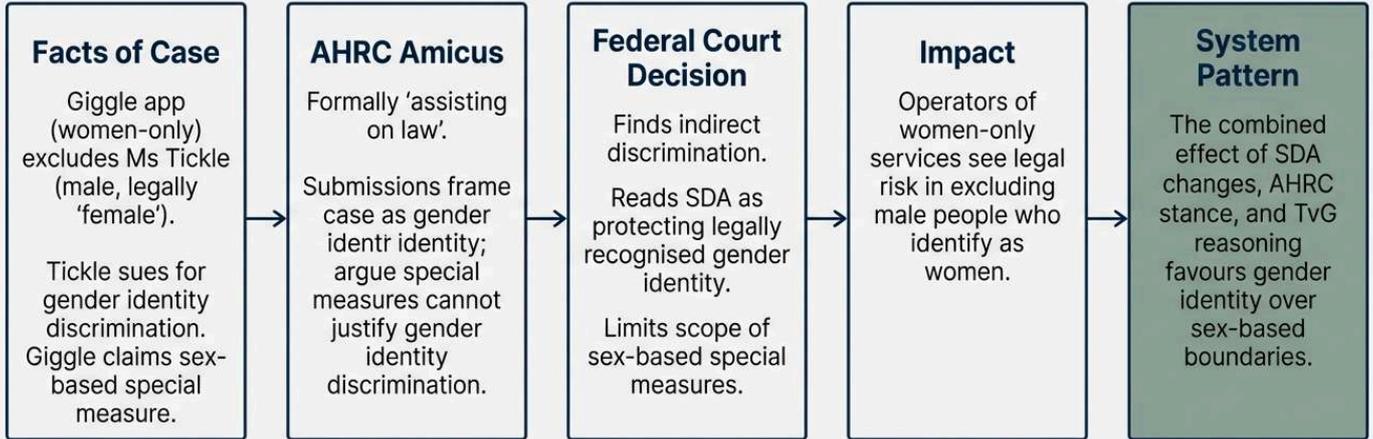


This combined framework has **never been tested against Australia's obligations to protect women as a sex class under CEDAW.**

Case Study 1: The Lesbian Action Group (LAG)



Case Study 2: Tickle v Giggle (TvG)



Case Study 3: Domestic Violence Refuges



The Perception of Institutional Bias

Neutrality must be seen to be believed.



Tickle v Giggle Amicus Role

While formally ‘assisting on law’, submissions argued for a specific outcome—collapsing sex into gender identity.

1



Internal Language

Internal communications celebrated the judgment as a “win’ for the Commission—language suited to an advocate, not a neutral body.

(Reference internal email/win language)

3



International Pressure

Internal discussions regarding using GANHRI to influence the UN Special Rapporteur because she was viewed as “misconstruing CEDAW”.

The Consequence: These actions create a barrier for women’s groups who feel they cannot rely on the Commission as an independent human rights body.

The Path to Clarity: Using Section 11

11

1. **Section 11(1)(e):** Function to examine enactments for inconsistency with human rights.
2. **Section 11(1)(f):** Function to inquire into acts or practices.
3. **Section 11(1)(g):** Advisory functions to report to the Attorney-General.

The Proposition: Use these functions to ‘map’ the framework and report to Parliament. This allows the AHRC to be the diagnostician rather than the failure.

Addressing Potential Objections

Potential Objection	The Response
The law is clear.	The conflicting views of the Federal Court, AHRC, and UN mechanisms prove ambiguity exists. Providers are currently uncertain.
This is Parliament's job.	Parliament has never been given a consolidated analysis. Section 11 is the mechanism for the AHRC to provide that expert analysis so Parliament can act.
We balance all rights.	The perception of the relevant stakeholders is that a holistic review of the cumulative impact on women as a sex class has not yet happened.
Matters are before the courts.	A Section 11 review looks at legislative architecture, not individual liability. Courts benefit from clearer parliamentary guidance.

Why Clarity Matters



Certainty for service providers trying to follow the law.



Safety and Privacy for women recovering from violence in refuges.



Freedom of Association for lesbians seeking to meet publicly.

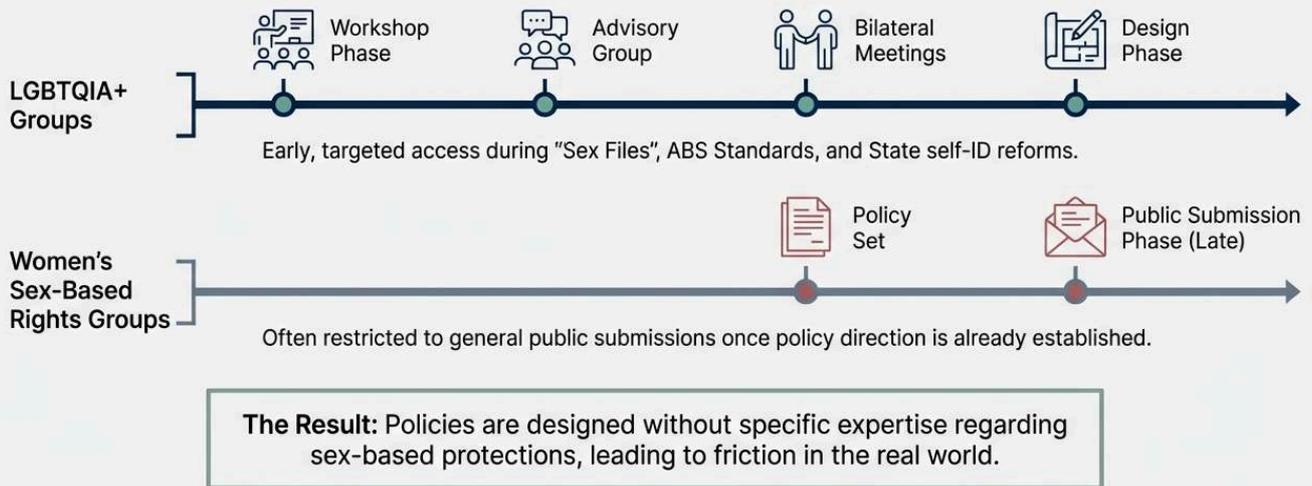


Integrity of the human rights framework.

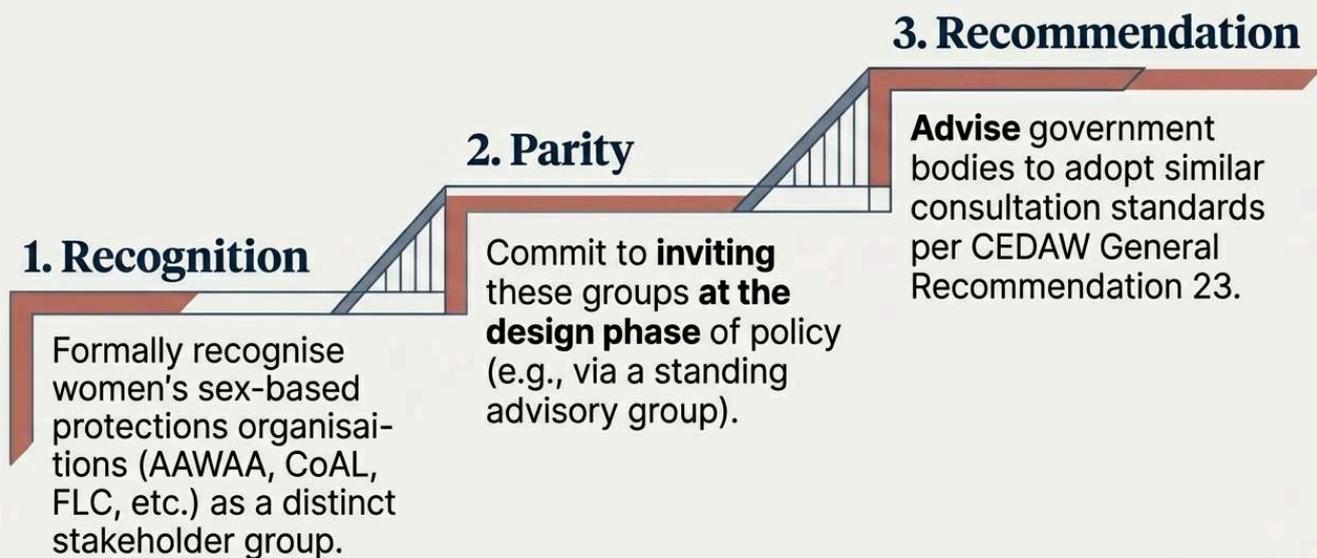
Ambiguity helps no one. A structured review is the first step to restoring confidence.

A Structural Imbalance in Consultation

Meaningful participation requires involvement in formulation, not just late-stage submission.



A Constructive Path for Consultation



Request 1: The Statutory Review



Acknowledge the contest and uncertainty around the interaction of sex-based and gender-identity protections.



Consider utilising Section 11(1)(e) to examine the cumulative sex and gender framework.



Provide a public account to the Attorney-General and Parliament identifying where clarification is needed.

Request 2: Neutrality & Consultation



Publish clear guidance on the Amicus role. Clarify how the Commission distinguishes between “assisting the court” and advocating for a policy outcome.



Establish a structured mechanism for consulting women’s sex-based rights groups (e.g., a Standing Advisory Group). Reflect on how institutional weight is used in relation to UN mandate holders to ensure open debate is protected.



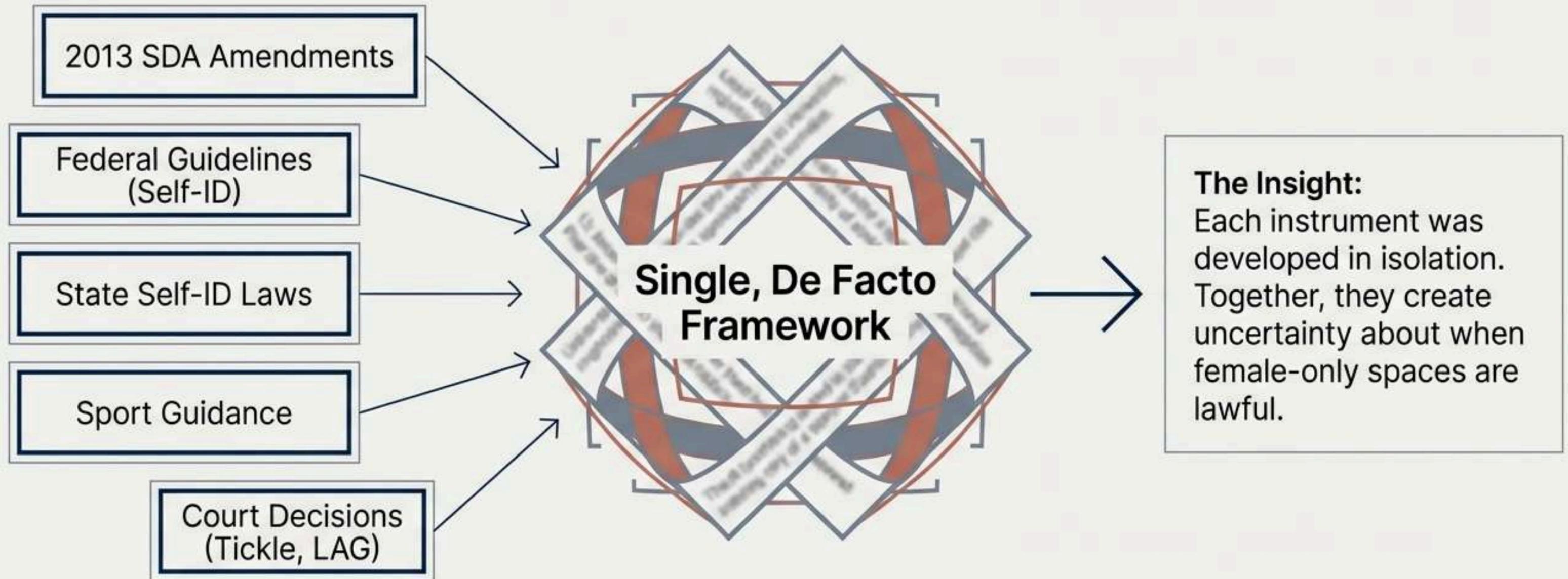
**We thank commissioners for your time
and look forward to being of ongoing
assistance in matters of sex and gender.**

TAB 2

Agenda item 4

Statutory review of sex and
gender laws

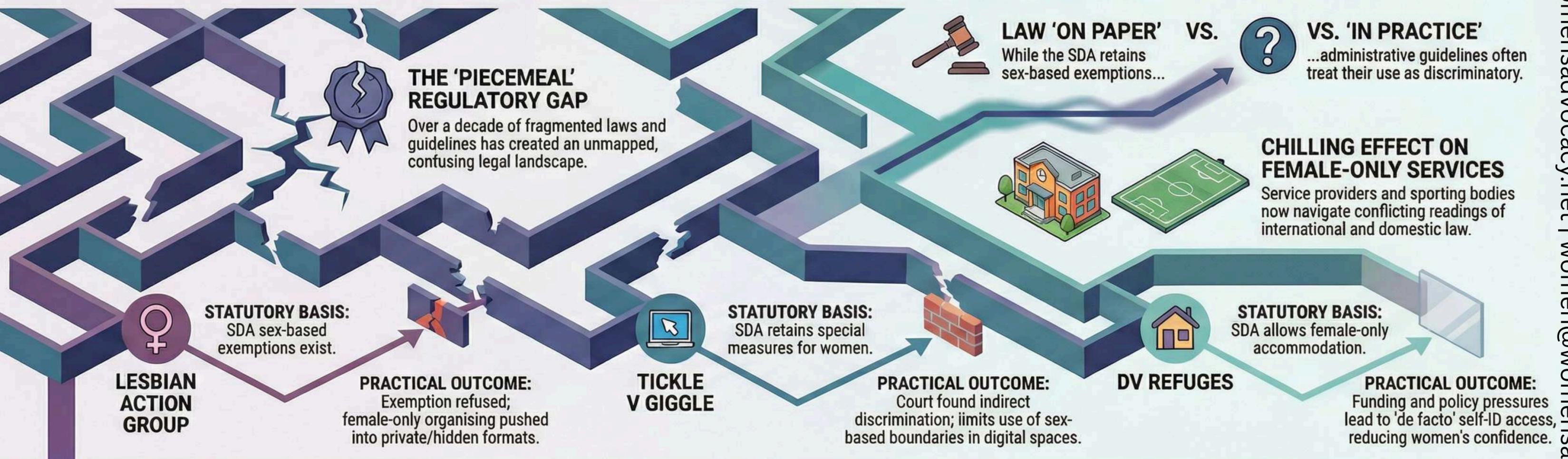
The Core Issue is Cumulative Ambiguity



This combined framework has **never been tested against Australia's obligations to protect women as a sex class under CEDAW.**

Navigating the Labyrinth: The Case for a Statutory Review of Australia's Sex and Gender Framework

THE PROBLEM: SYSTEMIC AMBIGUITY IN PRACTICE



THE SOLUTION: A HOLISTIC STATUTORY REVIEW



Resolving Australia's Sex and Gender Law Ambiguity

To ensure legal clarity for women and girls, a holistic statutory review of fragmented laws is necessary.

THE PROBLEM – A FRAGMENTED FRAMEWORK



A Decade of Piecemeal Development



Disparate laws and guidelines have formed a complex, unexamined framework that lacks a unified structure.



Systematic Legal Ambiguity

Interactions between conflicting laws make it unclear when female-only spaces and sport categories are lawful.



Conflicting International Interpretations

Courts and commissions hold divergent readings of GEDAW obligations regarding sex-based versus gender-based protections.



2013 SDA Amendments
Removed biological definitions of 'man' and 'woman' in favour of gender identity.



State Self-ID Laws

Changed legal sex markers without clarifying how they interact with sex-based exemptions.

Sport Guidance



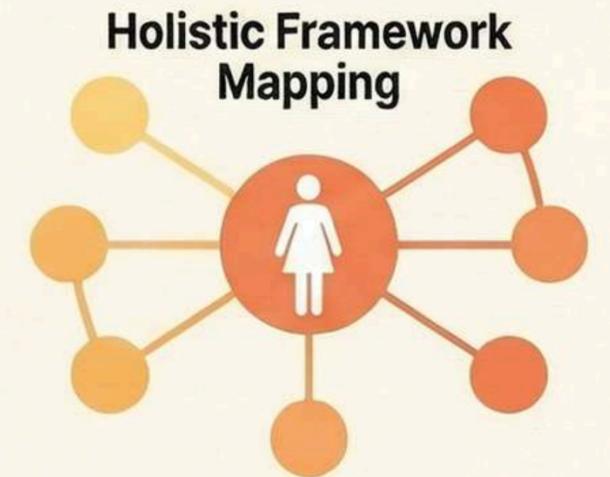
Emphasised inclusion of male-bodied participants with limited engagement with sex-based rights.

THE SOLUTION – A STATUTORY REVIEW



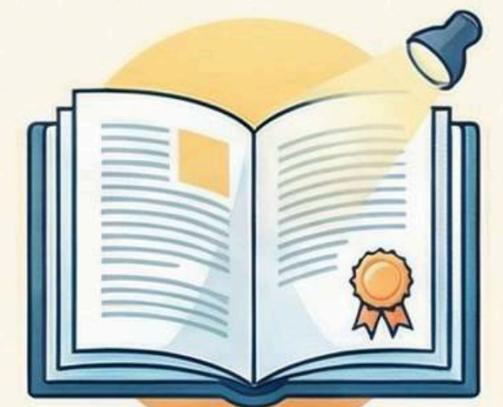
Invoking Section 11 Authority

The AHRC should use Section 11 functions to examine if current enactments are inconsistent with human rights.



Holistic Framework Mapping

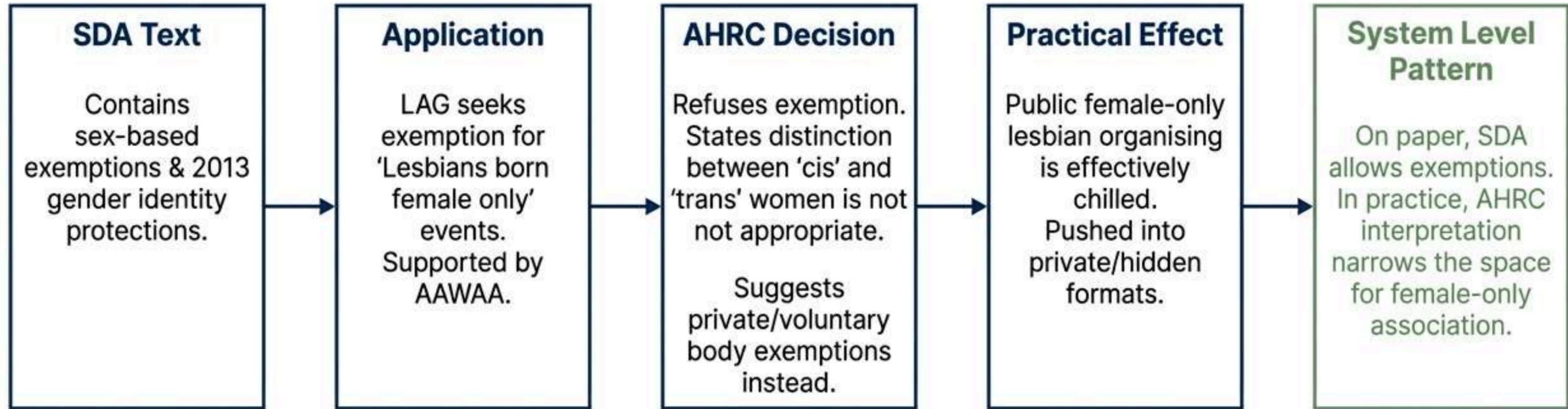
A structured examination would analyze the cumulative impact of these laws on women as a sex class.



Providing a Public Account

A formal report to Parliament would offer the clarity needed for organisations to operate with confidence.

Case Study 1: The Lesbian Action Group (LAG)



The LAG Case: The Narrowing Gap of Sex-Based Rights

THE LEGAL CONFLICT

The Sex Discrimination Act (SDA)

While providing sex-based exemptions, 2013 amendments introduced gender identity and intersex status protections.

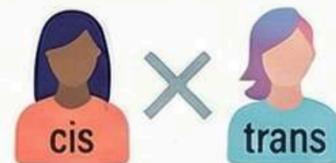
The group sought a temporary exemption to host public events for female-born lesbians only.



DECISION AND IMPACT



The AHRC Refusal



The Commission ruled that distinguishing between "cis" and "trans" women is no longer acceptable.

THE "CHILLING EFFECT"



Public female-only events are now treated as discriminatory, pushing lesbian organising into private formats.

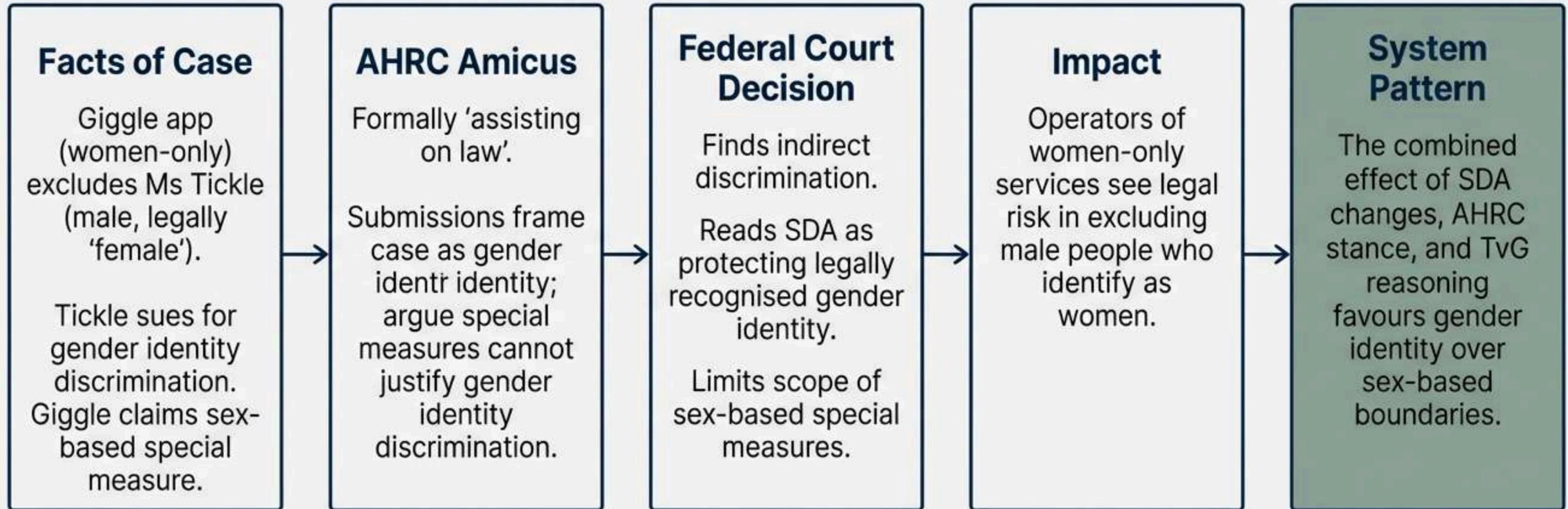


Paper Rights vs. Practical Reality



Administrative use of power is narrowing the legal space for sex-based association in public.

Case Study 2: Tickle v Giggle (TvG)



Tickle v Giggle: The Shift from Sex-Based to Gender Identity Protections

From Legislation to Litigation

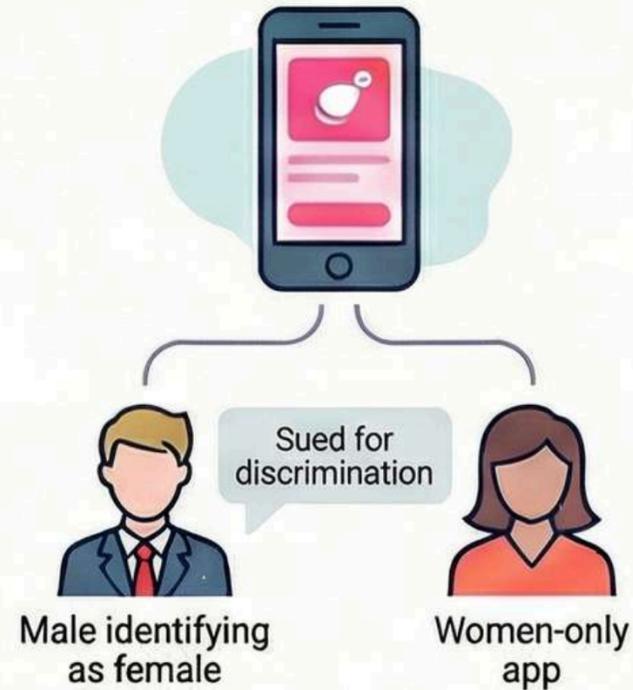
The 2013 SDA Architecture



Biological definitions of 'woman' & 'man' removed

Amendments added gender identity discrimination

The Giggle App Dispute



The AHRC Interpretation

The Commission argued sex-based measures cannot justify discrimination against gender identity.

The Ruling and its Consequences

Federal Court Decision



The court found indirect discrimination, protecting legally recognised gender identity over sex-based boundaries.

Impact on Women-Only Spaces



Operators now face significant legal risk when excluding males who identify as women.

A Systemic Shift in Practice



Sex-based protections

Gender identity



Legal reasoning now effectively favours gender identity over established sex-based protections.



Case Study 3: Domestic Violence Refuges



The Erosion of Female-Only Refuges: Law vs Practice

LEGAL RIGHT (SDA)

Legal exemptions allow female-only spaces

The SDA permits sex-based services to ensure privacy, safety, and dignity.

POLICY CONFLICT

Conflicting policies create tension

Federal and state self-ID laws place a strong emphasis on gender-identity inclusion.

SHIFT IN PRACTICE

FUNDING PRESSURES

Funding and accreditation risks

Shelters fear that excluding male-bodied people may trigger complaints or financial loss.

Policy shift toward self-identification

Staff often avoid stating sex-based rules to minimise perceived legal risks.

Compromised safety for women

Vulnerable women may feel unsafe or stop using services entirely.

Female-only provision is becoming rare

Institutional messaging undermines the confidence that sex-based provision is lawful.

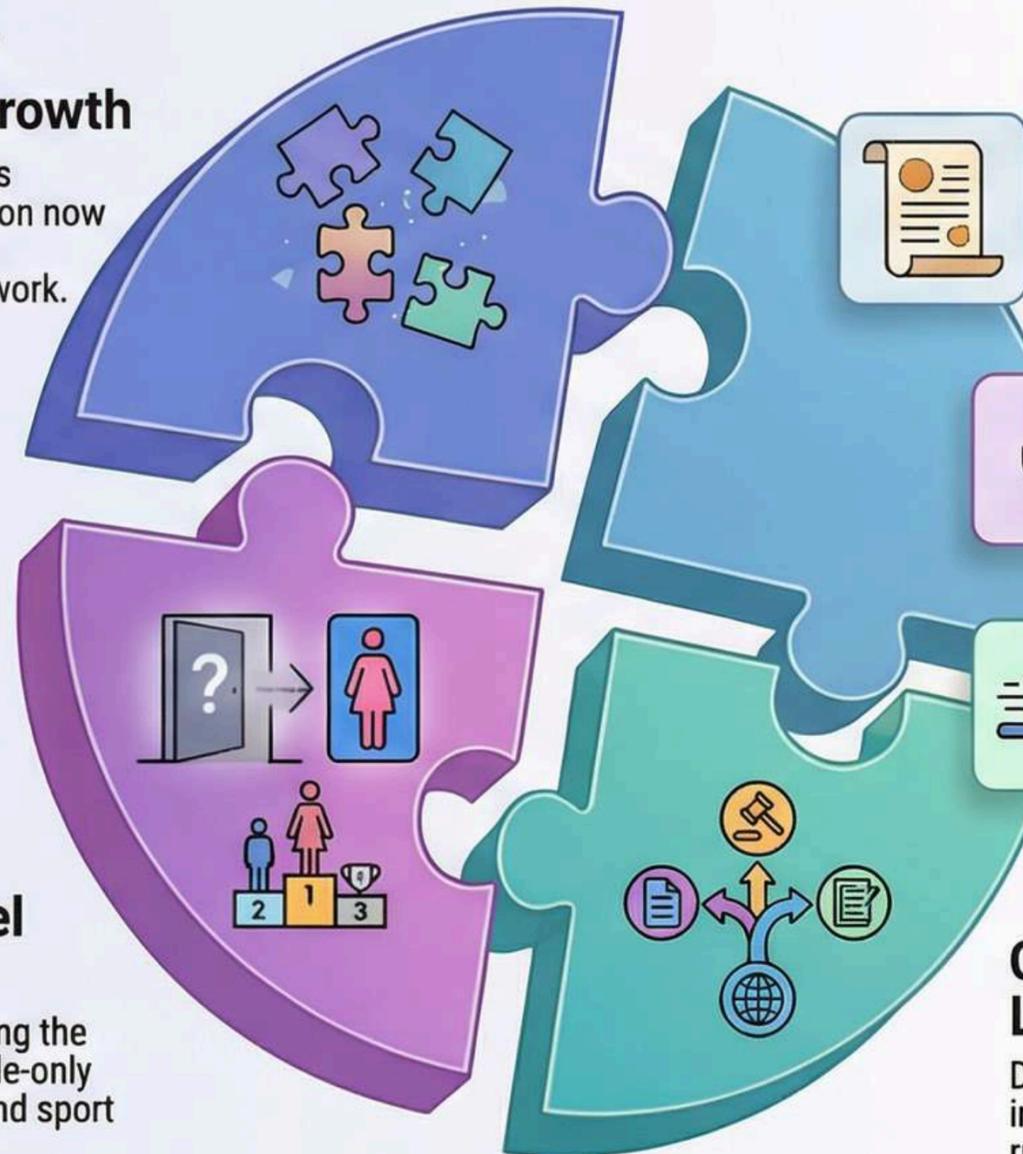
Australia's Sex and Gender Framework: The Case for a Holistic Review

Australia's regulatory landscape for sex and gender has evolved through isolated legal changes over a decade, creating a de facto, **unexamined** framework. This fragmentation creates legal uncertainty for **women's sex-based** protections, requiring a formal AHRC review to restore clarity.

The Fragmented Framework

10+ Years of Piecemeal Growth

Laws and guidelines developed in isolation now operate as a single, unexamined framework.



2013 SDA Amendments
Introduced gender identity protections while removing biological definitions.

2013 Federal Guidelines
Mandated a self-identification model for public and funded services.

National Sport Guidance
Emphasised inclusion of male-bodied participants in women's sport categories.

Conflicting Legal Readings
Disconnect between AHRC interpretations, Federal Court rulings, and UN Special Rapporteur reports.

System-Level Ambiguity

Uncertainty regarding the lawfulness of female-only spaces, services, and sport categories.

The Pathway to Clarity



Section 11 Statutory Review

Utilising the AHRC Act to formally map and report on the framework's coherence.

Restoring Institutional Neutrality

Moving from perceived advocacy back to an independent, balancing 'friend of the court' role.

Meaningful Consultation

Engaging women's sex-based rights organisations at the early design stage of policy formulation.

TAB 3

Agenda item 5

AHRC's institutional role and
neutrality

The Perception of Institutional Bias

Neutrality must be seen to be believed.



Tickle v Giggle Amicus Role

While formally ‘assisting on law’, submissions argued for a specific outcome—collapsing sex into gender identity.

1



Internal Language

Internal communications celebrated the judgment as a “win’ for the Commission—language suited to an advocate, not a neutral body.

(Reference internal email/win language)

3



International Pressure

Internal discussions regarding using GANHRI to influence the UN Special Rapporteur because she was viewed as “misconstruing CEDAW”.

The Consequence: These actions create a barrier for women’s groups who feel they cannot rely on the Commission as an independent human rights body.

The Path to Clarity: Using Section 11

11

1. **Section 11(1)(e):** Function to examine enactments for inconsistency with human rights.
2. **Section 11(1)(f):** Function to inquire into acts or practices.
3. **Section 11(1)(g):** Advisory functions to report to the Attorney-General.

The Proposition: Use these functions to ‘map’ the framework and report to Parliament. This allows the AHRC to be the diagnostician rather than the failure.

Addressing Potential Objections



Potential Objection	The Response
The law is clear.	The conflicting views of the Federal Court, AHRC, and UN mechanisms prove ambiguity exists. Providers are currently uncertain.
This is Parliament's job.	Parliament has never been given a consolidated analysis. Section 11 is the mechanism for the AHRC to provide that expert analysis so Parliament can act.
We balance all rights.	The perception of the relevant stakeholders is that a holistic review of the cumulative impact on women as a sex class has not yet happened.
Matters are before the courts.	A Section 11 review looks at legislative architecture, not individual liability. Courts benefit from clearer parliamentary guidance.

Why Clarity Matters



Certainty for service providers trying to follow the law.



Safety and Privacy for women recovering from violence in refuges.



Freedom of Association for lesbians seeking to meet publicly.



Integrity of the human rights framework.

Ambiguity helps no one. A structured review is the first step to restoring confidence.

Restoring Institutional Neutrality: The AHRC and Sex-Based Rights

Context Summary: Women's organisations have raised concerns that the AHRC is shifting from a neutral human rights institution to an institutional advocate for a specific gender identity models. This perceived bias, evident in court interventions and international engagement, threatens the Commission's credibility and the confidence of stakeholders.

The Perception Problem: Advocacy vs. Neutrality



Legal Assistance vs. Outcome Advocacy

Submissions in cases like *Tickle v Giggle* appeared to prioritise specific outcomes over neutral legal assistance.



Institutional Weight in International Fora

Internal discussions suggest the Commission considered using its influence to counter independent UN mandate holders.



Imbalance in Guidance and Decisions

Current sports guidance and exemption decisions often privilege gender identity over sex-based protections.

The Path Forward: Restoring Credibility

Acknowledge Stakeholder Perceptions

Recognise that reasonable stakeholders perceive the Commission as aligned with one side of a contested debate.



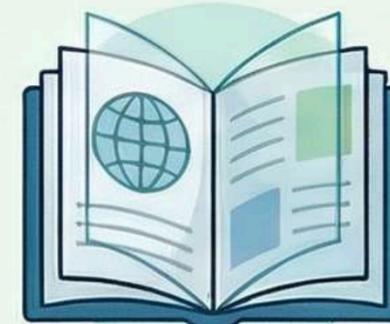
Clarify the Amicus Role

Issue public guidance distinguishing between assisting the court and advocating for specific policy results.



Transparent International Engagement

Share how the Commission manages internal disagreements regarding sex-based protections when engaging with UN mechanisms.



TAB 4

Agenda item 6

Meaningful consultation

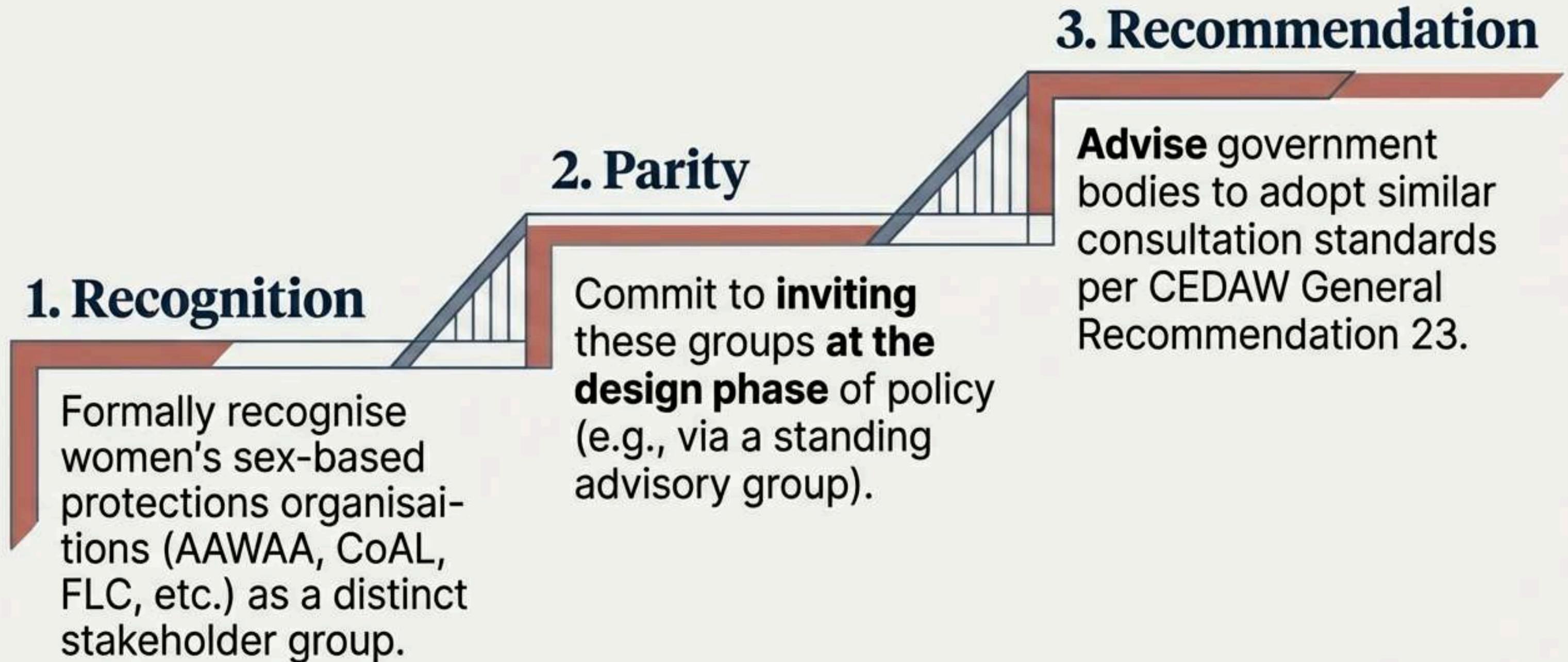
A Structural Imbalance in Consultation

Meaningful participation requires involvement in formulation, not just late-stage submission.



The Result: Policies are designed without specific expertise regarding sex-based protections, leading to friction in the real world.

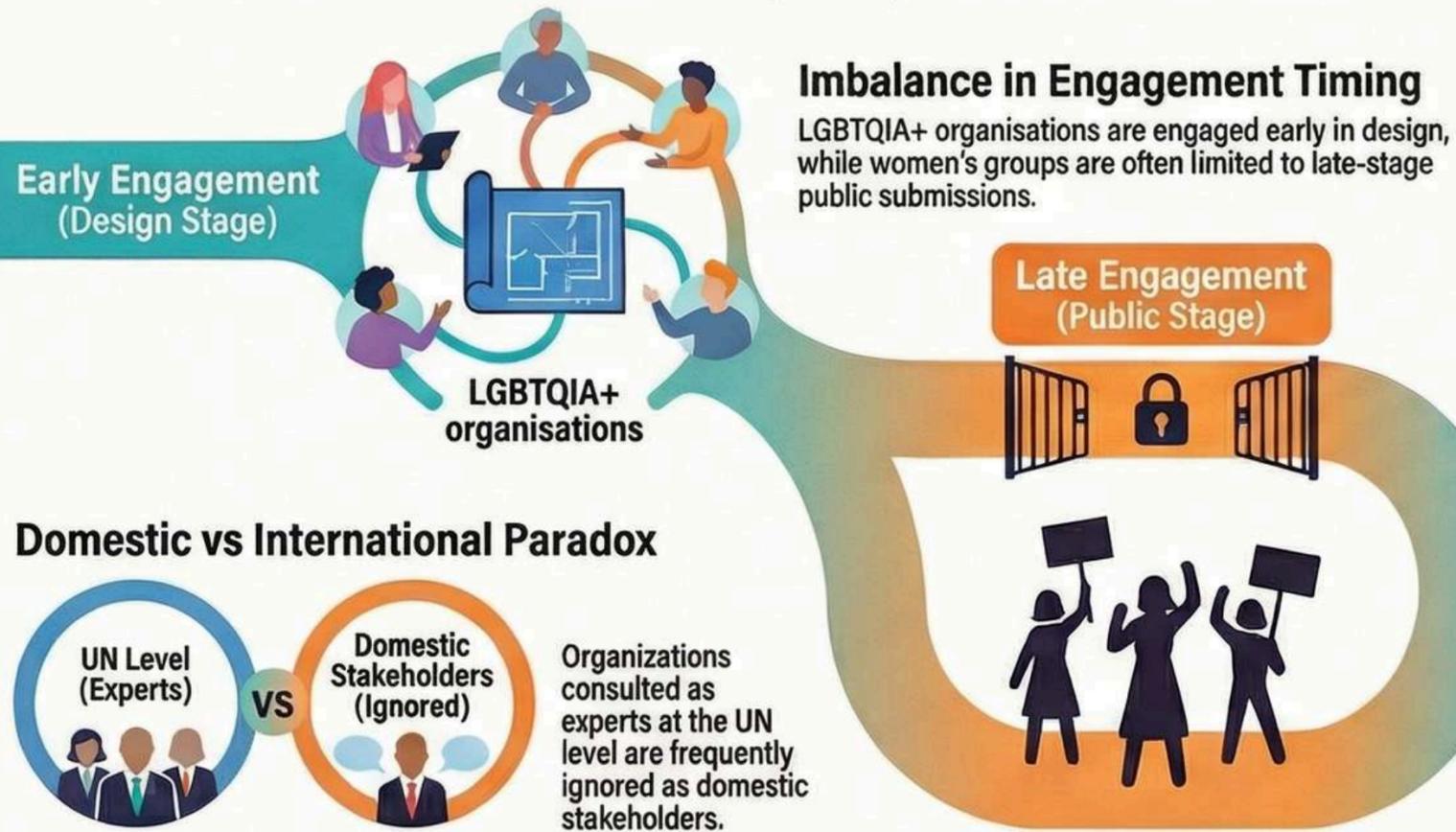
A Constructive Path for Consultation



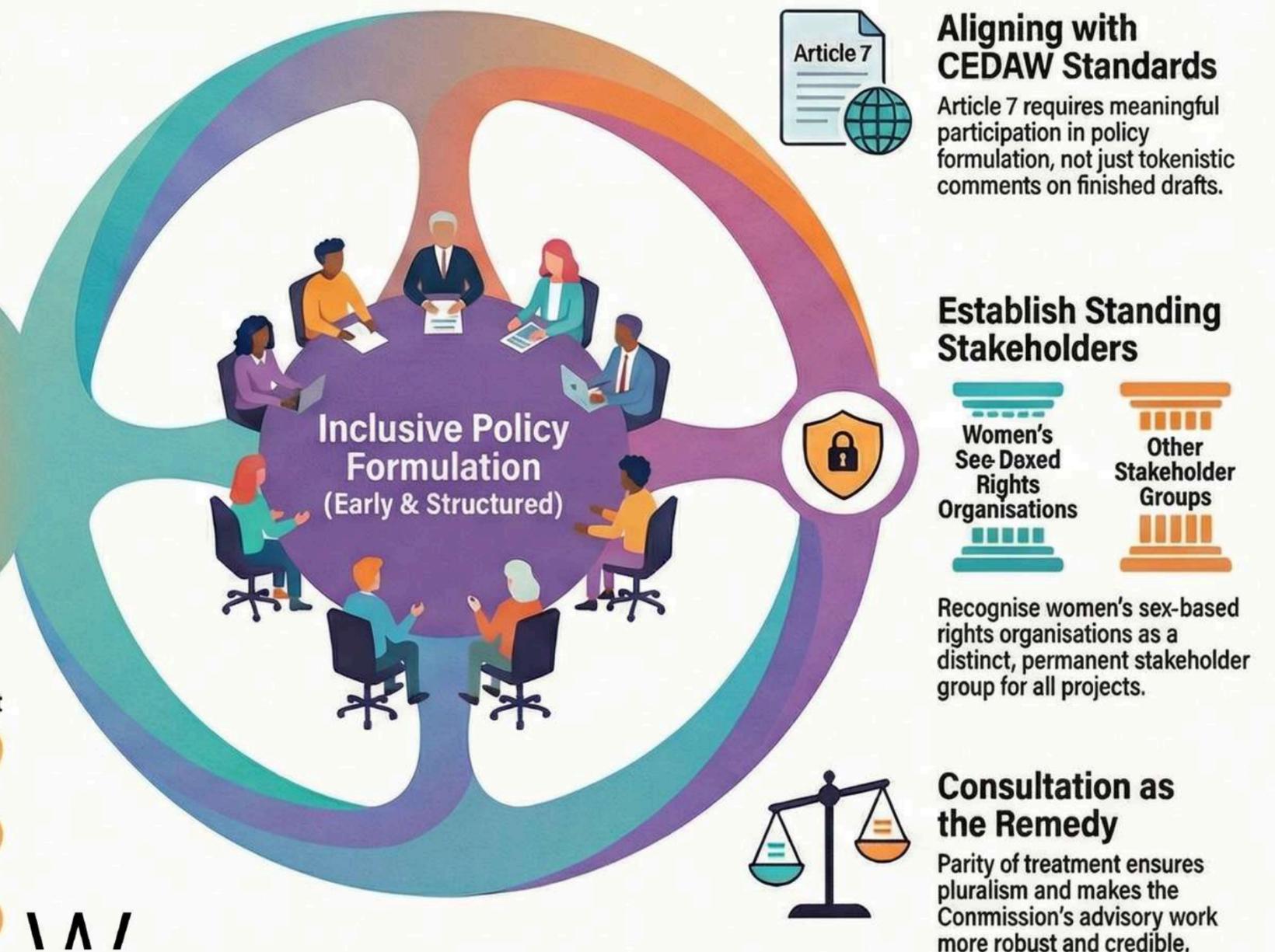
Meaningful Consultation: Achieving Parity in Sex and Gender Policy

Evidence indicates a recurring structural gap where women's sex-based rights organisations are excluded from the early design stages of policy. By transitioning from ad hoc, late-stage input to structured, early engagement, the Commission can ensure compliance with international human rights standards.

The Current Consultation Disparity



A Framework for Meaningful Inclusion



Documented Consultation Gaps

FDI data shows multiple projects, including ABS standards, lacked parallel consultation with women's rights groups.

	Early Engagement	Late Engagement
QLD Sex Self-ID	LGBTQIA+ Groups (from 2018)	Women's Groupe (2022 only)
NSW Equality Bill	Extensive Invite-only Access	Single late-stage hearing
WA Sex Self-ID Bill	Closed formative processes	Exclusion of women's advocacy



Request 1: The Statutory Review



Acknowledge the contest and uncertainty around the interaction of sex-based and gender-identity protections.



Consider utilising Section 11(1)(e) to examine the cumulative sex and gender framework.



Provide a public account to the Attorney-General and Parliament identifying where clarification is needed.

Request 2: Neutrality & Consultation



Publish clear guidance on the Amicus role. Clarify how the Commission distinguishes between “assisting the court” and advocating for a policy outcome.



Establish a structured mechanism for consulting women’s sex-based rights groups (e.g., a Standing Advisory Group). Reflect on how institutional weight is used in relation to UN mandate holders to ensure open debate is protected.



**We thank commissioners for your time
and look forward to being of ongoing
assistance in matters of sex and gender.**