



4 May, 2022

## Statement on "Report on Gender Theory" by Independent Expert Madrigal-Borloz for the United Nations Office for the High Commissioner for Human Rights (OHCHR)

### *Introduction*

Women's Declaration International (WDI)<sup>1</sup> hereby calls on the United Nations Office for the High Commissioner for Human Rights (OHCHR) to take action to protect women and girls globally **on the basis of sex**, by refraining from approving the "[Report on Gender Theory](#)" of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. The Independent expert must give space and consideration to women's concerns and the potential erosion of women's rights.

The first and second parts of the report are called "[The Law of Inclusion](#)" & "[Practices of Exclusion](#)". Part 1 was reported to the UN Human Rights Council in June 2021, and part 2 in July 2021. The report presents incorporating "gender identity" in legislation as not only positive but lawful (part 1), while presenting any defense of sex-based rights as negative and exclusionary (part 2).

With this Report, the Independent Expert seeks to assert a new meaning for "gender" in direct conflict with how it has been used and understood before. This is done by stepping away from its conventional meaning of "social roles and expectations assigned to both sexes", to an integral part of individual identity ("gender identity") and personality ("gender expression"). He also does not acknowledge the resulting confusion of this to the meaning of "gender" in international human rights law.

By colonizing this key word this manner, all existing legislation that seeks to prevent "discrimination on the basis of gender", understood thus far as combating the hierarchy privileging men over women in the distribution of wealth and power, would invert the scope of such legislation. Nowadays, in some jurisdictions, not complying with the demands and wishes of those who claim to have a "gender identity" is considered legally sanctioned discrimination.

The Report seems to be designed to advance the incorporation of the *nebulous and shifting concept* of gender identity in international law without proper scrutiny and critical examination. We believe

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<sup>1</sup> Read the Declaration on Women's Sex-Based Rights by Women's Declaration International at <https://womensdeclaration.com/en/>

this is done in a manner that violates the fundamental human rights of women and girls as a female sex class.

#### *Contradictions and conflicts in the report by the Independent Expert*

In February 2021 the Independent Expert [issued](#) a “Call for Input to a thematic report: Gender, sexual orientation and gender identity”. Its stated purpose was “[t]o inform the Independent Expert’s report to be presented to the 47th session of the Human Rights Council”. The deadline was March 14, 2021. The call stated:

*Gender theory informed approaches recognize gender as inextricably linked with social construct - that the meanings attached to sex (and other) differences are socially created. They challenge the assumption that gender identity necessarily correlates with biological sex and recognize the validity of a wide range of sexual orientations and gender identities.*

In the same paragraph, the Independent Expert himself directly contradicts his own assertions. He considers gender as "socially constructed" but also innate. It is unacceptable that a report that in its very premise makes directly contradictory claims, is taken seriously. The word “gender” is used in different ways in consecutive sentences: gender as the system of roles attributed to both sexes, but also that it’s a part of an inner identity (“gender identity”), hence creating confusion about the goals and scope of the report.

#### *Lack of transparency and smear campaign against feminists*

Regarding transparency, the call in February 2021 said: “All responses and submissions received in accessible format will be published online, except if confidentiality of the submission is explicitly requested. Submissions received in non-accessible PDF format will not be published but will be made available upon request.”

We are aware of at least three submissions that were both timely and submitted using the required accessible PDF format. These submissions were made by WDI itself (called WHRC at the time), and

by two signatories to the Women’s Declaration, Jan Rivers<sup>2</sup> and Anna Kerr<sup>3</sup>, of the Feminist Legal Clinic in Australia. Correspondence from Rivers and Kerr is available in the footnotes of this statement. No confidentiality was requested. These have not been published.

The eventual report states: “A comparatively small number of other submissions were hateful or contained hate speech and were excluded *ad portas*. They will not be part of any publication sponsored by the mandate holder.” No definition of “hate speech” has been provided, despite numerous requests.

The Office for the High Commissioner for Human Rights offers instruction “[About Good Governance](#)”, making a mention of “transparent and accountable processes and institutions” as an area of good governance. Furthermore, the Human Rights Council offers five attributes of good governance it has identified: “transparency, responsibility, accountability, participation, and responsiveness (to the needs of the people)”<sup>4</sup>.

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<sup>2</sup> “Greetings from New Zealand Please can you advise where I can find the submissions made for this report. I can see the call for submissions here <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/GenderTheory.aspx> and the report to the Forty-seventh session 21 June–9 July 2021 of the Human Rights Council says that submissions will be available at the same time that the report is published with the report itself which is available here. But the submissions are neither there. Nor is there any indication of where they are published. Neither is there a link to the launch event. As someone who contributed to a submission I was not informed of the publication of the report which is of course regrettable. It is hard to make the case for people to contribute in democratic processes when those who take the trouble to do this are not kept informed of the resulting report. The report to the 47 session says that statistical information is available at which appears to be the case [www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/ReportGenderTheory.aspx](http://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/ReportGenderTheory.aspx) and that submissions will be available at [www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/ReportGenderTheory.aspx](http://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/ReportGenderTheory.aspx). A note in the report states that: “A comparatively small number of other submissions were hateful or contained hate speech and were excluded *ad portas*. They will not be part of any publication sponsored by the mandate holder.” I should also like to know the criteria that were applied in deciding that submissions were hateful or contained hate speech. Please can you supply these criteria. Can you also let me know where the submissions have been published and if they have not whether the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has provided any reason for their lack of appearance. In particular I am interested to know of any submissions which were made from New Zealand. Sincerely Jan Rivers Wellington NZ“

<sup>3</sup> “Dear OHCHR Registry, I refer to the report by Victor Madrigal-Borloz entitled The Law of Inclusion and dated 3 June 2021. I note that he states in paragraph 4 of his report that: All receivable and non-confidential submissions will be published on the web page for the mandate. I also refer to my email below sending our submission (which can be accessed here) as input into this thematic report and note that I have not been able to locate where the submissions for this report have been published. Could you please advise where the submissions are published and whether ours has been included? Regards, Anna, Anna Kerr, Principal Solicitor, Feminist Legal Clinic, [anna@feministlegal.org](mailto:anna@feministlegal.org), [www.feministlegal.org](http://www.feministlegal.org)  
On 23/2/21 9:01 am, Anna Kerr wrote:  
Please find attached our submission to the thematic report on gender, sexual orientation and gender identity.  
We would be grateful if you could please confirm receipt and let us know when it has been published on your website. Regards, Anna Kerr

<sup>4</sup> <https://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/AboutGoodGovernance.aspx>

We call on the Office of the High Commissioner to live up to these ideals it espouses and to 1) publish the submissions made by, to a great extent, grass-roots women's organizations, to the Independent Expert and 2) to explain what in the submissions is regarded as "hateful" or "hate speech".

The Independent Expert is also completely dismissive of women's interests and existing science. By reading the Report ([Summary](#), part 1 and part 2), it is evident for everyone to see that the Independent Expert does not pay attention to feminist concerns such as the status of female sports categories in the world today. The Independent Expert contradicts himself, claiming that gender (a concept that has evolved in his report from "social construct", to "identity" to finally a "suprabiological phenomenon", whatever that might mean)<sup>5</sup>, will not curtail any achievements in equality between the sexes, while at the same time reifying immaterial gender (identity) as more important than physical sex, for example, in sports.

#### *Contravention of Sex-Based Rights of Women and Girls in the Name of "Gender Identity"*

The Yogyakarta Principles are mentioned in the first part of the report as a relevant and prominent international human rights document, without any disclaimer about the relation of the Expert to them. He is a signatory of Yogyakarta Principles plus 10 (YPplus10), the enhancement of the original Yogyakarta Principles, added in 2017. Not only does he omit that information, but the Independent Expert makes a false claim in his report that it was in 2018 when he "*concluded that the right to self-determine one's gender was a fundamental part of a person's freedom and a cornerstone of the person's identity*"<sup>6</sup> as if that hadn't been his belief already when [he was appointed](#) to this position, only 5 days after [YPplus10 were published](#).

His support of self-identification of legal gender is so staunch that he considers the requirements of "*medical certification, surgery or treatment*" to be "*abusive*"<sup>7</sup>, or even to be "*cruel, inhuman and degrading treatment, and possibly torture*"<sup>8</sup>. That said, he fully contradicts himself by stating that "*Access to transition-related medical care is part of the measures ensuring bodily autonomy for trans persons.*"<sup>9</sup>

By grouping sexual orientation and gender identity together, including condition of Differences in Sexual Development (DSD), referred to in the report as "intersex", examples of rampant homophobia or violence against lesbians are considered equivalent to defending sex-based rights. This is because, in the view of the Expert, it would be "exclusionary" to say that males who claim to have a female "gender identity" are not included in the category of "woman"<sup>10</sup>.

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<sup>5</sup> See summary, "Reports on Gender", page 8, [https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/Reports\\_on\\_Gender\\_Final\\_Summary.pdf](https://www.ohchr.org/Documents/Issues/SexualOrientation/IESOGI/Reports_on_Gender_Final_Summary.pdf).

<sup>6</sup> Law of inclusion, pg. 10, para. 36.

<sup>7</sup> Law of inclusion, pg. 10, para. 36.

<sup>8</sup> Law of inclusion, pg. 12, para. 50.

<sup>9</sup> Law of inclusion, pg. 12, para. 50.

<sup>10</sup> Practices of exclusion, pg. 13, para. 41, c) and d).

The use of hyperbolic language is nothing short of astonishing. Submissions from feminists describing the harms that gender identity ideology creates for women and girls were placed in the second report called “Practices of exclusion” which “analyses backlash against the incorporation of gender frameworks”. Hence, this “backlash” includes feminists’ positions. Moreover, the harms caused to women and girls’ rights by introducing policies based on “gender identity or expression” that were highlighted in different submissions were not taken into account but were described patronisingly as “alleged”: “B. Alleged impact on children’s rights”<sup>11</sup>, “C. Alleged impact on women’s rights”<sup>12</sup> and “D. Alleged impact on women and girls’ sports”<sup>13</sup>.

The expert’s zeal in presenting the reification of gender identities as a very positive development in our society takes him to state that the categories of male and female are a consequence of colonialism: “... the evidence suggests that, in many countries, the rigid understanding of the male/female binary as a main ordering social principle are the result of colonialism”<sup>14</sup>. The idea that only the western world can observe the sex binary is insulting. These claims of “gender identity” are in complete contravention of practices followed by cultures that actually had visibly gender non-conforming people.

### *Conclusion*

Protection of “gender” or “gender identity”, in place of, in addition to, or as a component of sex, contravenes the principles reaffirmed in the [Declaration of Women’s Sex-Based Rights](#), violates the sex-based rights of women and girls globally, and must be rejected.

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<sup>11</sup> Practices of exclusion, paras. 51-58.

<sup>12</sup> Practices of exclusion, paras. 59-64.

<sup>13</sup> Practices of exclusion, paras. 65-70.

<sup>14</sup> Practices of exclusion, pg. 12