

Lesbian Action Group
Applicant

Australian Human Rights Commission
Respondent

Lesbian Action Group Inc
Other Party

STATEMENT OF FACTS, ISSUES AND CONTENTIONS

A. Facts

1. The Lesbian Action Group (**LAG**) is an association of lesbian women who subscribe to a lesbian feminist critique. LAG's objective for associating is to assert and fight for the human rights of lesbians: LAG fights for freedom of association, freedom of speech, freedom from discrimination, freedom from violence, and freedom in law, for all lesbians. As its constitution records, LAG intends to (amongst other things):
 - (a) be a political advocacy group for, by, and about, lesbians in Australia and internationally;
 - (b) assert the biological fact that sex is binary and immutable;
 - (c) fight the oppression of, and discrimination against, lesbians;
 - (d) raise lesbian visibility, both in the general community and within LGB groups;
 - (e) promote outlets for lesbians to meet, have discussions and organise events for the political, social, cultural, physical and mental wellbeing of lesbians; and
 - (f) lobby relevant parties to raise awareness of lesbian needs and interests.
2. LAG applied to the Australian Human Rights Commission (**AHRC**) for a five-year exemption under section 44 of the *Sex Discrimination Act 1984* (Cth) (**SD Act**), so that it could organise public events for the above purposes. The exemption was sought so that LAG could exclude people of the opposite sex, and those who are not lesbians. The exclusion was proposed to extend to all males irrespective of the gender with which they identify.

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3. LAG initially applied for an exemption so that it could hold a public event to celebrate International Lesbian Day on 8 October 2023. This particular event was intended to have a celebratory purpose. Cultural activities were planned, and it was intended to engender a sense of lesbian pride amongst attendees.
4. The exemption decision was finalised on 12 October 2023, after the date by which the named event could have been organised. The AHRC nonetheless considered LAG's application on the basis that LAG indicated that it intended to hold public events for the duration of the five-year exemption period sought.

The AHRC decision

5. The AHRC rejected LAG's application. President Croucher's written reasons (**Decision or D**) concluded it was not '*appropriate or reasonable to make distinctions between women based on their biological sex at birth or transgender experience at a community event ... and to exclude transgender lesbians from a community event*': D[9.55].
6. To make good that conclusion, President Croucher primarily used the following inference:

9.58 The Commission notes that the grant of this exemption may lead to the further exclusion of and discrimination against transgender women who are lesbians. Transgender women are a group who have and continue to experience discrimination, harassment and social exclusion. Recent studies within Australia reveal that transgender and gender diverse people report high levels of harassment and social exclusion due to their gender identity or sexuality. Experiences of harassment and social exclusion often lead to poorer health outcomes, with 67.4% of transgender women reporting being diagnosed or treated for a mental health condition in the previous 12 months, and 86% of trans women reporting ever having thoughts about suicide.

7. The second finding President Croucher made in support of her conclusion was that the abuse and harassment experienced by lesbians, as identified in submissions before her, was "*anecdotal*" and "*not supported by persuasive empirical evidence*": D[9.59].

LAG's application to the Tribunal for review

8. LAG applied to the Tribunal for a review of the Decision on 8 November 2023. In December 2023 LAG incorporated its association, and the Tribunal has added the incorporated entity as another party to facilitate its role as the body who is conducting the litigation for and on behalf its members (including those who had initially formed the unincorporated association).

B. Issues

9. The issue in the proceeding is whether the Tribunal should, in its review jurisdiction, grant LAG's exemption. If the Tribunal is persuaded to grant the exemption, a subsidiary issue arises with respect to how that exemption is to be framed in light of the requirements of section 44(3) of the SD Act.¹

C. Contentions

C1. *The Tribunal's jurisdiction and power*

10. The Tribunal's jurisdiction and power should be outlined at the outset. Section 45 of the SD Act provides:

45 Review by Administrative Appeals Tribunal

Applications may be made to the Administrative Appeals Tribunal for review of decisions made by the Commission under section 44.

11. Section 45 invokes the Tribunal's review jurisdiction under the *Administrative Appeals Tribunal Act 1975* (Cth). This jurisdiction extends beyond review for legal error and into a consideration of the facts and circumstances relevant to the decision.² The object of the review undertaken by the Tribunal is to determine what is the "correct or preferable decision."³ A "correct" decision is one rightly made in the proper sense. A "preferable" decision is one that involves the application of discretionary considerations.⁴
12. The Tribunal reaches its correct or preferred conclusion by conducting its own independent assessment and determination of the matters that are necessary to be addressed.⁵ The Tribunal's exercise of power is not dependent upon the existence of error in the original decision. Instead, the Tribunal is authorised, and required, to review the actual decision rather than the reasons for it.⁶
13. The Tribunal "*stands in the shoes*"⁷ of the AHRC. The Tribunal is subject to the same general constraints as the AHRC, and should approach its task as though it were

¹ There are extant issues as to whether gender-identity protections in the SD Act are beyond the Commonwealth's legislative power, and whether the SD Act impermissibly burdens LAG's freedom of political communication and is beyond the Commonwealth's legislative power for this additional reason. The AAT has no judicial power to decide these questions and thus cannot form issues in this review. LAG reserves its rights should it become necessary to litigate these questions in the federal courts.

² *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 (**Shi**), [140].

³ *Frugtniet v ASIC* (2019) 266 CLR 250 (**Frugtniet**), [14]; *Shi*, [140]; *Drake v Minister for Immigration & Ethnic Affairs* (1979) 24 ALR 577 (**Drake**), 589, 591.

⁴ *Shi*, [140].

⁵ *Shi*, [141]; *Drake*, 599.

⁶ *Shi*, [141]; *Drake*, 599.

⁷ *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666, 671.

performing the relevant function of the original decision-maker in accordance with the law as it applied to the AHRC at the time of the original decision.⁸ Accordingly, the Tribunal adopts the functions of the AHRC as prescribed in the SD Act and its enabling legislation, the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). Of note is the duty conferred on it by section 10A(1):

10A Duties of Commission

- (1) It is the duty of the Commission to ensure that the functions of the Commission under this or any other Act are performed:
- (a) with regard for:
 - (i) the indivisibility and universality of human rights; and
 - (ii) the principle that every person is free and equal in dignity and rights; and
 - (b) efficiently and with the greatest possible benefit to the people of Australia.

14. In standing in the AHRC's shoes, the Tribunal can have regard to the policy formulated by the AHRC. Simply applying policy without regard to what is correct and preferable, however, would be erroneous. The Tribunal can consider, but is not bound, to apply policy in the course of exercising its jurisdiction.⁹ Relevantly, the AHRC has a published guideline: "*Temporary Exemptions under the Sex Discrimination Act.*"
15. Finally, the correct and preferable decision is to be determined on the material before the AAT, not the material as it was before the AHRC.¹⁰ On this score, LAG has filed a witness statement of Carole Ann and a report of Professor Sheila Jeffreys, which are to be considered in addition to the material that was before the AHRC.

C2. The power to grant exemptions under section 44 of the SD Act

16. The Decision under review was an exercise of the power in section 44, which relevantly permits the AHRC to grant an exemption from Division 2 of the SD Act:

44 Commission may grant exemptions

- (1) The Commission may, on application by:
- (a) a person, on that person's own behalf or on behalf of that person and another person or other persons;
 - (b) 2 or more persons, on their own behalf or on behalf of themselves and another person or other persons; or
 - (c) a person or persons included in a class of persons on behalf of the persons included in that class of persons;
- by instrument in writing, grant to the person, persons or class of persons, as

⁸ *Frugtniet*, [14] (Kiefel CJ, Keane and Nettle JJ), [51]; *Shi*, [142]; *Hospital Benefit Fund v Minister for Health* (1992) 39 FCR 225, 234 (the Court).

⁹ *Tarrant and ASIC* [2013] AATA 926, [19]-[21].

¹⁰ *Frugtniet*, [14]; *Shi*, [143].

the case may be, an exemption from the operation of a provision of Division 1 or 2, or paragraph 41(1)(e), or paragraph 41B(1)(b), as specified in the instrument.

- (2) The Commission may, on application by a person to, or in respect of, whom an exemption from a provision of Division 1 or 2, or paragraph 41(1)(e), has been granted under subsection (1), being an application made before the expiration of the period for which that exemption was granted, grant a further exemption from the operation of that provision.
 - (3) An exemption, or further exemption, from the operation of a provision of Division 1 or 2, or paragraph 41(1)(e) or paragraph 41B(1)(b):
 - (a) may be granted subject to such terms and conditions as are specified in the instrument;
 - (b) may be expressed to apply only in such circumstances, or in relation to such activities, as are specified in the instrument; and
 - (c) shall be granted for a specified period not exceeding 5 years.
17. There has been no previous judicial consideration of section 44, and as such, the Tribunal will have to discern its legal meaning for itself. What is immediately apparent from the provision is that there is no specified criterion to guide the Tribunal as to how to exercise the discretion conferred by it. The only direction the provision offers is to the content of the exemption in section 44(3); the anterior question of whether to exercise the discretion in section 44(1) is wholly undefined and unfettered.
18. In that scenario, Dixon J's dicta in *Browning* applies. What might be relevant to the exercise of discretion is limitless - except where the subject matter, scope and purpose of the SD Act may enable the Tribunal to discern that certain considerations should be excluded from the exercise of discretion. But even then, there must be some warrant within the subject matter, scope and purpose of the SD Act for the Tribunal to be able to conclude that some consideration is to be excluded.¹¹

C3. *The subject matter, scope and purpose of the SD Act*

19. The Tribunal ought to start at the beginning given the unbounded nature of section 44: it is a provision that was made in a common law legal system that is underpinned by the liberty of the individual. Under such a system, “*everybody is free to do anything, subject only to the provisions of law*”¹² and “[w]here Liberty ends the Law begins and where the Law ends Liberty begins.”¹³ Liberty and its core tenets – freedom of expression and freedom of association – are not merely what remains when the meaning of statute and the scope of executive powers are determined by courts. These freedoms have their

¹¹ *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J). See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 285.

¹² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564.

¹³ *Brown v Classification Review Board of the Office of Film and Literature Classification* (1998) 82 FCR 223, 235.

own intrinsic weight.¹⁴ The value placed on freedom of expression and association by the common law is high.¹⁵ The system of representative and responsible government established by the *Constitution*, in turn, implicitly limits legislative power to regulate political expression such that it cannot be unjustifiably burdened. The SD Act is to be construed in light of this constitutional limitation on legislative power.¹⁶

20. The objects of the SD Act are provided in section 3:

Objects

The objects of this Act are:

- (a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments; and
 - (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and
 - (ba) to eliminate, so far as possible, discrimination on the ground of family responsibilities in the area of work; and
 - (c) to eliminate, so far as is possible, discrimination involving sexual harassment, and discrimination involving harassment on the ground of sex, in the workplace, in educational institutions and in other areas of public activity; and
 - (ca) to eliminate, so far as is possible, discrimination involving subjecting persons to workplace environments that are hostile on the ground of sex; and
 - (d) to promote recognition and acceptance within the community of the principle of the equality of men and women; and
 - (e) to achieve, so far as practicable, substantive equality between men and women.
21. Part I of the SD Act sets forth preliminaries, including definitions of discrimination and like machinery. Divisions 1 to 3 of Part II contain the core prohibitions against sex-based discrimination and harassment in specified areas of public life, including employment, education, goods and services, facilities, accommodation, land, and clubs. It is discrimination on the grounds of sex, sexual orientation and gender identity which are relevant to this review: see sections 5, 5A and 5B. It is discrimination in connection with services that is relevant: see section 22.
22. The SD Act goes on to address where sex-based discrimination is permitted to occur in Division 4 of Part III. Division 4 ought to be considered with a bird's eye.
- (a) It establishes a number of exceptions where sex discrimination in particular areas

¹⁴ *Evans v New South Wales* (2008) 168 FCR 576, 594.

¹⁵ *Brown v Classification Review Board of the Office of Film and Literature Classification* (1998) 82 FCR 223, 234; *South Australia v Totani* (2010) 242 CLR 1, [423].

¹⁶ *Acts Interpretation Act 1901* (Cth), s 15A.

of public life is allowed to occur, including religion, charities, sport, residential care, accommodation, insurance, and superannuation. A cursory examination of these exceptions reveals that they are each adapted to suit the particular features of the exempted public activity that serves to justify the sex discrimination.

- (b) It could not have been possible for the legislature to enumerate every single public activity where sex discrimination should be permitted in the public interest. As such, Division 4 also contains the exemption in section 44 that is the subject of this proceeding.
23. This explains the unfettered nature of section 44. It is intended to be a valve to permit justified forms of sex discrimination in additional activities and areas of public life that the legislature could not anticipate arising for itself. There is nothing peculiar within the scope, subject matter and purpose SD Act that directly serves as a warrant to delimit this valve, in the sense outlined in *Browning*. Indeed, there are provisions (such as the special measures regime in section 7D) which further indicate that there is a residual public interest in some forms of sex discrimination, and this public interest is to be facilitated by section 44.
24. In other words, the considerations that are to apply in the exercise of the discretion in section 44 remain unconfined by the subject matter, scope and purpose of the SD Act. So construed, it is wrong to attribute a top-down to the SD Act to the effect that no sex discrimination is to ever occur. It is to be eliminated “so far as is possible”: section 3(b). Rights and interests that might conflict with the intention to eliminate sex discrimination remain able to be accommodated, and given effect, by an exemption under section 44 if all of the circumstances justify it.
- C4. *The exercise of the discretion in section 44 in light of international human rights instruments*
25. International human rights instruments are relevant to the exercise of the discretion in section 44, as section 3(a) of the SD Act and the AHRC’s enabling legislation identify. As the High Court noted in *Teoh*, the ratification of such instruments is not to be dismissed as a merely platitudinous or ineffectual act; it is rather a positive statement by the executive that its agencies will act in accordance with the ratified instrument.¹⁷ The human rights enshrined in these instruments can form additional relevant considerations to bear upon the exercise of the discretion in section 44, and there is no warrant in the SD Act to exclude them (in the *Browning* sense). These rights include those enshrined

¹⁷ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288, 291, 301, 318-318.

in the International Covenant on Civil and Political Rights (**ICCPR**)¹⁸ and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).¹⁹ Under these instruments, lesbians are to be afforded:

- (a) freedom of expression (Article 19, ICCPR) and freedom of assembly and association (Articles 21 and 22, ICCPR), rights that similarly exist at common law (as explained above);
- (b) the right to take part in cultural life (Article 14, ICESCR), which relevantly extends to a freedom to choose their own cultural identity, to belong to a community, to be free from forced assimilation, and to have their choices respected;²⁰ and
- (c) equality before the law (Article 26, ICCPR), and an equal right of men and women to the enjoyment of all rights conferred by both the ICCPR and ICESCR (Article 3 of both the ICCPR and ICESCR).

26. The Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**) is to be brought into account next. As the Special Rapporteur on violence against women and girls, Reem Alsalem, explains, this convention is concerned with the protection of biological women, and prohibits any derogation to the prohibition of discrimination against such women. Where there is conflict between the rights of biological woman and transgender persons who identify as women, the protection against discrimination afforded by CEDAW does not permit any subordination of the rights of biological women, including lesbian women.²¹

C5. Indivisibility, universality, equality and achieving the greatest possible benefit

27. The Tribunal must ultimately return to the AHRC's duty - and thus its own duty - under section 10A of the AHRC Act (extracted above) when exercising the discretion under section 44. The Tribunal brings into account all the rights and interests summarised above when applying that duty. This requires:

- (a) giving lesbians an equal entitlement to all of the human rights summarised above (the principle of universality);
- (b) giving effect to all of the rights summarised – for lesbians cannot enjoy one set of

¹⁸ Opened for signature 19 December 1966, 99 UNTS 171 (entered into force 23 March 1976).

¹⁹ Opened for signature 16 December 1966, 99 UNTS 3 (entered into force 3 January 1976).

²⁰ International Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 43 sess UN Doc E/C.12/GC/21 (21 Dec 2009), [49].

²¹ Carole Ann Statement, Exhibit CA-8.

rights fully without the other (the principle of indivisibility);

- (c) not subordinating the human rights of lesbians in preference for others (the principle of equality); and
- (d) ensuring that exercise of discretion brings the greatest possible benefit to all Australians, including our lesbian Australians.

C6. Application of the discretion in section 44 to the facts

28. There are a number of powerful reasons which compel the Tribunal to exercise the discretion favourably to LAG, which have been explained by both Carole Ann and Professor Jeffreys. They can be summarised by reference to the human rights identified above.

An exemption protects freedom of political communication and expression

29. One must start with what the common law regards as “*most important*,” with what the *Constitution* protects from unjustified incursion, and with that international law regards as “*fundamental*.”²² The holding of public events is essential to protecting LAG’s freedom of political communication and expression. Public events will allow it to further its objective of accruing political influence in order to promote its movement. Public events also assist LAG to accrue support of likeminded individuals, which, in turn, assists LAG to broaden community awareness and build political influence. LAG cannot freely do this in private, as it has been forced to do.
30. The political beliefs and objectives of LAG, and the underpinning tenets of lesbian feminism, are outlined in detail by both Carole Ann and Professor Jeffreys. There are a number of fields of public policy which LAG intend to advocate in for the benefit of lesbians, ranging from the subordination of lesbian interests by reason of the LGBTIQ+ grouping, the sex/gender identity debate, gender transition, the protection of female-dedicated spaces and services, experience of young lesbians, the protection of old lesbians, and the continued discrimination and violence inflicted on lesbians (most recently from trans lobbyists). LAG has a unique perspective that is able to contribute to the development of public policy across this broad range of issues. Many of these issues are unfolding right now in the present, as a comparison between public policy positions in Australia, the United Kingdom and the rest of the world demonstrates. The right to advance a lesbian feminist perspective on these public policy issues should be upheld, not suppressed.

²² *Brown v Classification Review Board of the Office of Film and Literature Classification* (1998) 82 FCR 223, 234.

31. It can be readily accepted that there are sections of society that do not agree with a lesbian feminist critique of these public policy issues, just as much as it can be accepted that there are other sections of society which would agree with such a critique. This is not the point; open and public debate of issues so that they can be resolved “*efficiently and with the greatest possible benefit to the people of Australia.*”²³ The continuation of the suppression of lesbian feminists, the erasure of their contribution to debate, and their retreat into the private sphere, is intolerable in a free and democratic society that is Australia.

An exemption facilitates freedom of association

32. The public events that LAG wishes to organise are just as important for permitting their freedom of assembly and association. LAG cannot accrue its desired political influence and explore the sexual and cultural needs of lesbians if they cannot associate. LAG needs to freely associate so that it can reach those lesbians who wish to meet likeminded individuals and who wish to contribute to their political, cultural and social objectives. The forced retreat into the private sphere has acted as a suppressant on lesbians being able to associate and ultimately their erasure from the public.
33. An exemption will give LAG a legal right to hold public events which will moderate the behaviour of those who are opposed to it and its ideals, which in turn will bring about a greater confidence in those lesbians who wish to associate but do not do so out of fear. It will allow the public to obtain the benefit of their contribution to public policy debate and result in a net benefit to Australia.

An exemption protects the exercise of cultural rights

34. Lesbians have a history and culture that our society ought to recognise, respect, celebrate and document. The opposite is occurring. Lesbian culture is progressively being erased from Australian life and is being substituted with the fetishism and exhibitionism that is prevalent in the portrayal of LGBTIQ+ culture.
35. The exploration and celebration of lesbian culture is obviously vital to the health of lesbians. Older lesbians need the woman-loving ethos of lesbian feminism to deal with the issues to be confronted in the late stages of life. Younger lesbians need role models to look up to. Every single lesbian requires the pride that a lesbian community can deliver to them.
36. The state of services that are made available to lesbians is in an anaemic state. The grouping of lesbians under the LGBTIQ+ has caused the rights and interests of lesbians to be marginalised, defunded, and deleted from the public sphere. This has meant, for

²³ AHRC Act, s 10A.

example, the abolition of an estimated 100 dedicated spaces for lesbians over the course of the last generation (with only two remaining at the present day). “It has been like being back in the closet again.” An exemption is a minor ask in light of the vacuum that has been created.

An exemption facilitates sexual rights and the health of lesbians

37. It is unsurprising that lesbians exist that are not sexually attracted to men or members of the transgender community. A space should exist for such lesbians to meet females. That such a proposition has to be spelt out before the Tribunal is appalling – discrimination in the selection of sexual partners is the very essence of human behaviour. The law and its institutions must get out of the way of the exploration of sexual behaviour - and indeed, the law and its institutions ought to contribute towards such discrimination occurring. The Australian state is deeply interested in ensuring its citizens (including its lesbian citizens) have the opportunity to find partners, to marry, and to establish families. Partnering, marriage and the family unit are the fundamental building blocks of our society and central to its ultimate success.
38. There are no such spaces for women who are attracted to the female sex. Instead, spaces that are presently available appear to operate on the premise that female attracted lesbians must individuals who identify as transgender women as potential dating partners. This has resulted in documented evidence of pressure being placed on lesbians to engage in sexual relations with individuals who identify as transgender women. LAG’s exemption will permit at least one space where that premise does not operate, and this pressure will not arise.

An exemption upholds equality for lesbians

39. The exemption will bring about equality for lesbians. A similar exemption has been given to the Melbourne gay male community for the purposes of allowing that community to enjoy a hotel in “comfort” and free from others who have a different sexual orientation.²⁴ An organisation with similar objectives to LAG, Seahorse, is presently in operation for the Melbourne transgender community which is supported with the funding, facilities and other resources of the Victorian Pride Centre. All LAG is seeking by this exemption a similar opportunity that has been afforded to gay men and the transgender community.

C6. *The path of reasoning in the Decision must be rejected*

40. The path of reasoning adopted by President Croucher in her Decision must be rejected out of hand. No human rights-based analysis was engaged in of the kind traversed

²⁴ *Peel Hotel Pty Ltd (Anti-Discrimination Exemption)* [2010] VCAT 2005.

above.

41. The primary inference drawn – being that LAG’s proposed public events would lead to poor health outcomes and suicidal ideation within the cohort of the trans community (at D[9.58]) – is extreme. It is completely devoid of any evidentiary support. It cannot be characterised as a finding based on any legal principle. For the avoidance of doubt, LAG has not demonstrated any intention to inflict any legally recognisable harm on anyone (and indeed accepts the need for society to accommodate the rights and interests of the transgender community). That there are sections of society that disagree with the beliefs that LAG subscribe to does not support an evidentiary finding that an exemption in their favour creates a suicide risk.
42. The secondary finding President Croucher used to come to her decision – that the abuse and harassment experienced by lesbians was ‘*anecdotal*’ and ‘*not supported by persuasive empirical evidence*’ (at D[9.59]) – was wrong appreciation of the evidence. There was a wealth of evidence before her which made good the proposition that female attracted lesbians are being subjected to a variety of forms of violence online and in public. Nonetheless, disposition of the application depended upon a human rights analysis, not a question of which section of society is being most abused.

C7. Disposition

43. In light of the above, the Tribunal can set aside the Decision and make a substituted decision granting the exemption. In terms of the requirements of section 43(3), the exemption:
 - (a) does not require any particular term or condition;
 - (b) may be expressed to apply to enable LAG to further its objects as outlined in its Constitution; and
 - (c) should be granted for a period of five years.

1 July 2024

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