

Lesbian Action Group
Applicant

Australian Human Rights Commission
Respondent

Lesbian Action Group Inc
Other Party

REPLY SUBMISSIONS: INTERNATIONAL LAW¹

The AHRC misses the point

1. This proceeding concerns whether the Tribunal should grant LAG's exemption so that it, and its members, can realise the human rights *that lesbian feminists should be afforded*. The Tribunal is concerned with the human rights of LAG's *lesbians*, bearing in mind the principles of indivisibility, universality and equality in human rights law, as well as the need to engender the greatest possible benefit to the people of Australia.²
2. The AHRC's submissions on international law (the **AIL Submission**) fails to address the very issue that is before the Tribunal. Instead, we have been subjected to yet another verbose, confusing, and tortuous submission about the rights of the transgender community. This is notwithstanding that the proposed exemption affects the rights of individuals well beyond that community.
3. The Tribunal is not assisted by yet another statement that the transgender community has its own needs and human rights which require respect and accommodation. This has never been disputed by LAG, and has repeatedly been noted by it.³

The AHRC is now contradicting itself

4. The AHRC now accepts that a derogation (i.e. a limitation) on human rights requires a proportionality assessment: AIL Submission at [17]-[19]. This directly contradicts its closing submission that the task before the Tribunal "*is not a balancing exercise*." The AHRC is no

¹ Definitions adopted in LAG's SOFIC (the **LSOFIC**) are continued in this reply.

² ARHC Act, s 10A.

³ Ann Statement, [85]-[86]; Ann Reply Statement, [3].

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longer making sense. It has lost all objectivity.

5. This contradiction is nonetheless welcome. The Tribunal can now proceed, by agreement, to weigh up the competing considerations and decide whether the exemption should be granted. Thus:
 - (a) The Tribunal can consider what is said at LSOFIC at [26]-[39] about how an exemption will, if granted, uphold the political, social, sexual and health based rights of lesbians. What is essayed there (and developed in closing address) constitutes a powerful set of reasons which compel the Tribunal to exercise its discretion favourably, the substance of which was barely agitated by the AHRC.
 - (b) The Tribunal can weigh what is said at LSOFIC at [26]-[39] against the evidence that there is a rich body of resources that are made available to the LGBTIQ+ community, including the transgender community.⁴ The Tribunal can take into account the evidence that this LGBTIQ+ community has excluded LAG, lesbians, and lesbian feminists in its allocation of resources, whilst choosing to direct its resources to support others, including the transgender community.⁵ It is this type of issue (as well as others) that LAG's political objectives seek to correct.⁶
 - (c) The Tribunal can finally weigh what is said at LSOFIC at [26]-[39] against the prospective discrimination that will result – being LAG's proposed exclusion of all persons who are not lesbian (and not born female) from their public events.⁷ That prospective discrimination is, ultimately, immaterial in circumstances where there is already a wealth of resources that are enjoyed by others within the LGBTIQ+ community, and the heterosexual community.
6. The task before the Tribunal is no different from how the discretion was exercised favourably to the gay male community in *Peel*, and how the discretion is commonly exercised in other areas of public life (e.g. female only gyms). The circumstances at hand are overwhelmingly in favour of the exemption when the proposed discrimination is very slight. An excluded person at a future LAG event can avail themselves of the many other opportunities to associate and politically organise in ways that are more appropriate and adapted to their own particular needs and interests.
7. The Tribunal should reject, out of hand, the AHRC's position that the transgender community and the lesbian feminist community should be expected to be in the same room

⁴ Ann Statement, [49]-[51], [58].

⁵ Ann Statement, [49], [58], [60], [66], [88]-[89]; Sheila Jeffreys Report, [27]-[34], [38]-[44].

⁶ See LAG's Objects in its Constitution, Article 2, point 5. See also Ann Statement, [47]-[58].

⁷ See how this expressed in the terms of the proposed condition (handed up in closing address).

when exploring their political, cultural, social and health needs.⁸ This forced assimilation is intolerable when both communities can be ably accommodated by the Tribunal granting LAG the proposed exemption.

The Special Rapporteur's view should be accepted

8. A reasonable bystander would see it as outrageous that an organ of the United Nations has had to take the step of seeking to intervene in an Australian tribunal proceeding to protect LAG against the AHRC.
9. Ms Alsalem's intervention is symptomatic of the problems that LAG and lesbian feminists experience when it comes to seeking to advance their interests in Australian society. A UN intervention might be expected in another far-flung body politic. Not Australia. But this is the degraded situation that Australia finds itself in when it comes to sex-based and sexual orientation-based rights.
10. It is LAG's intention to change this situation, if the exemption is granted.
11. The AHRC's attempt to downplay Ms Alsalem's views should be rejected. As Bell J in *XYZ v Commissioner of Police* noted, Special Rapporteurs have a special and longstanding role in the United Nations with respect to the mandates they are afforded. Their mandate gives them valuable expertise which is available to Courts and Tribunals for consideration.⁹ Ms Alsalem's mandate is with respect to the violence perpetrated on women and girls – such as the violence that has been described in Professor Jeffreys report, and demonstrated by Dr Blake's affidavit. No one has said that Ms Alsalem's views are jurisprudential (cf. ALL Submission at [9]).
12. LAG has summarised what it says about Ms Alsalem's views in its Reply at [11]-[15]. LAG embraces, in full, the remarks she has usefully made at paragraphs [21]-[27] of her submission in support of LAG's exemption. What is useful about paragraphs [21]-[27] of that submission is that Ms Alsalem has *actually addressed the issue before the Tribunal* - being whether the exemption would give effect to the human rights of LAG and its members, and what issues should be considered and balanced as part of that question.
13. The same cannot be said about the AHRC's submissions. As explained above, the AHRC has totally failed to identify that issue, let alone grapple with it.

⁸ ASOFIC, [107]. Cf. Sheila Jeffreys Report, [69]-[74].

⁹ *XYZ v Commissioner of Police* (2010) 33 VAR 1, [446] (Bell J).

The Special Rapporteur's view is in accordance with international legal principle

14. Ms Alsalem's analysis is an application of the CEDAW Committee General Recommendations – most of which the Tribunal was taken to in LAG's closing address. In light of what is said in the AIL Submission, some general principles about how the Tribunal is to interpret CEDAW and CEDAW jurisprudence needs clarification:¹⁰
- (a) The content of a treaty obligation depends upon the construction which the international community would attribute to the treaty, and on the operation which the international community would accord to it in particular circumstances. That is, treaty construction must give effect to what the *international community* has agreed to in its treaty (rather than what portions of that community might want the treaty to say).¹¹
 - (b) Considerable weight should be given to the interpretations adopted by an independent body established to supervise the application of the treaty, such as the CEDAW Committee.¹² Whilst considerable weight attaches to the CEDAW Committee's interpretations, that does not mean that the Tribunal must defer to the CEDAW Committee *carte blanche*.¹³
 - (c) The CEDAW Committee's jurisdiction to supervise CEDAW is contained in CEDAW itself, and in an Optional Protocol. CEDAW invests the Committee with jurisdiction to make General Recommendations (Article 21), and also engage in a supervisory process by which it can make Concluding Observations (Article 18). The Optional Protocol invests the Committee with jurisdiction to consider and make recommendations with respect to individual complaints raised against a member state.
 - (d) The Committee's General Recommendations are made as and when the Committee identifies matters of relevance to all state parties. General Recommendations typically explore that theme in a considered way, and are inspired by the CEDAW Committee observing common issues arising throughout their supervisory functions.
 - (e) Concluding Observations and Individual Communications are in a different category. Whilst a source of jurisprudence, they are of lesser significance *vis-à-vis* General Recommendations as such remarks only deal with a singular issues with a particular

¹⁰ The Siracusa Principles are a set of principles that the American Association for the International Commission of Jurists prepared in 1985. The Siracusa Principles are not a treaty, and have no relationship to CEDAW. The Statute of the International Court of Justice is a treaty establishing the ICJ. Articles 38(1)(d) and 59 deal with how the ICJ applies international law; these articles have no relationship to any issue in this proceeding, in any relevant sense.

¹¹ *CRI026 v Republic of Nauru* (2018) 92 ALJR 529, [22] (Kiefel CJ, Gageler and Nettle JJ).

¹² *CRI026 v Republic of Nauru* (2018) 92 ALJR 529, [22] (Kiefel CJ, Gageler and Nettle JJ).

¹³ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639, 664 [66].

member state (rather than a thematic issue).¹⁴

15. Ms Alsalem has identified that the CEDAW Committee has yet to consider the type of conflict that is presented by this case; being a conflict of rights and interests between same-sex attracted lesbian women and the transgender community. No CEDAW Individual Communication or Concluding Observation has directly addressed this topic, so Ms Alsalem has drawn on the principles that are traversed in the Committee's General Recommendations.¹⁵ Her conclusions at paragraphs [21]-[27] of her submission are correct:
- (a) Lesbians (and particularly those before the Tribunal who subscribe to lesbian feminism) face multiple intersecting forms of discrimination. LAG's evidence bears this out, as did the performance of Dr Elena Jeffreys in the witness box, in real time, before the Tribunal.
 - (b) In that circumstance, the obligations in CEDAW cannot not permit the subordination of the rights of lesbians in favour of the rights of others. CEDAW, like the SD Act, does not establish a hierarchy where the interests of the transgender community reign supreme. The text of CEDAW does not even mention gender, nor the transgender community, and it is unclear how and to what extent a transgender person can access CEDAW protections.¹⁶
16. LAG needs to be accommodated in the social and political fabric, in the same way as the transgender community. Ms Alsalem's views might, hypothetically speaking, be just as applicable to the transgender community if that community was similarly denied the opportunities to hold public events for the purposes of pursuing political objectives. But that community indeed has capacity to organise and associate through (for e.g.) Seahorse Victoria, and organisation that is privileged to enjoy the resources of the Pride Centre.¹⁷ Unlike LAG.

¹⁴ Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd Edition, Oxford University Press) [1.43]-[1.44].

¹⁵ Alsalem Submission, [32].

¹⁶ Does CEDAW apply to a biological man that identifies as a woman? Does CEDAW apply to a biological woman that identifies as a man? Does CEDAW apply to a biological man that has changed their sex via governmental procedures that permit same? Does CEDAW apply to a biological woman who has changed their sex by the same governmental procedure? Does CEDAW apply to someone who, absent any governmental procedure, decides to identify as a woman for some period of time? How much time is enough? Does CEDAW apply such a person if they do not express commonly accepted female gender mannerisms? What type of mannerism is enough to justify CEDAW protection? What would the international community say to this, in light of the fact that it has yet to agree to a transgender community specific treaty? In light of all of these questions, does attempting to confer CEDAW based protections to persons who are not biologically female undermine both CEDAW, and the need to ensure that the transgender community its own dedicated human rights framework? See for e.g. Gallagher, "Redefining "CEDAW" to Include LGBT Rights: Incorporating Prohibitions Against Discrimination of Sexual Orientation and Gender Identity" (2019) 29(4) *Southern California Interdisciplinary Law Journal* 367, 651-652 (accessible at this [link](#)).

¹⁷ Ann Statement, [51].

Professor Gerber is an advocate, and her views must be rejected

17. The Tribunal has admitted, over objection, Professor Gerber's report. LAG considers this was in error, and this error is now causing the Tribunal to have to engage with a bizarre submission that principles of law should have been the subject of cross-examination of a witness of fact: see AIL Submission at [26].
18. This error can be made immaterial if the Tribunal affords no weight to Professor Gerber's report. That is how Professor Gerber's report must be treated, regardless of the decision to admit its tender. Professor Gerber is no impartial expert, her report is replete with passionate advocacy for her own political cause. In summary, Professor Gerber has:
 - (a) misrepresented the issues before the Tribunal, and seemingly defined the issue herself, for her own political cause: paragraph 8;
 - (b) omitted to inform the Tribunal how the CEDAW Committee has, very clearly, distinguished between "sex" and "gender" in at paragraph 5 of CEDAW General Recommendation 28: paragraphs 13-14, 31-35;¹⁸
 - (c) omitted to advise the Tribunal of the nature of General Recommendations, and their superiority as a source of jurisprudence vis-à-vis other sources: paragraph 28;
 - (d) positively misrepresented the Yogyakarta Principles as an international treaty and a source of international law: paragraphs 24-26;
 - (e) relegated the Special Rapporteur to an "outlier" whose expertise should be discarded: paragraph 53;
 - (f) failed to identify to the Tribunal applicable principles to apply when it comes to considering the views of a Special Rapporteur: paragraph 53;
 - (g) treated Individual Communications that mention the rights of transgender women as if they are binding or form obiter dicta of a common law court: paragraphs 36-39; and
 - (h) even ventured to offer opinions on various matters that she, herself, accepts is beyond her expertise: paragraphs 83-100.¹⁹

Disposition

19. The AHRC's attitude to Ms Alsalem's intervention, the AHRC's attempt to take the legal issues away from the Tribunal's scrutiny via expert evidence, and the technique that has

¹⁸ See the highlighted section at page 20 of LAG's authority extract bundle.

¹⁹ Cf. *Makita v Sprowles* (2001) 52 NSWLR 705, [84]-[85] (see highlighted sections at pages 38-39 of LAG's authority extract bundle).

been ultimately adopted by Professor Gerber, precisely demonstrates why LAG needs the exemption it has applied for.

20. LAG is being subjected to the typical techniques of a technocracy, which is intent upon erasing its movement, its culture, and its capacity to participate in and influence debate.
21. LAG asks the Tribunal for protection by granting the exemption, bearing in mind the CEDAW Committee's expectations of the Tribunal as stated at paragraph 17 of General Recommendation 28.²⁰

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²⁰ Extracted at the Ann Reply Statement, [13].